A PRIMER ON

THE SMALL BUSINESS REORGANIZATION ACT OF 2019

by:

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I. INTRODUCTION

Effective February 19, 2020, the Small Business Reorganization Act of 2019 ("SBRA") amends the definitions of "small business case" and "small business debtor" in subsections 101(51C) and (51D) of the Bankruptcy Code, respectively, and adds subchapter V (containing 15 sections) to Chapter 11. While the definition of a small business debtor under § 101(51D) has some conforming changes, the aggregate debt limit of $3,024,725 does not change. Under the CARES Act, the aggregate debt limit is now $7,500,000.00 effective March 25, 2020 and sunsets on June 20, 2024. More importantly, subchapter V only applies if the small business debtor ***elects*** to be governed by the provisions of subchapter V, which includes the appointment of a trustee. Thus, under the SBRA, a § 101(51D) "small business debtor" that files Chapter 11 has two options: (1) proceed as a subchapter V case by electing subchapter V, or (2) proceed as a BAPCPA "small business case" by not electing subchapter V.

But why would a debtor elect to proceed under subchapter V if the appointment of a trustee imposes a degree of oversight on the debtor? This paper attempts to answer that question. Additionally, this paper—although not exhaustive—will attempt to summarize and detail the specific provisions of subchapter V of the Bankruptcy Code in such a way as to introduce the reader to its practical application. As this paper will demonstrate, the new subchapter V is a hybrid of chapters 11, 12 and 13 of the United States Bankruptcy Code.

The principal features of subchapter V are set forth below; before we get to that however, I want to lay out what I see as the big 6:

- elimination of creditor sponsored plans
- elimination for the most part—of a creditors' committee.
- elimination of the Absolute Priority Rule.
- ability of a Debtor to modify a non-purchase money security interest or mortgage in a residence used in connection with a Debtor's business.
- confirmation of a Plan can be obtained without the support of any class of claims, so long as the plan meets certain requirements; and
- the serial filer no-automatic-stay provision of § 362(n) does not apply

II. GENERAL PROVISIONS

1. **The small business case:** Eligibility for a Subchapter V small business reorganization case is restricted to a "small business debtor" (statutorily defined in § 101(51D)) that "elects subchapter V of chapter 11 shall apply." The SBRA also amends the pre-existing "small business case" definition in § 101(51C) as follows:

   (51C) The term "small business case" means a case filed under chapter 11 of this title in which the debtor is a small business debtor [defined in § 101(51D)] *and has not elected that subchapter V of chapter 11 of this title shall apply.*

2. **The small business debtor:** The prior definition of "small business debtor" measured the "business" status of a debtor by simply asking whether that debtor is "engaged in commercial or business activities," which could mean anything, even something as simple as operating a lemonade stand. The definition now requires that at least 50% of the debt arose from commercial or business activities. Additionally, the SBRA excludes publicly traded corporations and amends the definition of "small business debtor" (now eligible for a subchapter V case) in § 101(51D) as follows:

   (51D) The term "small business debtor"—

   (A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $3,024,725[1] (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

   (B) does not include

   (i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $3,024,725.00[2] (excluding debt owed to 1 or more affiliates or insiders)*;*

   *(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78**o**(d)); or*

   (iii) any corporation that—

   (I) is subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); and

   (II) is an affiliate of a debtor.[3]

3. **Application of subchapter V:** Pursuant to The Bankruptcy Threshold Adjustment and Technical Corrections Act ("*BTATCA*")[4] Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of title 11 shall apply.[5] BTATCA is set to sunset on June 20, 2024 at which time § 1181 will no longer state the definition of a debtor eligible to be a subchapter V debtor.

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[1] See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.
[2] See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.
[3] *See* H.R. Rep. No. 116-171, at 24-25 (2019) (reprinting 11 U.S.C.A. § 101(51D), marked to show H.R. 3311 revisions).
[4] Bankruptcy Threshold Adjustment and Technical Corrections Act, §§ 2(a), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").
[5] 11 U.S.C. § 103(i).

Title search: Subchapter V: A Welcome Tool In The Consumer Lawyer’s Tool Box

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