



AMERICAN
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INSTITUTE

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The Small Business Reorganization Act: How It's Going So Far

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SMALL BUSINESS REORGANIZATION ACT

Prepared by the Subchapter V Trustees in the Northern District of Ohio (in alphabetical order), Bridget Franklin, Patricia B. Fugée, Colette Gibbons and Fred Schwieg

- I. Summary -
 - a. Goals
 - i. Less barriers; less expensive
 - ii. Fast resolution of disputes
 - iii. Faster plans – more exit strategies
 - iv. More successful reorganizations, with equity involved
 - b. Differences
 - i. The lovely trustees (at least in ND Ohio)
 - ii. No committee
 - iii. No absolute priority rule (equity can actually reorganize!)
 - iv. No competing plans can be filed
 - c. Eligibility
 - i. Debt limit – \$7.5m (for now, until 3/27/2021), otherwise \$2,725,625
 - 1. Note that Sens. Durbin and Grassley introduced the *COVID-19 Bankruptcy Relief Extension Act* on 2/25/21 to extend the increase, as well as exclude federal COVID-related payments from income in chapters 7 and 13, permit chapter 13 plan modifications, and more
 - ii. Must have at least 50% business debt
 - iii. No SAREs allowed
 - d. Timeline
 - i. Within 7 days – must file balance sheet, cash flow statement, statement of operations, and tax return
 - ii. Status conference with SBRA trustee and court within 60 days
 - iii. 14 days before the conference, debtor must file a report regarding consensual plan attempts
 - iv. Plan due within 90 days (no separate disclosure statement!)
 - e. Plan Contents
 - i. Plan must contain some of the disclosure statement requirements
 - 1. History of operations
 - 2. Liquidation analysis
 - 3. Projections
 - ii. Plan can be nonconsensual if “fair and equitable” (no acceptance needed!)
- II. Role of Sub V Trustee
 - a. To be a mediator
 - b. To facilitate a consensual plan
 - c. To give reports to the court at hearings on:
 - i. Status conference
 - ii. Confirmation of plan

- iii. Plan modifications
 - iv. Sale of property
 - v. Value of property subject to a lien
- d. Trustee's duties may be expanded by the court, including on a limited basis (*See IN RE: AJEM Hosp., LLC d/b/a Al's Burger Shack, et. al.*, No. 20-80003, 2020 WL 3125276, at *2 (Bankr. M.D.N.C. Mar. 23, 2020) (expanding trustee's duties on a limited basis to investigate intercompany claims))
- e. Trustee is relieved of duties when:
 - i. A consensual plan is substantially consummated (debtor discharge on confirmation)
 - ii. After the Trustee makes payments under a non-consensual plan (debtor discharge after payments made)

III. Case Update/Initial Trends

- a. Cannot-hire-lawyers-case
 - i. *In re Penland Heating & Air Conditioning, Inc.*, No. 20-01795-5-DMW, 2020 BL 217309, 2020 Bankr Lexis 1550 (Bankr. E.D.N.C. June 11, 2020) (trustee cannot appoint counsel without specific needs)
- b. Retroactive application cases
 - i. *In re Progressive Sols., Inc.*, No. 8:18-bk-14277-SC, 2020 BL 63794, 2020 Bankr Lexis 467, 2020 WL 975464 (Bankr. C.D. Cal. Feb. 21, 2020) (pending case can be redesignated as sub-v) (indicates application to preferences)
 - ii. *In re Moore Props. of Person Cty., LLC*, No. 20-80081, 2020 BL 77065, 2020 Bankr Lexis 550, 2020 WL 995544 (Bankr. M.D.N.C. Feb. 28, 2020) (same)
 - iii. *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020) (same, over the bank's objection and notwithstanding the motion to appoint a chapter 11 trustee)
 - iv. *In re Bello*, No. 19-46824, 2020 BL 115774 (Bankr. E.D. Mich. Mar. 27, 2020) (same)
 - v. *But see In re Double H Transp. LLC*, No. 19-31830-hcm (Chapter 11), 2020 BL 191591 (Bankr. W.D. Tex. Mar. 05, 2020) (striking amended petition since deadlines had past and debtor did not file financial statements with amended petition)
 - vi. *In re Twin Pines, LLC*, No. 19-10295-j11, 2020 BL 170633 (Bankr. D.N.M. Apr. 30, 2020) (allowed to amend petition after case pending a year, even though missed prior small business deadlines)
 - vii. Issue: is it retroactive for debtors who filed before the debt limit changed to \$7.5m
- c. Business debt cases – “Currently” Engaged in Business Required?
 - i. *In re Ventura*, No. 8-18-77193-reg, 2020 BL 134496, 2020 Bankr Lexis 985, 2020 WL 1867898 (Bankr. E.D.N.Y. Apr. 10, 2020) (conversion to SBRA to avoid confirmation of a competing plan, over objection of competing creditor; residential mortgage considered business when debtor intended to run a bed and breakfast);

- ii. *In re Wright*, No. C/A No. 20-01035-HB Chapter 11, 2020 BL 172550, 2020 Bankr Lexis 1240 (Bankr. D.S.C. Apr. 27, 2020) (can be a small business debtor if dealing with residual business debt even though not actively engaged in business)
 - iii. *In re Crilly*, No. 20-11637-SAH, 2020 BL 242363, 2020 Bankr Lexis 1718 (Bankr. W.D. Okla. June 30, 2020) (not small business debtor where debt incurred to renovate personal residence)
 - iv. *Thurmon*, 2020 WL 7249555 (Bankr. W.D. Mo. Dec. 8, 2020) (Business operations terminated and most assets sold prior to bankruptcy; court held not engaged in business)
 - v. *In re Johnson*, 19-42063 (Bankr. N.D. Tex. March 1, 2021) (
- d. Eligibility – Debt Limits
 - i. *In re Parking Management, Inc.*, 2020 WL 6146476 (Bankr. D. Md. Aug. 28, 2020) (lease rejection claims should not be counted, since not assumed or rejected or due as of petition date; PPP loans should not be counted either, since liability to repay is not ascertained on petition date)
 - ii. *In re 305 Petroleum, Inc., Pacific Pleasant Investment, LLC, Pleasant Point Investment, LLC* (Case no. 20-11593, Bankr. N.D. Miss. Oct. 27, 2020) (Definition of “small business debtor” in section 101(51D) requires including the debt of debtor-affiliates, even if the affiliate is not a SubV debtor but is a regular chapter 11 debtor; debts of non-debtor affiliates would not be included)
- e. Eligibility – Other Issues
 - i. *In re Two Wheels Properties, LLC*, (Case no. 20-35372, Bankr. S.D. Tex. Dec. 30, 2020) (Debtor formed under Texas law had forfeited its charter prior to bankruptcy, and under Texas law, its only option was to liquidate; court determined that since it was prohibited under state law from conducting business, it was not eligible for relief under SubV)
- f. Extension of time to file plan
 - i. *In re Baker*, No. 20-33465, Bankr. S.D. Tex., Dec. 21, 2020) (requirement to file plan in 90 days is not jurisdictional, permitted where the debtor cannot be justly held accountable for circumstances; under facts of case, extension was granted)
- g. What is “Disposable Income” in a Plan?
 - i. *In re Ellingsworth Residential Community Association, Inc.*, (no. 20-01346, Bankr. M.D. Fla. Oct. 16, 2020) (“Fair and equitable” requirement of 1191(c) requires projected disposable income be applied to plan payments; it means income from all sources less amounts reasonably necessary to be expended for continuation, preservation or operation of the debtor’s business)
- h. Example of Cram Down Plan under SubV
 - i. *In re Pearl Resources*, 2020 WL 5823303 (Bankr. S.D. Tex. Sept. 30, 2020)

IV. SBRA One Year In

- a. *Subchapter V’s First 1,000 Cases*

- i. By Ed Flynn, published in XXXIX ABI Journal 11, 30-31, 42-43 (November 2020)
 - ii. Not an official government summary, but is ABI's case-by-case review
 - iii. Initially in February 2020, filings started strong, then dropped off as the pandemic began in March and April
 - iv. Filings have increased each month since then (to date of article in November 2020)
 - v. Three states account for 1/3 of the filings: FL, TX and CA
 - vi. About 26% of the filings were filed by individuals with business debt as a majority of their debt
 - vii. The most common industries for SubV debtors are, not surprisingly given the pandemic, restaurants and bars, business services, retail, construction and development, trucking and transport, real estate including realtors, property managers and investors, home services, leisure and entertainment, manufacturing, energy production and services, health and fitness, hotels and motels, taxi and limo services, farms and ranches, auto/truck sales and services, financial services including insurance, and nonprofit businesses, including churches
 - viii. Concludes it is "off to a pretty good start"
- b. *Small Business Reorganization Act: Implementation and Trends*
 - i. By Clifford J. White III, U.S. Trustee, published in XL ABI Journal I, 54-55 (January 2021)
 - ii. Agrees that "by all current measures, the SBRA is working as Congress intended..."
 - iii. There are tight timelines, including appointment of a SubV trustee within 24-48 hours of the filing and conducting an Initial Debtor Interview within 10 days of the filing
 - iv. A "key component" of the case is the SubV trustee to assess the viability of the business and facilitate the development of a consensual plan
 - v. Given that the SubV trustee's have extensive backgrounds, they do not generally hire professionals, thus keeping the costs down
 - vi. The UST has prepared a comprehensive handbook for SubV trustees, as well as a manual for SubV cases
 - vii. From February 19, 2020 through September 30, 2020, approximately 1,100 small business debtors elected SubV, comprising approximately 75% of all small business chapter 11 debtors and more than 2/3 filed by business entities, with the remaining 1/3 by individuals who operate a business
 - viii. Mr. White reports on indicia of SBRA's success:
 - 1. Higher plan confirmation rates – nearly 20%, which is six times higher than the percentage of confirmed plans for non Sub V small business cases
 - 2. About 7 percent amended out of subV, mostly because ineligible
 - 3. Of those remaining, 15% were converted or dismissed

4. “Anecdotal reports suggest that some of these cases were successful because the subchapter V trustee facilitated a consensual resolution with parties who decided that they could resolve matters outside of bankruptcy court.”
 5. Early indicators suggest cases are confirming more quickly than other small business cases
 6. More than 60% (or 80%, if factoring out a large group of related cases) were consensually confirmed
 7. Anecdotally and from UST observations, it seems the SubV trustees are resolving disputes prior to litigation, thus reducing or eliminating costs
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- c. *Proposed COVID-19 Bankruptcy Relief Extension Act*
- i. Introduced February 25, 2021
 - ii. Proposes to extend increased eligibility cap of \$7.5m until March 2022 (presently set to expire March 27, 2021)
 - iii. Other amendments related to COVID relief in chapters 7 and 13

Faculty

Daniel J. Casamatta is the Acting U.S. Trustee for Region 13 in Kansas City, Mo., which includes the judicial districts in Arkansas, Missouri and Nebraska. He was sworn in on Jan. 1, 2015. Mr. Casamatta has served as the Assistant U.S. Trustee in the Kansas City, Missouri office of the U.S. Trustee Program (USTP) since 2008. Prior to that appointment, he served as Assistant U.S. Trustee in Grand Rapids, Mich., for 18 years, was an attorney advisor in the Cleveland USTP office for three years, and for periods of time was also the Acting Assistant U.S. Trustee in Indianapolis and the Acting Chief of the USTP's National Bankruptcy Training Institute, located in the Department of Justice's National Advocacy Center in Columbia, S.C. Mr. Casamatta regularly speaks at the National Advocacy Center on a variety of topics and was the recipient of USTP's Director's Award for Exemplary Service (the USTP's second-highest award) in 2002. In 2018, he was given the USTP Director's Award for Distinguished Service (the Program's highest award). Mr. Casamatta chairs the U.S. Trustee Program's 10-member SBRA Working Group, which assisted in implementing the SBRA for the USTP and advises local USTP offices about policies and procedures to follow in SBRA cases. Before joining the USTP, he spent five years in private practice in Cleveland with an emphasis on bankruptcy and commercial litigation. Mr. Casamatta received his J.D. in 1982 from Case Western University School of Law.

Patricia B. Fugée is a partner with FisherBroyles LLP in Perryville, Ohio, and focuses her practice on commercial bankruptcy, creditors' rights, business litigation and lending. She chairs the firm's Bankruptcy, Financial Restructuring & Reorganization group and serves on the firm's opinion committee, with a focus on bankruptcy and mortgage-enforceability opinions. Her clients include financial institutions, landlords, trade creditors, bankruptcy trustees and receivers in bankruptcy cases, foreclosures, workouts and receiverships. In addition, Ms. Fugée has served as a state court receiver to operate and liquidate assets in various industries, she has served as an examiner under the Bankruptcy Code in chapter 11 cases, and she has been serving as an SBRA panel trustee in the Northern District of Ohio. Admitted to practice in Ohio, Michigan, New York, New Jersey and Illinois, Ms. Fugée is a member of ABI, TMA, IWIRC, NABT and several state and local bar associations. In addition, she has been Board Certified in Creditors' Rights Law by the American Board of Certification since 2009, and has served on ABC's Board since 2013. She is currently serving as ABC's President for 2021. Ms. Fugée received her B.A. in 1986 in mathematics from Wellesley College and her J.D. with high honors in 1990 from Rutgers University School of Law at Camden.

Hon. Michelle M. Harner is a U.S. Bankruptcy Judge for the District of Maryland in Baltimore, appointed in 2017. Prior to her appointment to the bench, she was the Francis King Carey Professor of Law and the Director of the Business Law Program at the University of Maryland Francis King Carey School of Law, where she taught courses in bankruptcy and creditors' rights, business associations, business planning, corporate finance and the legal profession. Judge Harner lectured frequently during her academic career on various topics involving corporate governance, financially distressed entities, risk management and related legal issues. Her academic scholarship is widely published, with her publications appearing in, among others, the *Vanderbilt Law Review*, *Notre Dame Law Review*, *Washington University Law Review*, *Minnesota Law Review*, *Indiana Law Journal*, *Fordham Law Review* (reprinted in *Corporate Practice Commentator*), *Washington & Lee Law Review*, *William & Mary Law Review*, *University of Illinois Law Review*, *Arizona Law Review* (reprinted in *Corporate*

Practice Commentator) and *Florida Law Review*. Judge Harner has served as the Associate Reporter to the Advisory Committee on the Federal Rules of Bankruptcy Procedure, the Reporter to the ABI Commission to Study the Reform of Chapter 11, and most recently chaired the Dodd-Frank Study Working Group for the Administrative Office of the U.S. Courts. She also served as the Robert M. Zinman ABI Resident Scholar for the fall of 2015. Judge Harner is an elected conferee of the National Bankruptcy Conference, an elected Fellow of the American College of Bankruptcy, and an elected member of the American Law Institute. She previously was in private practice in business restructuring, insolvency, bankruptcy and related transactional fields, most recently as a partner at the Chicago office of the international law firm Jones Day. Judge Harner received her B.A. *cum laude* from Boston College in 1992 and her J.D. *summa cum laude* from The Ohio State University College of Law in 1995.

Donald W. Mallory, CPA is a partner of the law firm of Wood + Lamping, LLP in Cincinnati, where his practice focuses on insolvency, debtors' and creditors' rights with a focus on credit union representation, bankruptcy reorganizations, out-of-court workouts, financial and organizational corporate restructurings, complex litigation and general business matters. He has experience representing debtors, secured lenders, trustees and trade creditors in proceedings under chapters 7, 11 and 13 of the U.S. Bankruptcy Code, and in insolvency-related litigation such as receiverships and assignments for the benefit of creditors. Mr. Mallory has appeared and argued extensively in federal and state courts throughout the U.S. on a wide range of bankruptcy and collection-related issues, including appellate litigation. He is a member of the Cincinnati, Ohio and Kentucky Bar Associations and is admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Courts for the Northern and Southern Districts of Ohio and the Eastern and Western Districts of Kentucky, the U.S. Tax Court and the Bankruptcy Appellate Panel of the U.S. Court of Appeals for the Sixth Circuit. He also is an ABI member and an adjunct professor at Chase College of Law. Mr. Mallory received his B.B.A. in 1995 from the University of Cincinnati and his J.D. *magna cum laude* in 1999 from Northern Kentucky University, Chase College of Law, where he served on the *Northern Kentucky University Law Review* and was an officer of the Northern Kentucky University Moot Court Board.

James F. Molleur is the managing member of Molleur Law Office in Saco, Maine, and concentrates his practice in bankruptcy, primarily representing consumer and small business debtors. He has lectured and written materials on bankruptcy issues for ABI, the Maine State Bar Association, the National Association of Consumer Bankruptcy Attorneys and the National Association of Chapter 13 Trustees. He is also Board Certified in Consumer Bankruptcy Law by the American Board of Certification. Mr. Molleur is a member of the York County and Maine State Bar Associations, ABI and the National Association of Consumer Bankruptcy Attorneys. He was admitted to the Maine and Federal District Courts in 1979, the First Circuit in 1998, and the U.S. Supreme Court in 2010, and he was inducted into the American College of Bankruptcy in 2018. Mr. Molleur received his B.A. in economics *magna cum laude* from Bowdoin College in 1976 and his J.D. from the University of Maine School of Law in 1979.