

Outline of the Small Business Reorganization Act (the “SBRA”)

I. Introduction to Legislation

- a. SBRA is a new option under Chapter 11 – Subchapter V
 - i. Goes into effect on February 19, 2020
- b. Purpose of SBRA - Past difficulty for small businesses to get plans of reorganization confirmed under chapter 11
 - i. Addressed, in part, by eliminating the absolute priority rule and making it easier to confirm a plan over objections
 - ii. Quicker timeline – more efficient and cost effective option for small businesses. Important to note—there are no U.S. Trustee Quarterly Fees.
- c. The SBRA does not repeal existing small business provisions—it provides a different track.

II. Who Does the SBRA Apply to?

- a. Small businesses are defined as organized entities or individuals operating a business with no more than \$2,725,625.00 of noncontingent liquidated secured and unsecured debt combined as of petition date (or order for relief)
 - i. At least 50% of debt must be from business and commercial activity
 - ii. Excludes single asset real estate debtors
 - iii. Debtor must opt-in to be a small business debtor under subchapter V
 - iv. Definition is found under section 101(51)(D)
- b. Lower costs for small business debtors and makes bankruptcy feasible. Will proceed more like a chapter 13 or 12.

III. Committees and Professionals under the SBRA

- a. Unless Court orders otherwise, there is no creditors’ committees in subchapter V small business cases. So going forward creditors’ committees will be the exception not the rule in small business reorganizations. No committee counsel, no committee professionals and the accompanying administrative expense.
- b. Subchapter 5 also provides a flexible approach in retention of professionals for SBRA debtors. Under subchapter 5 professionals are not disqualified from being employed by the estate under section 327 of the Bankruptcy Code if they hold a claim against the debtor of less than \$10,000 that arose prior to the commencement of the case. This acknowledges that small business debtors may lack cash flow to provide its bankruptcy counsel with a retainer prior to filing for bankruptcy.

IV. The Subchapter V Trustee

- a. 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).
- b. Duties include (*see* 11 U.S.C. § 1183)
 - i. Perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a)—duties of a chapter 7 trustee—of this title¹;
 - ii. perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a)—duties of a trustee and examiner—of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;²
 - iii. appear and be heard at the status conference under section 1188 of this title and any hearing that concerns—
 1. the value of property subject to a lien;
 2. confirmation of a plan filed under this subchapter;
 3. modification of the plan after confirmation; or
 4. the sale of property of the estate;
 - iv. ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;
 - v. if the debtor ceases to be a debtor in possession, perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor;

¹ Section 704(a):

(2) be accountable for all property received
(5) examine proofs of claims and object to the allowance of any claim that is improper
(6) if advisable, oppose the discharge of the debtor
(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest
(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee

² Section 1106(a):

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable—

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates

(7) after confirmation of a plan, file such reports as are necessary or as the court orders

- vi. if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title; and
- vii. facilitate the development of a consensual plan of reorganization.
- c. Termination of Trustee Services—
 - i. 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.
 - 1. The United States trustee may reappoint a trustee as needed for performance of duties under subsection (b)(3)(C) (modification) and section 1185(a) (removal of debtor as debtor in possession).
 - ii. 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.
- d. Removal of Debtor as Debtor in Possession
 - i. 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. §1185(b).

V. Reorganization under the SBRA

- a. Expedited Timeframe.
 - i. Status conference to be held no less than 60 days after filing
 - ii. At least 14 days before status conference, debtor must file a report containing an outline of efforts to confirm a plan
 - iii. Plan must be filed by 90 days after filing the case. Extension of that deadline only for “circumstances for which the debtor should not justly be held accountable”.
- b. Plans
 - i. Only the debtor may file a plan within 90 days of the petition date—this deadline may be extended by the court if the need for an extension is attributable to circumstances beyond the debtor’s control.
 - 1. Under current chapter 11 – once exclusive period for debtor to file plan expires any party may file a plan.
 - 2. Under the SBRA – only debtor may propose a plan. There is no option for another party to propose plan.
 - ii. There is a simple disclosure requirement to be contained in the plan.
 - 1. There is no separate disclosure statement required, unless otherwise ordered by the Court.

2. The SBRA provides that the plan must contain a brief business history of the debtor, a liquidation analysis, and projections on the ability to make payments under the plan.
- iii. Modification of Mortgage Claims
 1. Under existing law, individual debtors can't modify rights of secured creditor if claim secured by mortgage in debtors' primary residence.
 2. Under the SBRA there is a narrow exception—the proposed subchapter V plan may modify the claim secured by real property that is the principal residence of the 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.
 - iv. Delayed payment of administrative expense claims – may stretch out over term of plan, even for post-petition goods and services and estate professionals' fees.
- c. Confirmation
- i. 1191(a) allows confirmation of consensual plan if all of the requirements of section 1129(a), other than paragraph (15) are met.
 - ii. 1191(b) and (c) allow for increased ability to cramdown unsecured creditors, may do so as long as the plan is “fair and equitable” and does not discriminate unfairly.
 1. A plan can be confirmed if all the requirements of section 1129(a) other than (8) all classes accept, (10) one impaired class accepts and (15) individual 11, disposable income for 5 years—are met.
 2. Removes the absolute priority rule
 3. Unsecured creditors may still elect treatment under Section 1111(b).
 - iii. Fair and equitable –
 1. for secured claims, plans must still meet the requirements of 1129(b)(2)(A)
 2. To be “fair and equitable” – debtor must pay all of its projected disposable income for the first 3 or 5 years of the plan.
 - a. 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.
 3. there is at least a reasonable likelihood the debtor will be able to make the payments under the plan
 4. the plan provides appropriate remedies to protect creditors in the event payments are not made

- a. can include plan to liquidate nonexempt assets, for example
- 5. Because the absolute priority rule is eliminated, there is no new value exception
- iv. No 45-day time limit for plan confirmation
- d. Modification.
 - i. The debtor may modify the plan prior to confirmation, provided that the modified plan complies with section 1122 (classification of claims and interests) and section 1123 (with the exception of 1123(a)(8)).
 - ii. The debtor may modify a plan confirmed under section 1191(a) before substantial consummation of the plan, provided that the modified plan complies with section 1122 (classification of claims and interests) and section 1123 (with the exception of 1123(a)(8)), and the court finds after notice and hearing that circumstances warrant modification.
 - iii. If the plan was confirmed under 1191(b) then a debtor may modify the plan during the income commitment period, as long as the modified plan meets the requirements of section 1191(b), and if the court finds, after notice and hearing, that circumstances warrant modification.

VI. Discharge under the SBRA

- a. 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).
- b. If plan is confirmed under 1191(b) and the debtor makes use of the cramdown provisions, a discharge is entered as soon as practicable after debtor completes plan payments within the income commitment period and unless the plan provides otherwise, the Trustee will remain and make payments under the confirmed plan (unless otherwise provided in the confirmed plan).

VII. Conclusion

- a. Subchapter V may result in more filings by debtors who traditionally have avoided chapter 11 and the absolute priority rule.
- b. Ideally, debtors will be able to more easily obtain confirmation of plans over creditor dissent.
- c. At the same time, it should generally be a faster and less costly process for all involved and provide greater chances of repayment for creditors.
- d. Although subchapter V will make it more difficult for unsecured creditors to block confirmation, the appointment of the trustee and expedited time frame for the filing of a chapter 11 plan should benefit creditors and increase their chance of quick recovery.
- e. Given that this process will, ideally, be efficient and streamlined, it may make bankruptcy a more viable option for small business debtors and individuals saddled with business debt to reorganize as opposed to filing for chapter 7 or otherwise winding up outside of bankruptcy. It also gives creditors a more realistic possibility of repayment.

Regular Chapter 11	Small Business Case	SBRA 11.V Case
Not Small Business (Not an election)	Small Business – <ul style="list-style-type: none"> • Engaged in Commercial/Business Activities • Not SARE • $\leq \\$2,725,625$ liquidated debt • $\geq 50\%$ of debt from commercial/business activities • Not elected under SBRA 	Same as SBC <ul style="list-style-type: none"> • 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 1115 for individuals	Same as regular	Property of Estate per 541, plus 1115 (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

Disclosure statement required	Disclosure statement required, but can be combined, waived, or conditionally approved	No DS required unless ordered. If ordered, it can be as for a Small Business 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

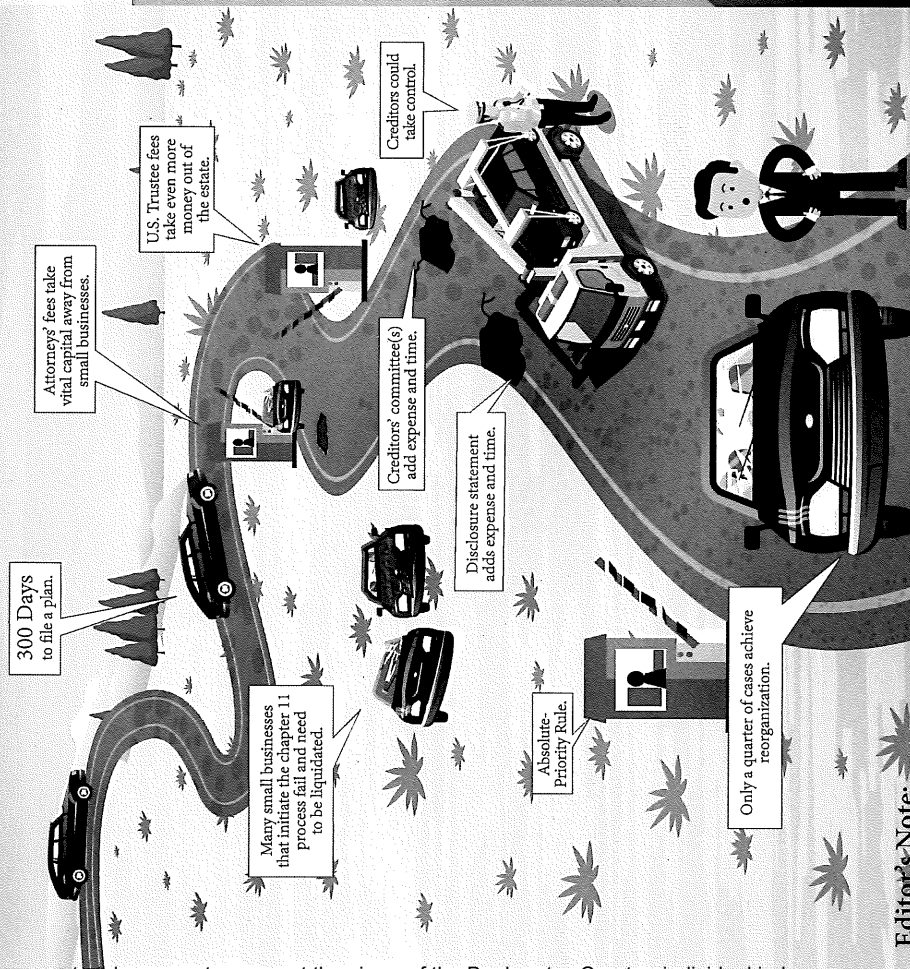


SBRA

Small Business Reorganization Act A Better Road to Reorganization for Main Street Businesses

Prior to February 19, 2020

Some small businesses cannot afford to file under the 1978 Code.



Editor's Note:

The Small Business Reorganization Act of 2019 (P.L. 116-54) creates a new subchapter V of the Bankruptcy Code and is effective on Feb. 19, 2020. The new law is inspired by ABI's Commission to Study the Reform of Chapter 11. This graphic compares key changes from the prior law. For more on the ABI Commission's work, including its final report that was released in 2015, visit Commission.abi.org.

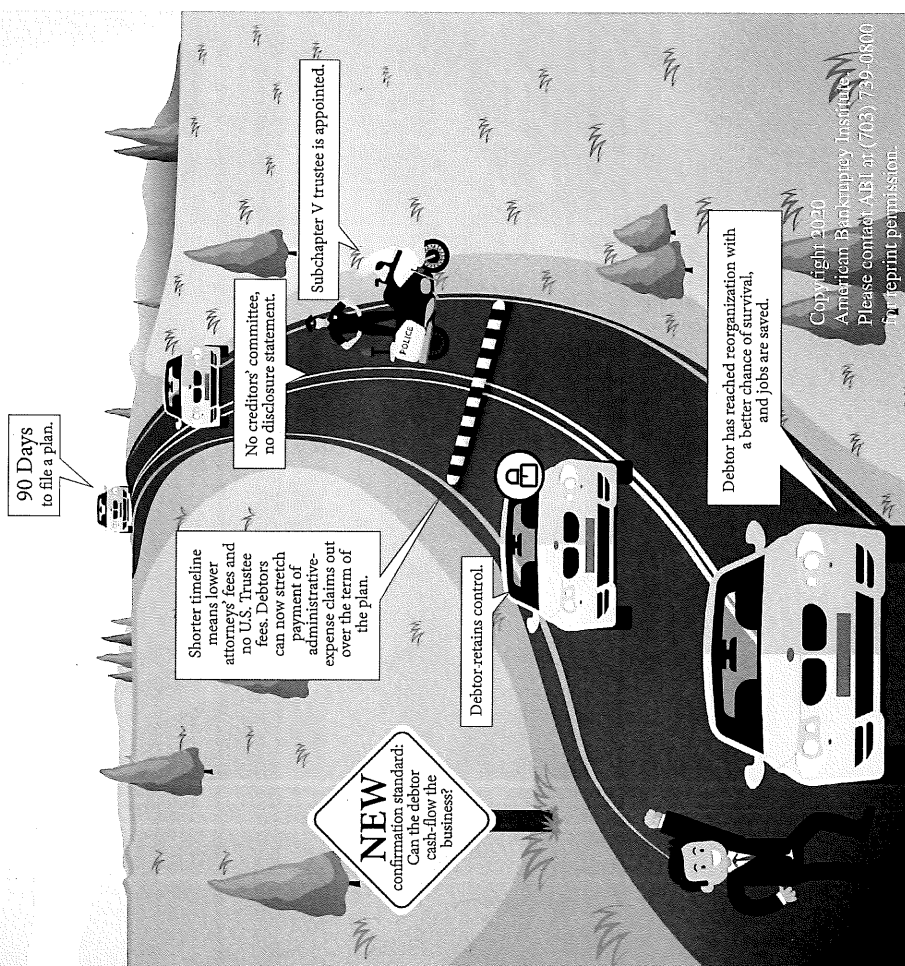
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*Reprint permission obtained from the ABI on January 3, 2020. Note: the effective date in this handout has been changed from that included in the original version.

As of February 19, 2020

Price point has been addressed to allow greater ability to file.



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