



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Consumer Practice Extravaganza

Subchapter V 101: A Guide to the Bankruptcy Code's Newest (Sub)Chapter

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THE SMALL BUSINESS REORGANIZATION
ACT OF 2019:
THE BANKRUPTCY CODE'S NEWEST
(SUB)CHAPTER

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Kesha Tanabe is a bankruptcy attorney licensed in Minnesota, North Dakota and New York. She is a graduate of the University of St. Thomas, London School of Economics and Cardozo School of Law. She started her career as an Assistant Attorney General in New York. Prior to starting her own firm, she was a partner at Maslon LLP and Faegre Baker Daniels. She is also a professor of Bankruptcy Law at the University of St. Thomas Law School, Editor in Chief of the MSBA's Bankruptcy Bulletin, and a member of the Bankruptcy Practice Committee for the District of Minnesota. She has also been appointed by the U.S Trustee Program of the Department of Justice to serve as a Business Bankruptcy Trustee in Region 12.

This presentation was prepared by materials originally created by Kesha for the Minnesota Bankruptcy Law Seminar. Special thanks to Kesha for her support.

Kesha Tenabe

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Jolene Wee is owner, Managing Director and Founder of JW Infinity Consulting, LLC, a financial advisory firm specialized in providing transaction advisory, interim management, litigation consulting, and forensic accounting services to distressed companies and its stakeholders. She is a subchapter V trustee in Region 2 covering Eastern and Southern districts of New York and Region 4 covering Maryland, the District of Columbia and the Eastern district of Virginia.

Jolene deploys large scale data analytics to derive forward-looking business insights based on her professional training in accounting, finance, and economics. She has served as financial advisor to foreign-based creditors committees, fiduciaries, legal counsel, distressed companies, high net worth individuals, and public agencies on restructuring, bankruptcy, litigation, fraud, financing, merger, and buyout matters. She has also performed fraudulent transfer analyses and business valuations on bankruptcy litigation matters. Her case experience included companies in the banking, e-commerce, healthcare, insurance, manufacturing, real estate, and retail industries with revenues of up to \$15B. Prior to starting her own firm, she began her restructuring career at a publicly-held global management consulting company.

Born and raised in Penang, Malaysia, Jolene speaks several Asian languages, holds a Certified Insolvency & Restructuring Advisor (CIRA) professional designation and is a member of the American Bankruptcy Institute's Mid-Atlantic Advisory Board, a member of the Planning Committee of the annual IWIRC at the Shore Conference and Treasurer for the International Women's Insolvency and Restructuring Confederation, Greater Maryland Network. The American Bankruptcy Institute recently named Jolene as an honoree of its 2020 "40 Under 40" class, which identifies 40 top industry professionals under age 40. She is also a member of the Association of Insolvency & Restructuring Advisors (AIRA), INSOL International and the National Association of Bankruptcy Trustees (NABT). She holds an MBA from Miami University, OH and bachelor's degrees in Mathematics and Business Administration (Finance) from Berea College.

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Richard P. Cook

Richard P. Cook is the owner and managing attorney of Cape Fear Debt Relief, a boutique bankruptcy firm located in Wilmington, N.C. Founded in 2011, Cape Fear Debt Relief represents individuals and small businesses in Chapter 7, 11 and 13 cases before the U.S. Bankruptcy Courts in Eastern North Carolina. Richard is board certified by the North Carolina State Bar as a specialist in both business and consumer bankruptcy law.

In February 2020, Richard was named a Chapter 11 Subchapter V Trustee for the Eastern District of North Carolina. Richard has been selected as a "Rising Star" by Super Lawyers in 2017, 2018, 2019, 2020, and 2021; and was also recognized by the American Bankruptcy Institute as a "40 Under 40" in 2020. Richard formerly served on the board of the North Carolina State Bar Association's Bankruptcy Section Council from 2013 to 2016. He also serves as the Fourth Circuit Chair for the National Association of Consumer Bankruptcy Attorneys and is a regular speaker at state and national bankruptcy conferences. In 2017, 2019, and 2020, Richard was recognized as a Pro Bono Honor Society Inductee by the N.C. Pro Bono Resource Center for providing over 50 hours of pro bono legal services each year.

A proud double Tarheel, Richard received his undergraduate and law degrees from the University of North Carolina at Chapel Hill in 2003 and 2007, respectively.

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Ryan J. Richmond

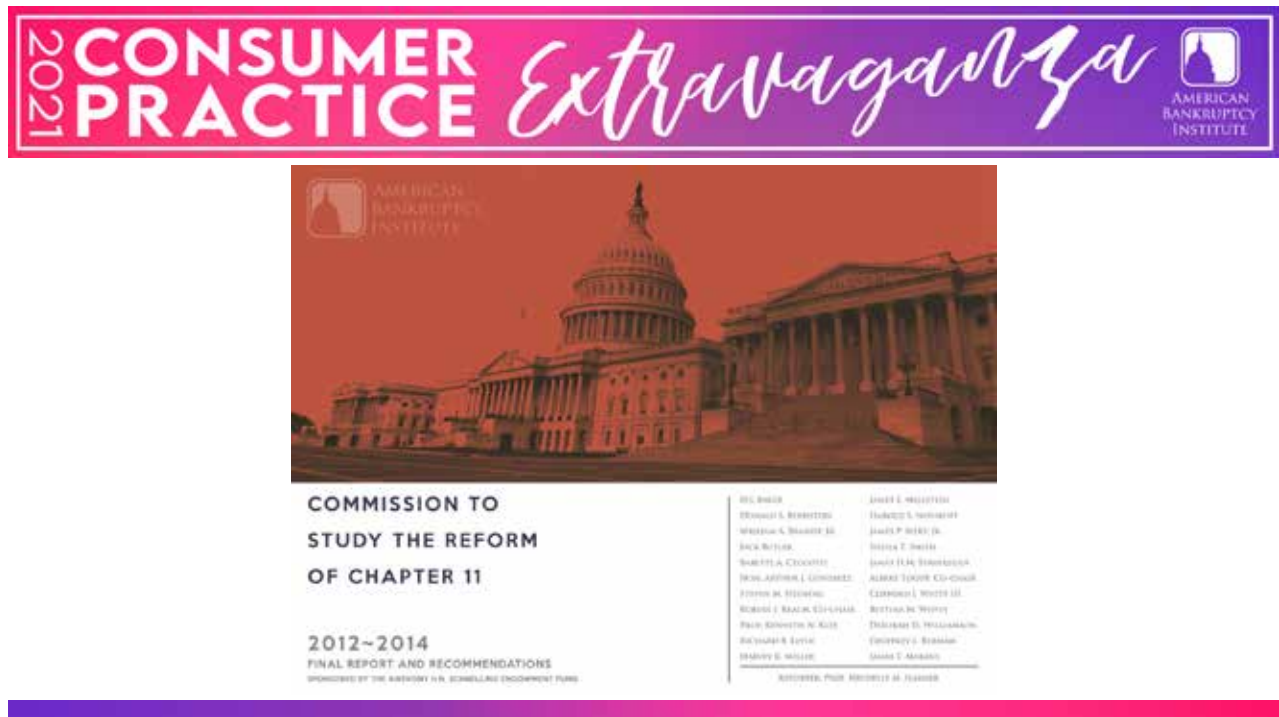
Ryan J. Richmond is a partner at the New Orleans, LA-based law firm of Sternberg, Naccari & White, LLC. He is the managing partner of the firm's Baton Rouge, LA where he leads the the firm's bankruptcy section.

Ryan clerked for the Hon. Douglas D. Dodd from 2006-07. Ryan's practice focuses on small business clients, both in and out of bankruptcy. Since 2020, he has served as a Subchapter V trustee throughout Louisiana.

Ryan is originally from Northern California. He graduated from the University of California, Davis in 2001. After living in Washington D.C. for two years while working for the American Bankers Association, Ryan moved to Louisiana where he earned his JD from Louisiana State University in 2006. Ryan later returned to LSU and received an MBA in 2015.

Since 2019, Ryan has served as the chair of the Bankruptcy Section of the Baton Rouge Bar Association. More recently, he served as the co-chair of the National Association of Bankruptcy Trustee's Annual Conference Subchapter V track along with co-panelist, Kesha Tenabe.

Ryan is admitted to practice in Louisiana, Texas and Mississippi.



ABI Commission Interviews: Does Ch 11 “work” for Small Business? No.

- Ch 11 is Cost Prohibitive
- Huge failure rate: only 27% of Small Business Debtors confirm plans
- Why bother? Absolute Priority Rule & Existing Owners
- Single Creditor can “Veto” your case
- Perceived Increase in Use and Speed of Asset Sales under 363



ABI Report: Recommended Changes

- Create an Estate Neutral to Facilitate Resolution
 - Eliminate Need for an Impaired Accepting Class to Cram Down
 - No Absolute Priority Rule
 - No Committees
 - Streamline solicitation and confirmation
 - Eliminate UST Fees
-



SBRA: Key Changes to Ch 11

- 11 U.S.C. §§ 1181–95 “Subchapter V of Chapter 11”
 - No Quarterly Trustee Payments
 - No Creditor Committee (“For Cause” Only)
 - Limited Trustee
 - No Disclosure Statement (“For Cause” Only)
 - Avoid Absolute Priority Over Impaired-Class Objections
 - Distinction Between “small business case” and “subchapter V case”
(11 U.S.C. § 101(51C))
-

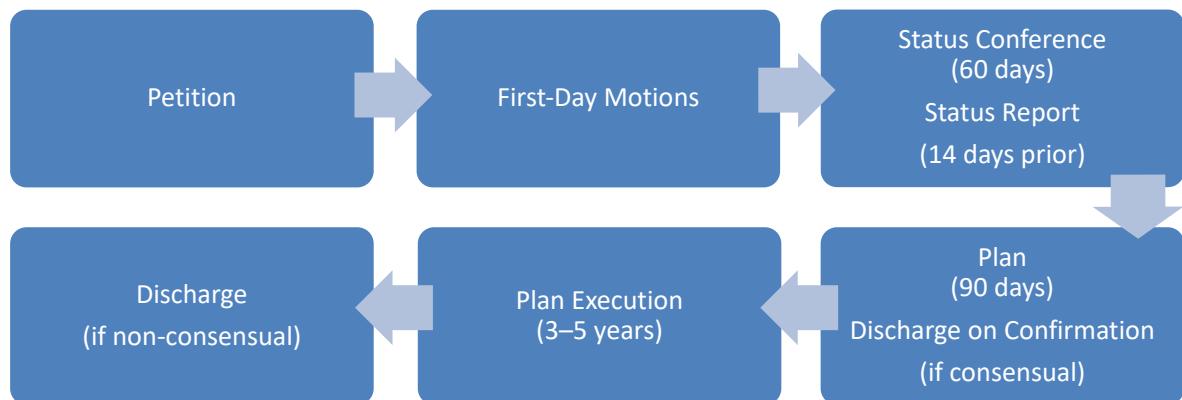


One Year Later...

- SubV Cases are **6x** more likely to result in confirmed plans of reorganization than conventional Chapter 11 cases.
- Only 15% of SubV cases were converted or dismissed.
- General Consensus: SubV Trustees add value, reduce conflict, and lead to more consensual plans.



SubV Timeline: Faster Ch 11 Cases





Who is Eligible for SubV?

- Section 101: A “Person”
 - Individual
 - Partnership
 - Corporation
 - Section 101(51D): A “Small Business Debtor”
 - No SARE’s
 - “Engaged in commercial or business activities”
 - Aggregate Debt Less than the Debt cap
 - ≥ 50 percent debt from commercial or business activities
-



Eligibility (Continued): “Engaged in Business” Requirement

- 11 USC 101(51D) and 11 USC 1182(1)(A)
 - “a person engaged in commercial or business activities”
 - Eligibility to operate is a state law question
 - *In re Two Wheels Properties, LLC* (Texas, 2020): Debtor was not eligible because it was a defunct corporation that had forfeited its charter (and thus its right to legally operate) prior to petition date.
-



Eligibility (Continued): How much is the Debt Cap?

- Original SBRA debt limit: \$2,725,625
 - CARES Act Raised the debt limit to \$7,500,000
 - Currently sunsets on March 27, 2021, unless adjusted by Congress.
-



Eligibility (Continued): How to Apply the Debt Cap

- See 11 USC 101(51D) and 1182(1)
 - What's included:
 - noncontingent debt
 - liquidated debt
 - secured and unsecured debt
 - Rule for Affiliated Debtors: Aggregate Debt must be under the cap
 - Do not include debt of any SARE's and non-debtor affiliates
-



Eligibility: No Public Companies

- 11 USC 1182(1)(B)
 - **Not** subject to the reporting requirements of the 34 Act
 - **Not** an affiliate of an issuer, as defined in the 34 Act
-



General Duties of Debtors in Ch 11 and SubV

- File small business documents listed in Section 1116(1)
 - Attend meetings described in Section 1116(2), e.g., IDI and 341
 - File schedules and SOFA, per Section 1116(3)
 - File post-petition financial reports, including MORs, per 1116(4)
 - Maintain insurance, per 1116(5)
 - File timely tax returns, per 1116(6)
 - Allow the UST to inspect books and records, per 1116(7)
-



Powers of Debtors in SubV

- All the same powers as DIP in Chapter 11 case, including:
 - Sell/lease/use property under Section 363
 - Obtain credit under Section 364
 - Assume/reject contracts under Section 365
 - Pursue preferences, fraudulent transfers, post-petition transfers under Section 547, 548, and 549
 - Hire professionals
- Key: Debtor has exclusive right to file a plan.



Some Unique Debtor Duties in SubV

- 14 days before Status Conference, file a report re Debtor's efforts to obtain consensual plan, per 1188(c)
- Attend a status conference no more than 60 days after Petition Date. Goal of status conference is to discuss "the expeditious and economical resolution of a case"
- File a plan within 90 days, per 1189(b)



SubV Trustee's Duties

- Facilitate the development of a consensual plan
 - Evaluate the viability of the business by reviewing financials
 - Take part in the Initial Debtor Interview
 - Attend and participate at the meeting of creditors
 - Participate in status conferences and hearings such as confirmation hearings
-



Trustee's Duties Under a Consensual Plan

- Trustee's services terminate upon substantial consummation of the plan
 - Debtor makes payments directly to the creditors
 - Debtor operates the business
 - Trustee files Report of No Distribution if the trustee did not handle funds
-



Trustee's Duties Under a Non-Consensual Plan

- Plan payments are made to the trustee and the trustee disburses to creditors
 - Trustee involved throughout the plan
 - Trustee files Final Report and Accounting of funds received and disbursed
 - Debtor operates the business
-



Trustee's Duties—For Cause Only

- For Cause, the court may require the trustee to perform the duties specified under § 1106(a)(3), (4) and (7)
 - Investigate the conduct and financial condition of the debtor and any matter relevant to the case
 - File a report on the investigation
 - For cause, the DIP may be removed, and the trustee will operate the business § 1183(b)(5)
 - The trustee will report any fraud, incompetence, or gross mismanagement
-



Trustee Compensation

- Received under § 330 – billable instead of a percentage of disbursements
 - Trustee will file an initial statement of their hourly rate
 - File fee application for any fees requests
 - Paid by debtor over time
-



Section 1190: Contents of a SubV Plan

- A brief history of the business operations of the debtor
 - A liquidation analysis
 - Feasibility projections
 - Debtor must commit future earnings as needed to make plan payments
-



Section 1191: How did SBRA change the Confirmation Standard?

- 1191(b) Allows a Debtor to Confirm a Plan w/o Impaired Accepting Class
 - Absolute priority rule d/n bar retention of equity by business owner
 - To be fair and equitable, debtor must commit 3-5 years of "projected disposable income" to fund the plan
-



Section 1191(d): "Disposable Income" in SubV

- Projected vs. Actual
 - DISPOSABLE INCOME.—For purposes of this section, the term 'disposable income' means the income that is received by the debtor and that is not reasonably necessary to be expended—
 - (1) for—
 - (A) the maintenance or support of the debtor or a dependent of the debtor; or
 - (B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or
 - (2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.
-



§1325(b)(2): “Disposable Income” in Ch 13

- For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--
 - (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
 - (ii) for charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
 - (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.



Questions and Discussion?

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by *Finance Monthly Global Awards*. Ms. Wee is a subchapter V trustee in Region 2, covering the Eastern and Southern Districts of New York, and Region 4, covering Maryland, the District of Columbia and the Eastern District of Virginia. She received her bachelor's degrees in mathematics and business administration with a focus on finance from Berea College, and her M.B.A. from Miami University of Ohio.