



New Reorganization Legislation for Small Business Debtors

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND**

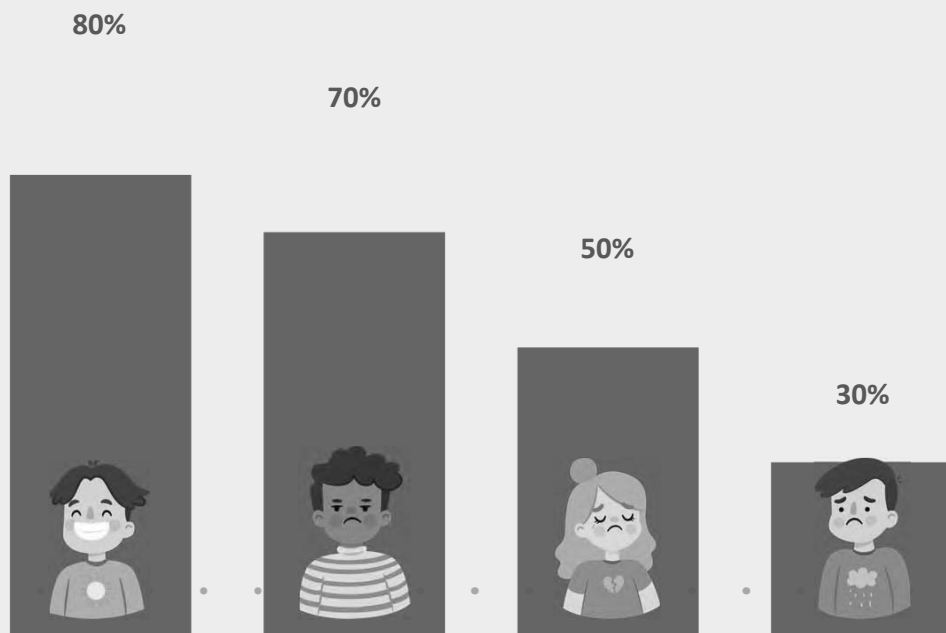


AGENDA

- ✓ *The Facts:* Some facts about small businesses
- ✓ *The Fix:* Brief overview of SBRA
- ✓ *The Future:*
Questions and considerations under SBRA



The Facts



Only 30% of small businesses survive after the 10th year

99%

of U.S. businesses are
small businesses

47.5%

of the total U.S.
workforce is employed
by small businesses



The Fix



Small Business Reorganization Act of 2019

Available to any entity or individual with aggregate noncontingent liquidated debts not more than \$2,725,625 of which not less than 50% of the debt is commercial or business

Goes into effect February 19, 2020

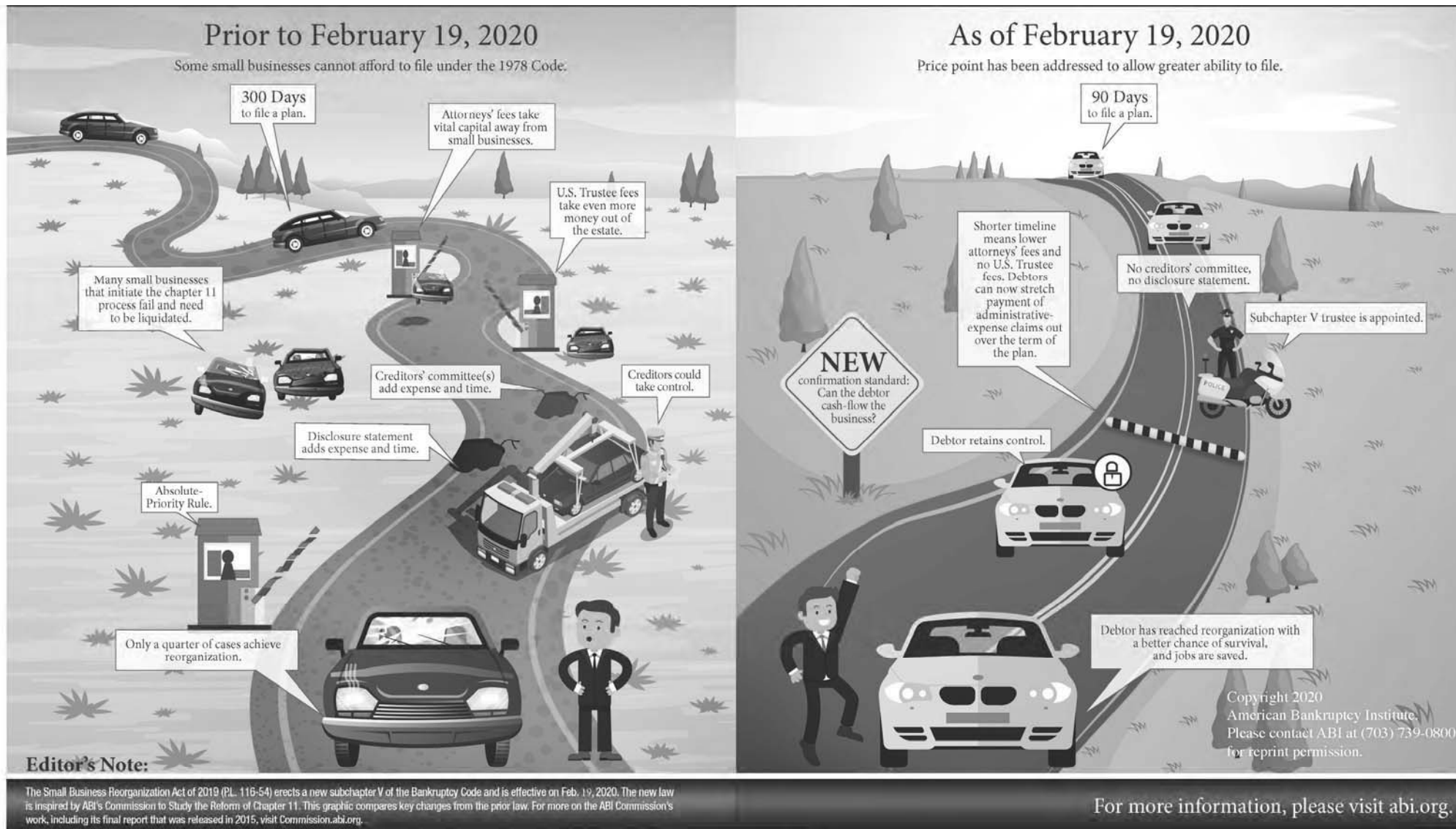
That definition represents 40% of small business Chapter 11 cases filed
(Based on data from the American Bankruptcy Institute)



KEY DIFFERENCES BETWEEN CHAPTER 11 AND SUBCHAPTER V

| Regular Chapter 11 | Small Business Case | SBRA Case |
|---|---|--|
| Not Small Business (Not an election) | Small Business - • Engaged in Commercial/Business Activities • Not SARE • < \$2,725,625 liquidated debt • >= 50% of debt from commercial/business activities • Not elected under SBRA | Same as SBC • Elected under SBRA |
| No trustee unless misconduct | No trustee unless misconduct | Trustee like C12, with full powers if removed as DIP for misconduct. Trustee removed if plan confirmed without cramdown. |
| Property of Estate per 541, plus 1116 for individuals | Same as regular | Property of Estate per 541, plus 1116 (in all cases) if crammed down |
| 120 days exclusivity to file plan, 180 days for acceptances, extendable no more than 18/20 months | 180 days exclusivity to file plan (extendable by order entered before expiration) | Only the Debtor may file a plan. |
| No deadline to file plan | 300-day deadline to file plan (extendable by order entered before expiration) | 90-day deadline to file plan |
| Creditor committee | No creditor committee | No creditor committee |
| Discharge upon confirmation (corporate)/completion (individual) | Same as regular | Discharge upon confirmation (no cramdown); upon completion (cramdown) |
| Status Conference Optional | Status Conference Optional | Status Conference w/in 60 days required. |
| Disposable income per 1325 only if unsecured creditor objects, for individuals only | Same as regular | Disposable income (not per 1325) to cram down, for all cases |
| Absolute priority rule applies (definitely for corporate, most cases say for individuals) | Same as regular | No APR. Replaced with disposable income requirement |
| Need accepting impaired class | Same as regular | Do not need accepting impaired class |

| Regular Chapter 11 | Small Business Case | SBRA Case |
|--|---------------------------------------|---|
| UST Fees | UST Fees | No UST fees, but commissions/ fees to SBRA Trustee |
| No confirmation deadline | 45-day confirmation deadline | No confirmation deadline |
| No initial documents filed | Small Business Docs filed w/ petition | Small Business Docs filed with election |
| No principal residence mortgage modification | Same as regular | Principal residence mortgage mod if not purchase money and new value used primarily in connection with small business |



GENERAL PROVISIONS AND PROCESS FOR DEBTORS UNDER SBRA

SBRA

General Objective:

**To make small business
reorganization cases ...**

Quicker

Cheaper

More effective

QUICKER: *NEW DEADLINES TO KEEP CASE ON TRACK*

- **STATUS CONFERENCE TO BE HELD NO LATER THAN 60 DAYS AFTER FILING**
- **AT LEAST 14 DAYS BEFORE STATUS CONFERENCE, DEBTOR MUST FILE A REPORT CONTAINING AN OUTLINE OF EFFORTS TO CONFIRM A PLAN**
- **PLAN MUST BE FILED ON OR BEFORE THE 90TH DAY AFTER THE PETITION DATE**

- **PLAN MAY THEREAFTER BE MODIFIED**
- **IN ADDITION, 90 DAY DEADLINE MAY BE EXTENDED FOR "CIRCUMSTANCES FOR WHICH THE DEBTOR SHOULD NOT JUSTLY BE HELD ACCOUNTABLE"**

Quicker



**In general, no
creditors' committee**



**In general, no
disclosure statement**



**In general, subchapter V
trustee serves different role
than traditional chapter 11
trustee**



**In general, more flexibility
in path to confirmation**



Cheaper

Fewer disclosure requirements

No quarterly UST fees

Potentially less expense if case proceeds on expedited timeline



More effective

- ❖ **SUBCHAPTER V GIVES DEBTOR THE CHANCE TO FILE A PLAN AND WORK TOWARDS CONSENSUAL RESOLUTIONS**
- ❖ **IT INCLUDES MORE ALTERNATIVES FOR CONFIRMATION WHEN A CONSENSUAL PLAN IS NOT POSSIBLE**
- ❖ **IT PROVIDES MORE GUIDANCE FOR DEBTOR AND CREDITORS, DESIGNED TO FACILITATE QUICKER RESOLUTIONS**

COMMENCEMENT OF THE CASE (NEW § 1187(a))

- UPON ELECTING TO FILE UNDER SUBCHAPTER V, THE DEBTOR MUST FILE A COPY OF THE COMPANY'S MOST-RECENT BALANCE SHEET, STATEMENT OF OPERATIONS, CASH-FLOW STATEMENT, AND FEDERAL INCOME TAX RETURN OR A SWORN STATEMENT THAT SUCH DOCUMENTS DO NOT EXIST
- SBRA DOES NOT SPECIFY WHEN THE DEBTOR MUST ELECT TO PROCEED UNDER SUBCHAPTER V
INTERIM B.R. 1020: ELECTION MUST BE MADE ON PETITION (FOR VOLUNTARY CASE) OR WITHIN 14 DAYS AFTER ORDER FOR RELIEF (INVOLUNTARY CASE)
- CREDITORS' COMMITTEE; UNLESS THE COURT ORDERS OTHERWISE, NO CREDITORS' COMMITTEE; CREDITORS' COMMITTEES WILL BE THE EXCEPTION – NOT THE RULE – IN SBRA REORGANIZATIONS

DUTIES OF DEBTOR UNDER SECTION 308 (NEW § 1187(b))

DEBTOR IS REQUIRED TO FILE PERIODIC REPORTS

THE PERIODIC REPORTS MUST CONTAIN INFORMATION:

1. THE DEBTOR'S PROFITABILITY

2. REASONABLE APPROXIMATIONS OF THE DEBTOR'S PROJECTED CASH RECEIPTS AND CASH DISBURSEMENTS

3. COMPARISONS OF ACTUAL CASH RECEIPTS AND DISBURSEMENTS WITH PROJECTIONS IN EARLIER REPORTS

4. WHETHER THE DEBTOR IS IN COMPLIANCE WITH POSTPETITION REQUIREMENTS OF THE BANKRUPTCY CODE AND THE BANKRUPTCY RULES AND WHETHER THE DEBTOR IS TIMELY FILING TAX RETURNS AND PAYING TAXES AND ADMINISTRATIVE EXPENSES WHEN DUE

5. IF THE DEBTOR HAS NOT COMPLIED WITH THE FOREGOING DUTIES, HOW, WHEN, AND AT WHAT COST THE DEBTOR INTENDS TO REMEDY ANY FAILURES

DUTIES OF DEBTOR UNDER SECTION 1116(2) – (7) (NEW § 1187(b))

THE DEBTOR’S SENIOR MANAGEMENT PERSONNEL AND COUNSEL MUST:

- **ATTEND MEETINGS SCHEDULED BY THE COURT OR THE U.S. TRUSTEE (INCLUDING INITIAL DEBTOR INTERVIEWS, SCHEDULING CONFERENCES, AND § 341 MEETINGS)**
- **TIMELY FILE ALL SCHEDULES AND STATEMENTS OF FINANCIAL AFFAIRS**
- **FILE ALL POSTPETITION FINANCIAL AND OTHER REPORTS**
- **MAINTAIN CUSTOMARY AND APPROPRIATE INSURANCE**
- **TIMELY FILE REQUIRED TAX RETURNS AND OTHER GOVERNMENT FILINGS AND PAY ALL TAXES ENTITLED TO ADMINISTRATIVE EXPENSE PRIORITY.**
- **ALLOW THE U.S. TRUSTEE TO INSPECT THE DEBTOR’S BUSINESS PREMISES, BOOKS, AND RECORDS**

ROLE OF THE OFFICE OF THE U.S. TRUSTEE

SUBCHAPTER V DEBTORS DO NOT PAY QUARTERLY FEES TO THE OFFICE OF THE U.S. TRUSTEE BUT THE OFFICE WILL STILL PERFORM ALL OF ITS DUTIES UNDER 28 U.S.C. § 586

ROLE OF THE OFFICE OF THE U.S. TRUSTEE

- **CONDUCT INITIAL DEBTOR INTERVIEW**
- **CONDUCT 341 MEETING OF CREDITORS**
- **ENSURE DEBTOR OPENS DEBTOR IN POSSESSION BANK ACCOUNT**
- **REVIEW MONTHLY OPERATING REPORTS**
- **ENSURE DEBTOR MAINTAINS INSURANCE**
- **ENSURE TRUSTEES ARE BONDED**
- **REVIEW APPLICATIONS TO EMPLOY PROFESSIONALS**
- **REVIEW APPLICATIONS FOR COMPENSATION**
- **REVIEW CHAPTER 11 PLANS**
- **ENSURE APPROPRIATE DISCLOSURES ARE FILED**
 - **- COMPENSATION OF OFFICERS**
 - **- OWNERSHIP INTEREST IN OTHER ENTITIES**
- **COLLECT AND REVIEW INITIAL FINANCIAL INFORMATION**
 - **- BANK ACCOUNT STATEMENTS**
 - **- INCOME TAX RETURNS**
 - **- FINANCIAL STATEMENTS**
- **REVIEW FIRST DAY MOTIONS**

THE SBRA TRUSTEE



APPOINTMENT OF SUBCHAPTER V TRUSTEE

SBRA ALLOWS FOR EITHER STANDING OR CASE-BY-CASE TRUSTEES. 11 U.S.C. § 1183(a) BOTH STANDING AND CASE-BY-CASE TRUSTEES HAVE THE SAME DUTIES.

➤ **CURRENTLY - TRUSTEES ARE APPOINTED ON A CASE-BY-CASE BASIS**

➤ **EACH REGION HAS A POOL OF TRUSTEES**

➤ **MARYLAND, D.C. AND NORTHERN VIRGINIA HAVE A POOL OF 7 TRUSTEES**

APPOINTMENT PROCESS FOR SUBCHAPTER V TRUSTEE

- THE SUBCHAPTER V TRUSTEE IS SIMILAR TO TRUSTEES UNDER CHAPTERS 12 AND 13 OF THE CODE
- WITH THE SUBCHAPTER V TRUSTEE IT IS IMPORTANT NOT TO THINK OF IT AS A CHAPTER 11 TRUSTEE IN THE SENSE THAT MANY CHAPTER 11 PRACTITIONERS ARE USED TO
- IT'S A SUPERVISORY TRUSTEE—NOT AN OPERATING TRUSTEE (THOUGH IT COULD BE TO THE EXTENT THAT THE DEBTOR IS REMOVED AS DIP ON REQUEST OF A PARTY IN INTEREST)

DUTIES OF SUBCHAPTER V TRUSTEE

1. ATTEND INITIAL DEBTOR INTERVIEW
2. ATTEND 341 MEETING OF CREDITORS
3. PERFORM THE DUTIES IDENTIFIED IN SECTION 1183 OF THE CODE, WHICH INCORPORATES SOME BUT NOT ALL ASPECTS OF SECTIONS 704 AND 1106 OF THE CODE

TERMINATION OF TRUSTEE

- IF THE PLAN IS CONFIRMED UNDER SECTION 1191(a), UNLESS PROVIDED OTHERWISE IN THE PLAN, THE SERVICE OF THE TRUSTEE SHALL TERMINATE WHEN THE PLAN HAS BEEN SUBSTANTIALLY CONSUMMATED
- IF A PLAN IS CONFIRMED UNDER 1191(b)—SECTION 1194(b) PROVIDES THAT, EXCEPT AS OTHERWISE PROVIDED FOR IN THE PLAN OR THE ORDER CONFIRMING THE PLAN, THE TRUSTEE SHALL MAKE PAYMENTS TO CREDITORS UNDER THE PLAN FOR THE DURATION OF THE PLAN
- THE UNITED STATES TRUSTEE MAY REAPPOINT A TRUSTEE AS NEEDED FOR PERFORMANCE OF DUTIES UNDER SUBSECTION 1183(b)(3)(C) (MODIFICATION) AND SECTION 1185(a) (REMOVAL OF DEBTOR AS DEBTOR IN POSSESSION)

COMPENSATION OF SUBCHAPTER V TRUSTEE

- **COMPENSATION FOR SBRA STANDING TRUSTEES WILL BE BASED ON A PERCENTAGE FEE DETERMINED BY THE UST, MUCH LIKE THE PERCENTAGE FEES SET FOR OTHER STANDING TRUSTEES UNDER 28 USC § 586(e)**
- **CASE-BY-CASE TRUSTEES MUST APPLY FOR COMPENSATION UNDER 11 U.S.C. § 330**
- **SECTION 326 DOES NOT APPLY TO COMPENSATION OF SBRA TRUSTEES – COMPENSATION NOT BASED ON DISBURSEMENTS**



TRUSTEE'S EMPLOYMENT OF ATTORNEYS AND OTHER PROFESSIONALS

- SECTION 327(a) PERMITS A BANKRUPTCY TRUSTEE TO EMPLOY ATTORNEYS AND OTHER PROFESSIONALS; SBRA DOES NOT MODIFY THIS PROVISION FOR SUBCHAPTER V CASES
- *NOTE:* A TRUSTEE'S EMPLOYMENT OF ATTORNEYS OR OTHER PROFESSIONALS HAS THE POTENTIAL OF SUBSTANTIALLY INCREASING THE ADMINISTRATIVE EXPENSES OF THE CASE

REMOVAL OF THE DEBTOR IN POSSESSION

- ON REQUEST OF A PARTY IN INTEREST AND AFTER NOTICE AND HEARING, THE DEBTOR SHALL BE REMOVED AS A DEBTOR IN POSSESSION FOR CAUSE, INCLUDING FRAUD, DISHONESTY, INCOMPETENCE, OR GROSS MISMANAGEMENT OF THE AFFAIRS OF THE DEBTOR, OR FOR FAILURE TO PERFORM ITS OBLIGATIONS UNDER A CONFIRMED PLAN (SEE § 1185(a))
- ON REQUEST OF A PARTY IN INTEREST, AND AFTER NOTICE AND A HEARING, THE COURT MAY REINSTATE THE DEBTOR AS A DEBTOR IN POSSESSION (SEE §1185(b))

CREDITOR CONSIDERATIONS UNDER SBRA

- ✓ THE CASH COLLATERAL, ADEQUATE PROTECTION, AND AUTOMATIC STAY PROVISIONS REMAIN THE SAME UNDER SBRA AS UNDER CHAPTER 11
- ✓ THE CRAMDOWN PROVISIONS AS TO SECURED CREDITORS REMAIN THE SAME BUT DIFFER FOR UNSECURED CREDITORS
- ✓ MAY STILL MAKE SECTION 1111(b) ELECTION
- ✓ SUBCHAPTER V TRUSTEE MAY HELP FACILITATE DISCUSSIONS BETWEEN CREDITOR AND DEBTOR
- ✓ SBRA PROVIDES A POTENTIALLY EXPEDITED PATH TOWARDS CONFIRMATION OF A STAND ALONE OR SALE PLAN, WHICH MAY BENEFIT CREDITOR TO THE EXTENT TERMS ARE REACHED WITH DEBTOR (OR TERMS PROPOSED BY DEBTOR ARE ACCEPTABLE)



PLAN PROCESS

- **ONLY THE DEBTOR MAY FILE A PLAN (MUST DO SO WITHIN FIRST 90 DAYS)**
ONLY THE DEBTOR MAY MODIFY THE PLAN, ANY TIME UP TO CONFIRMATION
- **DEADLINE MAY BE EXTENDED BY THE COURT IF THE NEED FOR AN EXTENSION IS ATTRIBUTABLE TO CIRCUMSTANCES BEYOND THE DEBTOR'S CONTROL**
- **GENERALLY, NO SEPARATE DISCLOSURE STATEMENT REQUIRED**
- **THE PLAN MUST CONTAIN A BRIEF BUSINESS HISTORY OF THE DEBTOR, A LIQUIDATION ANALYSIS, AND PROJECTIONS TO SUPPORT PAYMENTS UNDER THE PLAN**
- **NO 45-DAY TIME LIMIT FOR PLAN CONFIRMATION**



PLAN PROCESS – ADMINISTRATIVE CLAIMS

DELAYED PAYMENT OF ADMINISTRATIVE EXPENSE CLAIMS – MAY STRETCH OUT OVER TERM OF PLAN, EVEN FOR POST-PETITION GOODS AND SERVICES AND ESTATE PROFESSIONAL FEES



PLAN PROCESS – MODIFICATION OF MORTGAGE

**THE PROPOSED SUBCHAPTER V PLAN MAY
MODIFY THE CLAIM SECURED BY REAL PROPERTY
THAT IS THE PRINCIPAL RESIDENCE OF THE
INDIVIDUAL DEBTOR IF**

**(1) MORTGAGE LOAN WAS NOT USED PRIMARILY
TO PURCHASE THE DEBTOR'S RESIDENCE AND**

**(2) THE LOAN FUNDS WERE USED PRIMARILY IN
CONNECTION WITH DEBTOR'S SMALL
BUSINESS**

PLAN PROCESS – PROPERTY OF THE ESTATE

- **SECTION 1115 PROVIDES THAT, IN AN INDIVIDUAL CHAPTER 11 CASE, PROPERTY OF THE ESTATE INCLUDES ASSETS THAT THE DEBTOR ACQUIRES POSTPETITION AND EARNINGS FROM POSTPETITION SERVICES**
 - SECTION 1115 DOES NOT APPLY IN A SUBCHAPTER V CASE (SEE § 1181(a))
- **IF THE COURT CONFIRMS A PLAN UNDER THE CRAMDOWN PROVISIONS OF NEW § 1191(B), PROPERTY OF THE ESTATE INCLUDES (IN CASES OF BOTH INDIVIDUALS AND ENTITIES) POSTPETITION ASSETS AND EARNINGS (SEE § 1186(a)).**



PLAN CONFIRMATION SECTION 1191(b) AND (c)

DEBTOR CAN CONFIRM A CONSENSUAL PLAN UNDER SECTION 1191(a) OF THE CODE, BUT ALSO ...

- ✓ INCREASED ABILITY TO CRAMDOWN UNSECURED CREDITORS, MAY DO SO AS LONG AS THE PLAN IS “FAIR AND EQUITABLE” AND DOES NOT DISCRIMINATE UNFAIRLY
- ✓ PLAN IS PURSUANT TO THE USUAL CRITERIA OF SECTION 1129(a) OF THE BANKRUPTCY CODE, BUT SECTIONS 1129(a)(8) (ALL CLASSES ACCEPT), (a)(10) (ONE IMPAIRED CLASS ACCEPTS), AND (a)(15) (INDIVIDUAL 11, DISPOSABLE INCOME FOR 5 YEARS) DO NOT APPLY TO SBRA CASES
- ✓ REMOVES THE ABSOLUTE PRIORITY RULE

PLAN CONFIRMATION – FAIR AND EQUITABLE

- FOR SECURED CLAIMS, PLAN MUST STILL MEET THE REQUIREMENTS OF 1129(b)(2)(A)
- THERE IS AT LEAST A REASONABLE LIKELIHOOD THE DEBTOR WILL BE ABLE TO MAKE THE PAYMENTS UNDER THE PLAN
- THE PLAN PROVIDES APPROPRIATE REMEDIES TO PROTECT CREDITORS IN THE EVENT PAYMENTS ARE NOT MADE
- PLAN CAN PROVIDE FOR SALE OF NONEXEMPT ASSETS, FOR EXAMPLE
- BECAUSE THE ABSOLUTE PRIORITY RULE IS ELIMINATED, THERE IS NO NEW VALUE EXCEPTION.



PLAN CONFIRMATION – FAIR AND EQUITABLE

TO BE “FAIR AND EQUITABLE” AS TO UNSECURED— DEBTOR MUST PAY ALL OF ITS PROJECTED DISPOSABLE INCOME FOR THE FIRST 3 OR 5 YEARS OF THE PLAN (OR DISTRIBUTE VALUE EQUIVALENT TO THAT AMOUNT)

DISPOSABLE INCOME IS INCOME RECEIVED THAT IS NOT NECESSARY FOR

(1) MAINTENANCE OR SUPPORT OF DEBTOR OR DEPENDENT OF DEBTOR,

(2) DOMESTIC SUPPORT OBLIGATION FIRST PAYABLE AFTER DATE OF FILING,

(3) PAYMENT OF EXPENDITURES NECESSARY FOR CONTINUATION, PRESERVATION, OR OPERATION OF THE BUSINESS OF THE DEBTOR.

DISCHARGE AND POST-CONFIRMATION ISSUES

IF A CONSENSUAL PLAN IS CONFIRMED UNDER 1191(a):

THE DISCHARGE IS ENTERED UPON CONFIRMATION AND THE TRUSTEE IS RELIEVED OF HER DUTIES UPON SUBSTANTIAL CONSUMMATION, WHICH IS DEFINED AS COMMENCEMENT OF PLAN PAYMENTS UNDER THE PLAN (UNLESS OTHERWISE PROVIDED IN THE CONFIRMED PLAN)

DISCHARGE AND POST-CONFIRMATION ISSUES

IF PLAN IS CONFIRMED UNDER 1191(b) AND THE DEBTOR MAKES USE OF THE CRAMDOW PROVISIONS:

A DISCHARGE IS ENTERED AS SOON AS PRACTICABLE AFTER DEBTOR COMPLETES PLAN PAYMENTS WITHIN THE INCOME COMMITMENT PERIOD AND THE TRUSTEE WILL REMAIN AND MAKE PAYMENTS UNDER THE CONFIRMED PLAN (UNLESS OTHERWISE PROVIDED IN THE CONFIRMED PLAN)

PRE-BANKRUPTCY PLANNING

- ✓ IDENTIFY SECURED CREDITORS
- ✓ IDENTIFY CASH COLLATERAL AND FIRST DAY MOTION ISSUES
- ✓ GATHER THE FINANCIAL INFORMATION A SMALL BUSINESS IS REQUIRED TO PROVIDE AFTER FILING
- ✓ IDENTIFY EXECUTORY CONTRACTS AND LEASES
- ✓ CONTACT CREDITORS TO BEGIN NEGOTIATIONS
- ✓ WORK ON A CONSENSUAL PLAN
- ✓ CHECK STATUS OF INSURANCE, LICENSE, AND CORPORATE CHARTER

SUBCHAPTER V CAN WORK FOR FREE FALL CASES

IN MANY CASES - PRE-BANKRUPTCY PLANNING IS NOT POSSIBLE BECAUSE THE DEBTOR IS IN “FREE FALL” FACING FORECLOSURE, LEVY, OR REPOSSESSION

SUBCHAPTER V HAS SIGNIFICANT BENEFITS FOR THE SMALL BUSINESS DEBTOR

- **NO ABSOLUTE PRIORITY RULE/NO NEW VALUE**
- **NON-CONSENSUAL PLAN**
- **NO SEPARATE DISCLOSURE STATEMENT**

THERE *IS* FLEXIBILITY

- **THE PLAN HAS TO BE FILED WITHIN 90 DAYS – NOT CONFIRMED**
- **DEADLINE MAY BE EXTENDED BY THE COURT**
- **THE DEBTOR CAN MODIFY THE PLAN**

PROPOSED FORMS AND RULES GOVERNING SBRA

QUESTIONS & ANSWERS





Thank you