

SBRA AND SUBCHAPTER V UPDATE:

“There and Back Again”: An Assessment of What Aspects of the SBRA and SubChapter V Work, and Work Less Well, in Bankruptcy

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SubChapter V Overview

- SBRA enacted 2019; took effect Feb. 2020
 - A Sub-part of Chapter 11
 - Intended for small businesses but applies to an individual or business with less than \$2,725,625 in aggregate debt. § 101(51D)
 - Under CARES Act (enacted 3-27-20), debt limit increased to \$7.5mm (currently expires 3-27-22)
 - At least 50% of debt must arise from debtor’s business / commercial activities. § 101(51D)
- Under Consolidated Appropriations Act (enacted 12-27-20):
 - Subchapter V debtors could receive PPP loans
 - Also extended §365(d)(4)(A) deadline for debtor-tenant to assume or reject non-residential RE lease to a total of 210 days
 - With Court ordered extension for cause, as much as 300 days
 - Also excepts certain lease and supplier payment plans from preference claims

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Access to PPP Loans

- Under CARES Act, left to SBA policy
 - SBA originally ruled that bankrupt debtor status disqualified PPP loan eligibility
- Judge Jones in *Hidalgo Emer. Svc. Found. V. Carranza* that debtor had shown a reasonably likelihood of success on claim that such policy violated §525 prohibiting certain discrimination v. bankrupt debtors, and enjoined SBA from enforcement.
 - Decisions in accord followed in 1st, 2^d. And 10th Circuit bankruptcy cases.
 - Conflicting opinions were entered in Delaware, Wisconsin, and Judge Gargotta further determined in *In re Asteria Educ.* that the court lacked the power to enjoin the SB.
 - Ultimately 5th Cir. And 11th Cir. Courts of Appeal ruled in favor of SBA (*Hidalgo* injunction vacated)
- Enactment of CAA clarified that bankrupt debtors may be eligible for PPP Loans, but left final discretion to SBA
 - SBA's initial position: thanks but no thanks
 - In April 2021, SBA promulgated new policies allowing access to PPP Loans by bankrupt debtors if not “presently involved in bankruptcy, while defining this concept as excluding discharged and post-confirmation debtors
 - PPP Loan program ended 5-31-21

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Overview Cont'd

- Intended to streamline Ch. 11 to make it faster and less expensive for qualifying small business debtors
 - Standing Trustee. § 1183
 - No UCC (unless ordered). §§ 1102(a)(3), 1181(b)
 - No Q'ly UST Fees. 28 U.S.C. § 1930(a)(6)(A)
 - Relaxed disinterestedness (pre-petition claim < \$10K permitted). § 1195
 - Mandatory status conference within 60 days of order for relief (debtor must file consensual plan progress report at least 14 days prior). § 1181

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Overview Cont'd – Plan Terms

- Very Substantial Plan-related Provisions
 - Debtor plan exclusivity not subject to termination (90-days). § 1189(a)
 - Only debtor may modify plan. § 1193
 - No Absolute Priority Rule. § 1191(b)
 - Plan must devote minimum value of all projected disposable income during plan period to payment of creditors. § 1191(c)(2)
 - Disclosure statement not mandatory. § 1181(b)
 - Pay administrative claims over time. § 1191(e)
 - No voting / impaired consenting class requirement for cramdown (also possible to cramdown claim secured by principal residence). §§ 1191(b), 1190(3)
 - Expanded discharge rights. §§ 1181(c), 1192

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How Has it Worked?

- Over 1,640 Subchapter V cases filed in 1st Year (Feb. to Feb.)
 - Steadily increasing over time
 - Approximately 35% of all Ch. 11 filings (including affiliates); over 75% of all small business debtor Ch. 11s
- 75% business / 25% individual
 - Most popular industries: Healthcare, Construction, Restaurants / Bars, Professional / Business Services, Retail
- Most popular venues: Florida, California and Texas
 - N.D. Tex. 4th most popular district. S.D. Tex. 6th most popular district
- Confirmation rates approx. 20%
 - Mostly consensual
 - 6X greater than other small business Ch. 11s
- By end of 2020, UST appointed over 200 trustees to serve as Subchapter V trustees

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