

## **BUSINESS BANKRUPTCY STATUTES**

### **Who may be a Debtor 11USC 109**

#### **Chapter 13**

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850 may be a debtor under chapter 13 of this title.

#### **Chapter 11**

##### **11 U.S.C. § 109(d)**

Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 1 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

##### **11 USC 101 Definitions**

###### **Small Business Case**

(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 and has not elected that subchapter V of chapter 11 of this title shall apply.

## **Small Business Debtor**

(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 \$2,725,625 (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 . . .

## **11 U.S.C. § 101(51) – Definitions**

### **Single Asset Real Estate**

(51B) The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

### **§ 303. Involuntary cases**

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title–

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least \$16,750 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$16,750 of such claims;

(3) if such person is a partnership- (A) by fewer than all of the general partners in such partnership; or (B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership;

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if-

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

**US Trustee Quarterly Fee Calculation**

The quarterly fee is calculated by totaling the reported disbursements for the three-month calendar quarter, or portion thereof, according to the fee schedules shown below. . . .

**FEE SCHEDULE FOR CALENDAR QUARTERS BEGINNING  
JANUARY 1, 2018 THROUGH SEPTEMBER 30, 2020**

<b>TOTAL QUARTERLY DISBURSEMENTS</b>	<b>QUARTERLY FEE</b>
\$0 to \$14,999.99	\$325.00
\$15,000 to \$74,999.99	\$650.00
\$75,000 to \$149,999.99	\$975.00
\$150,000 to \$224,999.99	\$1,625.00
\$225,000 to \$299,999.99	\$1,950.00
\$300,000 to \$999,999.99	\$4,875.00

<b>TOTAL QUARTERLY DISBURSEMENTS</b>	<b>QUARTERLY FEE</b>
\$1,000,000 or more	1% of quarterly disbursements or \$250,000, whichever less

**11 U.S.C. § 1107 Powers and Rights of a Debtor in Possession**

- (a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter. (b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

**§ 1108. Authorization to operate business**

Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.

**§ 542. Turnover of property to the estate**

- (a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate. (b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

**§ 543. Turnover of property by a custodian**

- (a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property

of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall- (1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and (2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

#### **§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers**

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

#### **545. Statutory liens**

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien

(1) first becomes effective against the debtor-

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced; (C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or (F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or

(4) is a lien of distress for rent

#### **§ 1104. Appointment of trustee or examiner**

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee-

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;

or (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

#### **Attorney for the Debtor in Possession**

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other

professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

#### **Getting Paid**

#### **§ 328. Limitation on compensation of professional persons**

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse

to the interest of the estate with respect to the matter on which such professional person is employed

## **Using Cash Collateral**

### **§ 363. Use, sale, or lease of property**

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate,

c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless-

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

### **Adequate Protection**

(d) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

### **§ 1123. Contents of plan**

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall-

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as-

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may-

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for-

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;  
or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest

#### **§ 1125. Postpetition disclosure and solicitation**

(a) In this section-

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties.

#### **§ 1129. Confirmation of plan**

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable

(5) (A)

i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests-

(A) each holder of a claim or interest of such class-

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests-

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan

(b)

(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such

paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides-

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the **indubitable equivalent (see article at end)** of such claims.

(B) With respect to a class of unsecured claims-

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests-

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

# New Subchapter V May be the Bankruptcy Lifeline Small Businesses Need to Survive COVID-19

## Share

*Financial Restructuring and Bankruptcy Alert* | March 23, 2020 (Updated April 15, 2020)

By: Amy E. Vulpio

When the Small Business Reorganization Act (SBRA) was signed into law in August 2019 and slated to go effective in February 2020, no one could have foreseen that, by March 2020, the U.S. economy would grind to a halt as a result of a global pandemic. The financial consequences of COVID-19 have hit small businesses especially hard. The SBRA – commonly known as Subchapter V, referring to new Subchapter V of Chapter 11 of the Bankruptcy Code – may provide a much-needed lifeline to small businesses struggling to survive this crisis. With Subchapter V elections likely to surge during and after the pandemic, lenders and other creditors should know how the SBRA alters the normal Chapter 11 landscape to which they may be accustomed.

Arguably, the SBRA was long overdue. Many financially distressed small businesses have consulted a bankruptcy lawyer only to learn that, ironically, they are too poor to reorganize under Chapter 11. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) promised to streamline Chapter 11 for small businesses, for example, by allowing a one-step plan solicitation and confirmation process. However, BAPCPA imposed increased reporting requirements and other procedural burdens that many felt outweighed the benefits for small businesses. Subchapter V retains some components of BAPCPA, including one-step confirmation, while adding new features intended to make Chapter 11 more accessible for small businesses. Highlights of Subchapter V include:

- Normally, only a business debtor with non-contingent, secured and unsecured debt less than \$2,725,625 may elect Subchapter V treatment. (One key caveat: entities that derive substantially all of their income from operating a single real property are ineligible for Subchapter V.) While most “mom & pop” businesses fall within these debt parameters, many small businesses that could benefit from the SBRA exceed this modest threshold. Some cynics have speculated that, for borrowers on the cusp, lenders may extend additional credit to disqualify the borrower from a Subchapter V election. On the flipside, since the limit applies to “non-contingent”

debt, desperate or unscrupulous debtors could potentially circumvent the limit by characterizing legitimate debts as contingent or disputed. Even before the COVID-19 crisis, the National Bankruptcy Conference and others in the restructuring industry advocated raising the cap. On March 27, 2020, Congress increased the cap to \$7,500,000 for the next year as part of the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#), in the hope that the higher cap will benefit not only small business owners, but also their creditors, suppliers, customers, employees, and the overall economy.

- Much like a Chapter 13 case for individuals with regular monthly income, Subchapter V allows a debtor to spread its debt over 3 to 5 years, during which time the debtor must devote its projected disposable income to paying creditors. In many cases, this model benefits both debtors (by allowing them to spread payments over time) and creditors (by allowing them a meaningful recovery from debtors who may not have much money on hand but have a realistic expectation of income over time). In a traditional Chapter 11 case, administrative expenses must be paid at plan confirmation; under Subchapter V, they may be paid over the life of the plan. Debts are not discharged until the debtor completes all of its plan payments.
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- In order to keep cases moving quickly, theoretically conserving administrative costs, a Subchapter V debtor must normally file its plan of reorganization within 90 days after entering bankruptcy. However, the Bankruptcy Court may extend this deadline “if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.” Obviously, in the COVID-19 environment, courts are likely to grant extensions liberally.
- Normally, a Chapter 11 trustee is appointed only for cause, such as fraud or gross mismanagement, and seizes control of the debtor’s operations. Under Subchapter V, a trustee is automatically appointed, but the debtor retains control of its assets and operations. Creditors’ committees – a staple in traditional Chapter 11 cases – are formed only for cause in Subchapter V cases. Although Subchapter V trustees have authority to investigate the debtor’s financial affairs, their primary function is to facilitate a consensual plan among the debtor and its creditors, almost like a mediator would facilitate a settlement in litigation. The involvement of an impartial third-party may increase the likelihood of a fair and equitable resolution among the debtor and its creditors, and may be particularly useful for a small business whose creditors are unwilling to make reasonable concessions in light of the impending financial crisis. Under the supervision of the Department of Justice, approximately 250 Subchapter V trustees – mostly attorneys and accountants – were selected out of over 3,000 applicants. Most Subchapter V trustees had recently received their first case assignments when the COVID-19 pandemic hit.
- Subchapter V also cushions small business owners from certain adverse personal consequences that might otherwise disincentivize a Chapter 11 filing. For example, if the debtor’s principal used his or her primary residence as security for a loan to

fund the small business, the debtor's plan may modify the loan. Additionally, Subchapter V eliminates the so-called "new value rule," which normally requires equity holders to provide "new value" if they want to retain their equity interest in the business.

- Unprecedented in living memory, the COVID-19 pandemic may force even small businesses that were on fundamentally sound footing just a few weeks ago to explore the full panoply of options, including Subchapter V. Normally, businesses of any size are ill-advised to enter Chapter 11 without a well-planned exit strategy; this crisis may be the exception. Subchapter V may allow small businesses to responsibly pause their obligations for long enough to negotiate with lenders, landlords, and other creditors (who are being inundated with similar requests) and – hopefully – to resume normal operations once the immediate health peril subsides. However, small businesses should carefully consider the timing of a Subchapter V filing: the Borrower Application Form promulgated by the U.S. Small Business Administration indicates that applicants presently subject to a bankruptcy proceeding are ineligible for the [Paycheck Protection Program](#) (PPP). Subchapter V filings will likely surge once PPP funds run out, particularly among businesses who find themselves unable to meet the loan forgiveness criteria.

If you have questions or would like additional information, please contact Amy Vulpio ([vulpioa@whiteandwilliams.com](mailto:vulpioa@whiteandwilliams.com); 215.864.6250) or another member of the Financial Restructuring and Bankruptcy Group.

## **SUBCHAPTER V—SMALL BUSINESS DEBTOR REORGANIZATION**

### **§1181. Inapplicability of other sections**

(a) In General.—Sections 105(d), 1101(1), 1104, 1105, 1106, 1107, 1108, 1115, 1116, 1121, 1123(a)(8), 1123(c), 1127, 1129(a)(15), 1129(b), 1129(c), 1129(e), and 1141(d)(5) of this title do not apply in a case under this subchapter.

(b) Court Authority.—Unless the court for cause orders otherwise, paragraphs (1), (2), and (4) of section 1102(a) and sections 1102(b), 1103, and 1125 of this title do not apply in a case under this subchapter.

(c) Special Rule for Discharge.—If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1079.)

### **§1182. Definitions**

In this subchapter:

(1) Debtor.—The term "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 \$7,500,000 (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 \$7,500,000 (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, 78o(d)); or

(iii) any debtor that is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).

(2) Debtor in possession.—The term "debtor in possession" means the debtor, unless removed as debtor in possession under section 1185(a) of this title.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1079; amended Pub. L. 116–136, div. A, title I, §1113(a)(1), (5), Mar. 27, 2020, 134 Stat. 310, 311.)

### **§1183. Trustee**

(a) In General.—If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this subchapter, and if such individual qualifies as a trustee under section 322 of this title, then that individual shall serve as trustee in any case under this subchapter. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as trustee in the case, as necessary.

(b) Duties.—The trustee shall—

(1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;

(2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) 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;

(3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns—

(A) the value of property subject to a lien;

(B) confirmation of a plan filed under this subchapter;

(C) modification of the plan after confirmation; or

(D) the sale of property of the estate;

(4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;

(5) 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;

(6) 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

(7) facilitate the development of a consensual plan of reorganization.

(c) Termination of Trustee Service.—

(1) In general.—If the plan of the debtor is confirmed under section 1191(a) of this title, the service of the trustee in the case shall terminate when the plan has been substantially consummated, except that the United States trustee may reappoint a trustee as needed for performance of duties under subsection (b)(3)(C) of this section and section 1185(a) of this title.

(2) Service of notice of substantial consummation.—Not later than 14 days after the plan of the debtor is substantially consummated, the debtor shall file with the court and serve on the trustee, the United States trustee, and all parties in interest notice of such substantial consummation.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1079.)

### **§1184. Rights and powers of a debtor in possession**

Subject to such limitations or conditions as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving in a case under this chapter, including operating the business of the debtor.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1080.)

### **§1185. Removal of debtor in possession**

(a) In General.—On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.

(b) Reinstatement.—On request of a party in interest, and after notice and a hearing, the court may reinstate the debtor in possession.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1080.)

### **§1186. Property of the estate**

(a) Inclusions.—If a plan is confirmed under section 1191(b) of this title, property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in that section that the debtor acquires after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first.

(b) Debtor Remaining in Possession.—Except as provided in section 1185 of this title, a plan confirmed under this subchapter, or an order confirming a plan under this subchapter, the debtor shall remain in possession of all property of the estate.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1081.)

## **§1187. Duties and reporting requirements of debtors**

(a) Filing Requirements.—Upon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.

(b) Other Applicable Provisions.—A debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6), and (7) of section 1116 of this title.

(c) Separate Disclosure Statement Exemption.—If the court orders under section 1181(b) of this title that section 1125 of this title applies, section 1125(f) of this title shall apply.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1081.)

## **§1188. Status conference**

(a) In General.—Except as provided in subsection (b), not later than 60 days after the entry of the order for relief under this chapter, the court shall hold a status conference to further the expeditious and economical resolution of a case under this subchapter.

(b) Exception.—The court may extend the period of time for holding a status conference under subsection (a) if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

(c) Report.—Not later than 14 days before the date of the status conference under subsection (a), the debtor shall file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1081.)

## **§1189. Filing of the plan**

(a) Who May File a Plan.—Only the debtor may file a plan under this subchapter.

(b) Deadline.—The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1081.)

## **§1190. Contents of plan**

A plan filed under this subchapter—

(1) shall include—

(A) a brief history of the business operations of the debtor;

(B) a liquidation analysis; and

(C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization;

(2) shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; and

(3) notwithstanding section 1123(b)(5) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was—

(A) not used primarily to acquire the real property; and

(B) used primarily in connection with the small business of the debtor.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1082.)

## §1191. Confirmation of plan

(a) Terms.—The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title <sup>1</sup> are met.

(b) Exception.—Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(c) Rule of Construction.—For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:

(1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.

(2) As of the effective date of the plan—

(A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or

(B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

(3)(A)(i) The debtor will be able to make all payments under the plan; or

(ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and

(B) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.

(d) 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.

(e) Special Rule.—Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1082.)

<sup>1</sup> So in original. The words "of this title" probably should follow "1129(a)".

## **§1192. Discharge**

If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

(1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or

(2) of the kind specified in section 523(a) of this title.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1083.)

## **§1193. Modification of plan**

(a) Modification Before Confirmation.—The debtor may modify a plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. After the modification is filed with the court, the plan as modified becomes the plan.

(b) Modification After Confirmation.—If a plan has been confirmed under section 1191(a) of this title, the debtor may modify the plan at any time after confirmation of the plan and before substantial consummation of the plan, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. The plan, as modified under this subsection, becomes the plan only if circumstances warrant the modification and the court, after notice and a hearing, confirms the plan as modified under section 1191(a) of this title.

(c) Certain Other Modifications.—If a plan has been confirmed under section 1191(b) of this title, the debtor may modify the plan at any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1191(b) of this title. The plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan, as modified, under section 1191(b) of this title.

(d) Holders of a Claim or Interest.—If a plan has been confirmed under section 1191(a) of this title, any holder of a claim or interest that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless, within the time fixed by the court, such holder changes the previous acceptance or rejection of the holder.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1083.)

## §1194. Payments

(a) Retention and Distribution by Trustee.—Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deducting—

- (1) any unpaid claim allowed under section 503(b) of this title;
- (2) any payment made for the purpose of providing adequate protection of an interest in property due to the holder of a secured claim; and
- (3) any fee owing to the trustee.

(b) Other Plans.—If a plan is confirmed under section 1191(b) of this title, except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

(c) Payments Prior to Confirmation.—Prior to confirmation of a plan, the court, after notice and a hearing, may authorize the trustee to make payments to the holder of a secured claim for the purpose of providing adequate protection of an interest in property.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1084.)

## §1195. Transactions with professionals

Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title, by a debtor solely because that person holds a claim of less than \$10,000 that arose prior to commencement of the case.

(Added Pub. L. 116–54, §2(a), Aug. 23, 2019, 133 Stat. 1084.)

\*

**\*\*INDUBITABLE EQUIVALENT:** Something that is supposedly undoubtedly equal in value to what is taken away.

A “catch all” form of adequate protection under the Code requiring that a debtor provide a creditor with something having a value that is the “indubitable equivalent” of the amount of diminution in value of the creditor’s collateral resulting from its use in the bankruptcy case.

It is also one means of providing “fair and equitable” treatment to a secured creditor under a Chapter 11 plan, i.e., by providing the creditor with the “indubitable equivalent” of its claim. In a typical Chapter 11 plan involving the claim of a lender the debtor most often attempts to satisfy the lender’s right to “fair and equitable treatment” by providing the lender with periodic payments sufficient to pay the secured claim in full, with interest, while the lender retains its lien under the plan. A second option for the

debtor to satisfy the fair and equitable test is for the plan to provide for a sale of the lender's collateral, free and clear of the lender's lien, with the lien to attach to the sale proceeds. The third option—providing the lender with the “indubitable equivalent” of its claim—is less well defined than the first two options.

The courts have only outlined the contours of the term in decisions accepting and rejecting various plan treatments offered by proponents as providing a lender the indubitable equivalent of its secured claim. For example:

- A lender does not receive the indubitable equivalent of its claim if the debtor substitutes a letter of credit for the lender's collateral, but the letter of credit is subject to ambiguities in the letter of credit accommodations.
- There is no indubitable equivalence where a debtor substitutes equity securities for the lender's collateral if the value of the securities is questionable.
- If the debtor is to transfer property to the lender as the indubitable equivalent of the lender's secured claim, the property must produce cash flow or be capable of being sold within a reasonable time so that the lender can realize cash.

The U.S. Third Circuit of Appeals in *Philadelphia Newspapers, LLC*, 599 F.3d 298 (3rd Cir. 2010), held that, so long as the debtor's reorganization plan provides a secured creditor with the "indubitable equivalent" of its secured claim, a secured creditor can be barred from credit bidding at an auction sale under a plan. There currently is a split in the U.S. Court of Appeal Circuits that have considered the issue. The Supreme Court will presumably resolve this split in connection with an appeal pending (as of the date of publication) in the *Rad LAX Gateway Hotel, LLC*, et al. v. Amalgamated Bank case.

Bankruptcy Code §§ 361(3), 1129(b)(2)(A)(iii).

**EAT DIRT PLAN:** A Chapter 11 plan under which a debtor or other plan proponent proposes to transfer some of the lender's collateral to the lender as payment in full of the lender's claim, while the debtor keeps the remainder of the lender's collateral free of any claim by the lender.

The credit amount is set by the debtor's plan and approved by the court rather than by the results of an actual sale of the property. This creates the risk that the credit to the lender's claim will be greater than the value the lender can realize from the property. If the lender objects to this treatment, the plan cannot be confirmed unless the bankruptcy court finds that the debtor's "dirt for debt" proposal furnishes the lender the "indubitable equivalent" of its claim—a finding that many courts are reluctant to make because of the inherent difficulties in estimating the value of the lender's collateral.