SUBCHAPTER V AND THE COVID-19 DISRUPTION: DID CONGRESS GET SMALL BUSINESS BANKRUPTCY REFORM RIGHT THIS TIME?

ROBERT J. LANDRY, III*

Abstract

Reform efforts to enhance Chapter 11 for small business debtors have been a matter of great debate in recent years. On February 19, 2020, right as the Pandemic was rearing its ugly head, the fruits of those reform efforts materialized with the Small Business Reorganization Act of 2019 ("SBRA") becoming the law of the land. SBRA is the most extensive reform of small business bankruptcy in fifteen years. It added a new pathway of relief for small business debtors under Chapter 11 – a new subchapter V. Although SBRA has positive attributes that will enhance the rescue of small businesses, several aspects of subchapter V have significant deficiencies that will hamper the ability of small businesses to be rescued under Chapter 11. The COVID-19 pandemic has shined a light on these shortcomings. This paper analyzes the major aspects of SBRA and how they impact the ability of a small business to reorganize, offering several policy solutions rooted in the clarity that the COVID-19 disruption has brought.

I. INTRODUCTION

Before the pandemic, reforming bankruptcy law generally, and for small businesses in particular, has been a matter of debate and on policymakers agency for several years.[1] In late 2018 the Small Business Reorganization

* Professor of Finance, College of Business and Industry, Jacksonville State University, Jacksonville, Alabama.

[1] *See* Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 BANKR. L. LETTER, 1, 2–3 (Oct. 2019) (summarizing the policy debate from 1994 until the passage of the Small Business Reorganization Act of 2019).

Act[2] was introduced into Congress[3] which would add a new subchapter to Chapter 11[4] of the Bankruptcy Code[5] applicable to small business debtors.[6] The 2018 legislation did not gain much traction, but the bill was re-introduced into Congress the next year as the Small Business Reorganization Act of 2019 (SBRA).[7] This time SBRA enjoyed substantial bipartisan support and also enjoyed support from a wide array of nonpartisan organizations in the bankruptcy policy domain including the National Conference of Bankruptcy Judges (NCBJ), the American Bankruptcy Institute (ABI) and the National Bankruptcy Conference (NBC).[8] SBRA was passed by both chambers of Congress in late summer of 2019.[9] SBRA was presented to President Trump and signed into law on August 23, 2019.[10] SBRA, adding a new subchapter to Chapter 11 for small business debtors, i.e. "subchapter V", became effective February 19, 2020,[11] right as the Pandemic was showing its ugly head.

The underlying driver for SBRA was a concern that while most Chapters 11 cases are small business debtors, most small business debtors face difficulty successfully reorganizing under the current Chapter 11 structure.[12] Chapter 11, with a one size fits all framework for all debtors, fails to take into account the differences between large companies and

---

[2] Small Business Reorganization Act of 2018, H.R. 7190, 115th Cong. (2d Sess. 2018); Small Business Reorganization Act of 2018, S. 3689, 115th Cong. (2d Sess. 2018).

[3] *Legislative Update: Small Business Reorganization Act*, 38 AM. BANKR. INST. J. 8, 8 (Jan. 2019) [hereafter *Legislative Update*].

[4] Chapter 11 as used throughout this article refers to 11 U.S.C. §§ 1101–1195 (1978).

[5] All references to "Bankruptcy Code" or "Code" are to Title 11 of the U.S. Code.

[6] For a concise overview of the bill, see Katy Stech Ferek, *U.S. Lawmakers Propose New Bankruptcy Process for Small Businesses: Bipartisan bill could make process cheaper and faster*, WALL ST. J (Nov. 29, 2018), https://www.wsj.com/articles/federal-lawmakers-propose-new-bankruptcy-process-for-small-businesses-1543526806 [https://perma.cc/6H7Z-L33V].

[7] Small Business Reorganization Act of 2019, H.R. 3311, 116th Cong. (1st Sess. 2019); Small Business Reorganization Act of 2019, S. 1091, 116th Cong. (1st Sess. 2019).

[8] H.R. REP. NO. 116–171, at 2 (2019).

[9] 165 CONG. REC. H7217 (daily ed. July 29, 2019) (passes House by voice vote); 165 CONG. REC. H5321 (daily ed. Aug. 1, 2019) (passes Senate by voice vote).

[10] *In re* Ventura, 615 B.R. 1, 12 (Bankr. E.D. N.Y. 2020).

[11] The effective date of SBRA was 180 days after enactment. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079; *see also* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR THE UNITED STATES TRUSTEES, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES 1-1 (2020) [hereafter TRUSTEE HANDBOOK] (noting SBRA effective date of Feb. 19, 2020).

[12] H.R. REP. NO. 116–171, at 2–3.

smaller firms.[13] Chapter 11 is "a poor fit for many small businesses."[14] These concerns date back many years, and in fact, in 2005 Congress passed legislation designed to streamline Chapter 11 reorganizations for small business debtors.[15] However, those reforms have not effectively increased small business debtors' chance for a successful Chapter 11.[16] In light of continued problems following the 2005 legislation, the NBC since 2010 has advocated for reforms targeted at small business debtors in Chapter 11.[17] Likewise, in 2014 the ABI released a comprehensive report on Chapter 11 and devoted substantial attention to proposed reforms designed to improve reorganizations for Chapter 11 small business debtors.[18] Both the NBC and ABI proposals had significant influence in the substantive reforms reflected in SBRA.[19]

SBRA is intended to streamline Chapter 11 reorganization for small business debtors.[20] The reform attempts to enhance the opportunity for a successful Chapter 11 reorganization by making the process quicker, less costly and removing of other legal barriers to confirmation of a plan.[21] To this end, SBRA includes three principle reforms. First, SBRA provides for

---

[13] Michael C. Blackmon, Note, *Revising the Debt Limit for "Small Business Debtors": The Legislative Half-Measure of the Small Business Reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339, 344 (2020).

[14] Edward R. Morrison & Andrea C. Saavedra, *Bankruptcy's Role in the COVID-19 Crisis* (Colum. L. & Econ., Working Paper No. 624, 2020), https://ssrn.com/abstract=3567127 [https://ssrn.com/abstract=3567127].

[15] H.R. REP. NO. 116–171, at 3.

[16] *Id.* at 4.

[17] *See Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 1 (2019) [hereafter *Small Statement*] (statement of A. Thomas Small, The National Bankruptcy Conference) (detailing the NBC reform proposal for small business dating back to 2010); s*ee also* NAT'L BANKR. CONFERENCE, SMALL BUSINESS WORKING GROUP REPORT (2018) [hereafter NBC REPORT] (summarizing the NBC proposed reform for a new subchapter V for small business debtors).

[18] *See* AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 2012–2014 FINAL REPORT AND RECOMMENDATIONS (2014) [hereafter ABI REPORT].

[19] H.R. REP. NO. 116–171, at 4.

[20] *Id.* at 1; *see also* TRUSTEE HANDBOOK, *supra* note 11, at 1-1 ("The legislative purpose of the SBRA was to provide a fast track for small businesses to confirm a consensual plan with the assistance of a private trustee, a subchapter V trustee."); *In re* 305 Petroleum, Inc., 622 B.R. 209, 211 (Bankr. N.D. Miss. 2020) ("Congress passed the Small Business Reorganization Act of 2019 . . . to make it easier for small businesses to reorganize under the Bankruptcy Code."); *In re* Ventura, 615 B.R. 1, 12 (Bankr. E.D. N.Y. 2020) ("By enacting this law, Congress intended to streamline the reorganization process for small business debtors because small businesses have often struggled to reorganize under chapter 11.").

[21] Blackmon, *supra* note 13, at 345.

the appointment of a trustee in every Chapter 11 small business debtor case.[22] Secondly, it requires the trustee to monitor the small business debtor's progress toward confirmation of a plan.[23] Thirdly, SBRA expressly provides for a cram down of dissenting creditor class provided the treatment "fair and equitable", but defining "fair and equitable" to effectively abolish the absolute priority rule as currently applied to a dissenting class of unsecured creditors.[24]

Aspects of SBRA are positive and move Chapter 11 in the direction of facilitating the reorganization of small businesses. However, the legislation is far from a panacea for small business debtors in financial distress. It may help some small business debtors, but it may, in fact be ineffective to enhance the rescue of many other small business debtors.

Certain features of the SBRA may limit its impact. For example, qualifying as a small business debtor is restrictive, scrutiny by a trustee may serve as a disincentive to opt for relief under SBRA, the fast track nature of the reform may impact the SBRA's use, and in light of the trustee fees and continued reporting requirements, cost savings under SBRA may not be as dramatic as envisioned. Thus, whether Congress got small business bankruptcy reform right this time is an open question.

This question is important as the law muddles through the Pandemic and works to find ways to assist small businesses. Bailout and other legislative relief efforts may well be necessary to keep small businesses afloat until the COVID-19 disruption passes;[25] however, there will be a day of reckoning when the temporary relief measures pass. That day of reckoning may well require the use of Chapter 11 as a tool to rescue the business. Now is the time for policymakers to consider whether small businesses have adequate tools in Chapter 11 to facilitate a rescue.

Following this Introduction, Part II articulates what the policy goal of Chapter 11 for small businesses is or should be. This goal–rescue–serves as the benchmark to evaluate Chapter 11. Part III details pre-SBRA rescue options for small business debtors under Chapter 11. With that backdrop, the major aspects of SBRA and new subchapter V, as well as potential deficiencies of SBRA, some brought to light by the COVID-19 Pandemic, are explored in Part IV. The Conclusion offers several reforms for policymakers to consider that would enhance the opportunity for small business rescue under Chapter 11, reminding policymakers that even if COVID-19 bailouts are provided to small businesses, rescue under Chapter

---

[22] H.R. REP. NO. 116–171, at 4.
[23] *Id.*
[24] *Id.*
[25] For an excellent analysis of the need and role of bail-outs in light of the Pandemic, see generally Kristin van Zwieten, Horst Eidenmueller & Oren Sussman, *Bail-outs and Bail-ins are better than Bankruptcy: A Comparative Assessment of Public Policy Responses to COVID-19 Distress* (Eur. Corp. Governance Inst., Working Paper No. 535, 2020).

11 may be needed to aid viable small businesses to weather this storm - the Pandemic.

II. WHAT IS (AND SHOULD BE) THE POLICY GOAL OF CHAPTER 11 FOR SMALL BUSINESS DEBTORS?

Any assessment of a reform in a policy domain must begin with an understanding of the policy goal underpinning the reform in that policy domain. There is no way to fully understand the policy goal without defining the problem that is being addressed.[26] Clarity of both the policy goal and identification potential problems are prerequisites to developing policy solutions.[27] This interconnection of the problem, policy and solution is critical to any successful policy reform. The ultimate ability to have effective reform will be a political question and depend on whether the problem, policy and solution converge.[28] Therefore, critical to analyzing reforms needed to small business bankruptcies requires analyzing what is (or should be) the policy goal of Chapter 11 for small business debtors? With that policy goal articulated then the need for reforms can be considered.

There is a consensus among bankruptcy scholars that when a business is in financial distress,[29] Chapter 11 can help mitigate the common pool problem caused by a race to the courthouse by individual creditors.[30] Moreover, most scholars agree that Chapter 11 can play an important role in maximizing the value of the debtor's assets.[31] However, there is

---

[26] For an analysis of the importance of problem definition in public policy reforms, employing reforms pertaining to the opioid crisis, see generally Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups and Problem Definition*, 48 U. MEM. L. REV. 1357, 1364–83 (2018); s*ee generally* Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509, 515–28 (2003) (analyzing consumer bankruptcy reform and the importance of problem definition in the policy reform process).

[27] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 2–3 (1986) (Professor Jackson recognized that we must understand what bankruptcy can and should do, i.e. the goal of bankruptcy law. With that understanding the "problems" in the bankruptcy system can be addressed).

[28] Political scientists have employed a streams analogy to describe the policy process which is comprised of three streams that converge: problem, policy, and political streams. *See* El-Sabawi, *supra* note 26, at n.14 (citing JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 165–95 (2d ed. 2003)).

[29] Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 VA. L. REV. 1199, 1200 (2005) ("A firm is only in financial distress if it would have positive earnings were it not required to service its debt.").

[30] Sarah Paterson, *Rethinking Corporate Bankruptcy Theory in the Twenty-First Century*, 36 OXFORD J. LEG. STUD. 697, 698 (2016).

[31] *Id*; s*ee also* Ashley Suarez, Comment, *An Analysis of § 363(b) Sales: Justified Deviations or Just Deviations?*, 22 U. PA. J. BUS. L. 988, 991–92 (2020) (observing that Chapter 11 reorganizations can help preserve assets).

disagreement as to what the policy goal of Chapter 11 should be in terms of distribution of the pool of assets.[32]

For simplicity, we can view the policy orientation in two camps – creditors' bargain theory and the progressive school.[33] Law and economic scholars advance the creditors' bargain theory[34] where creditors' pre-bankruptcy rights should be given effect in Chapter 11, except when pre-bankruptcy rights interfere with maximization of the pool of assets.[35] The progressive school[36] argues that distributions in Chapter 11 should consider the consequences of the financial failure among a host players and interests, not merely creditors.[37] In a nutshell, the traditional debate over what Chapter 11 should do boils down to either maximization of the return to creditors only or consideration of other goals and interests.[38]

The reality is that such a bipolar view of the policy goal of Chapter 11 ignores the dynamic nature of Chapter 11. Chapter 11 positive law reflects aspects of both schools of thought. It reflects a broad orientation geared towards rescue – rescue of the company or rescue of the business. At its core Chapter 11 is a rescue model of bankruptcy[39] and that orientation should be the focal point used to analyze any reforms to Chapter 11. The rescue orientation considers value maximization, but is cognizant of the dynamic environment modern businesses operate in and requires consideration of a host of stakeholders -- all with the goal of rescuing the company or rescuing the business.[40] The other stakeholders, whether it be

---

[32] *See* Paterson*, supra* note 30, at 698.

[33] Some scholars label the schools of thought differently. Those in the creditors' bargain theory have been labeled as "proceduralists" and those in the progressive school as "traditionalists." *See* Edward J. Janger & Adam J. Levitin, *The Proceduralist Inversion – A Response to Skeel*, 130 YALE L.J. FORUM 335, 335–36 (2020) (summarizing the two schools of thought).

[34] Paterson, *supra* note 30*,* at 699.

[35] VANESSA FINCH & DAVID MILMAN, CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES, 29 (3d ed. 2017); s*ee also* Barry E. Adler, *The Creditors' Bargain Revisited*, 166 U. PA. L. REV. 1853, 1854–59 (2018) (summarizing the creditors' bargain framework of bankruptcy).

[36] Paterson, *supra* note 30, at 699 (classifying scholars on this side as the "progressive school"); s*ee also* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 12 (2001) (characterizing the policy debate between the law and economics scholars and the "progressive scholars").

[37] FINCH & MILMAN, *supra* note 35, at 40.

[38] *See* BO XIE, COMPARATIVE INSOLVENCY LAW: THE PRE-PACK APPROACH IN CORPORATE RESCUE 8–9 (2016) (detailing the two viewpoints of the debate).

[39] James H.M. Sprayregen, *Acceptance Remarks of James H.M. Sprayregen Lifetime Achievement Award: International Insolvency: From Punitive Regimes Toward Rescue Culture*, 36 EMORY BANKR. DEV. J. 7, 7 (2020).

[40] For a detailed analysis developing the rescue orientation in Chapter 11, see generally Robert J. Landry III, *Enhancing Rescue in Chapter 11: Lessons from Reform Efforts in the United Kingdom*, 57 AM. BUS. L.J. 227, 240–43 (2020).

customers, suppliers, employees[41] or any party that relies of the business – have a stake in the rescue of a business.[42] Rescue orientation "promotes going-concern value and rehabilitation"[43] which can have a positive impact on the panoply of parties and interests impacted by the financial distress of the firm. This broader orientation and view of Chapter 11 has been recognized by courts. For example, a bankruptcy court recently characterized the goal of Chapter 11 to encompass "with the goal of preserving enterprise value, jobs, and the like through reorganization."[44] SBRA should be evaluated in terms of whether it enhances the rescue of the company or business viewed broadly taking into account all stakeholders. It should not be tethered solely to either school of thought.

III. PRE-SBRA CHAPTER 11 OPTIONS FOR SMALL BUSINESS DEBTORS

Prior to SBRA, small business debtors filing for Chapter 11 were subject to special provisions of the Code, added to the Code under The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[45] The BAPCPA small business provisions were designed to speed up Chapter 11 for small business debtors and to make it easier for small businesses to reorganize,[46] as well as enhance oversight of debtors to "weed out those cases that should not be in Chapter 11."[47] The BAPCPA reforms to small businesses were rooted in the view that the Chapter 11 framework for small businesses in place prior to 2005 was inadequate.[48]

---

[41] *See* Suarez, *supra* note 31, at 991–92 (noting Chapter 11 reorganizations help preserve jobs).
[42] *See* Blackmon, *supra* note 13, at 345 (recognizing a ripple effect to other stakeholders beyond the small business in a reorganization).
[43] Sprayregen, *supra* note 39, at 8.
[44] *In re* Zamora, No. 19-01040-WLH13, 2020 WL 4289926, at *9 n.49 (Bankr. E.D. Wa. July 27, 2020).
[45] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 59.
[46] 2 THE LAW OF DEBTORS AND CREDITORS § 16A:17 (November 2020 Update).
[47] Ira Bodenstein et al., *Chapter 11 and the Individual Debtor Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 061506 ABI-CLE 263, American Bankruptcy Institute, 13th Annual Central States Bankruptcy Workshop, June 15–18, 2006.
[48] *See* Amber N. Morris, *Small Business Debt in the Age of COVID-19*, 29 AM. BANKR. INST. L. REV. 131, 137–38 (2021) (noting the concern about the inadequacies of Chapter 11 for smaller debtors leading to the 2005 reform).

Small business debtors were defined as business debtors with less than $2,725,525 in debt,[49] which is inflation adjusted every three years.[50] If a debtor fits within the definition of small business debtor the debtor was subject to the BAPCPA provisions and treated as a "small business case."[51] There was no ability to opt out of being treating as a small business case and the specific requirements imposed by BAPCPA.[52]

A key provision in small business cases is the debtor's exclusive right to file a plan for 180 days after the order for relief.[53] This exclusive right gives the debtor to formulate a plan and to work out a negation with creditors without concern for competing creditor plans during the 180 day window. This gives debtors in a small business case an additional 60 days of exclusivity to propose a plan than other Chapter 11 debtors.[54]

Balancing against this exclusivity period for the debtor are confirmation requirements in a small business case that are inflexible and are somewhat unworkable in all small business cases.[55] A disclosure statement and plan must be filed within 300 days of filing[56] and the plan must be confirmed within 45 days after the filing of the plan.[57] The disclosure statement requirement can be waived by a court, which adds some flexibility and reduces some costs.[58] However, the very short timeframe to achieve confirmation is problematic in most small business cases.[59]

In addition to these practical problems with obtaining confirmation several other aspects of the Chapter 11 small business case can lead to

---

[49] *See* 11 U.S.C. § 101(51D) (2018) (defining small business debtor). The initial statutory limit in BAPCPA was $2,000,000, but has been adjusted upward to the current amount; *see, e.g.*, Bodenstein, *supra* note 47 (noting the initial debt limit under BAPCPA which is subject to adjustment).

[50] *See* 11 U.S.C. § 104(b)(1) (providing that dollar limits are subject to automatic adjustment, based on the Consumer Price Index for Urban Consumers every three years).

[51] 2 THE LAW OF DEBTORS AND CREDITORS, *supra* note 46.

[52] *Id.* Although a small business debtor could not opt out of being a small business case under BAPCPA, if a committee was appointed then the debtor would not be a small business case. *See* Bodenstein, *supra* note 47.

[53] 11 U.S.C. § 1121(e)(1).

[54] Bodenstein, *supra* note 47.

[55] *See* 2 THE LAW OF DEBTORS AND CREDITORS, *supra* note 46 (noting that the "confirmation requirements that were viewed as burdensome, if not unworkable, by many debtors.").

[56] 11 U.S.C. § 1121(e)(2).

[57] *Id.* § 1129(e).

[58] 2 THE LAW OF DEBTORS AND CREDITORS, *supra* note 46.

[59] *Id.* A court can extend the time for confirmation beyond the 45 days, but that requires a hearing which will be challenging to have before the 45-day period runs. *See* Bodenstein, *supra* note 47 (The short time frames may create "havoc" with the [bankruptcy] [c]ourt's docket" as the "court may not have sufficient time. . . to complete a lengthy hearing within the 45 day period."); s*ee also* Blackmon, *supra* note 13, at 346 (summarizing the timing and deadline difficulties under a BAPCPA small business case).

relatively high administrative costs in small business cases.[60] Small business debtors are required to pay statutory quarterly fees based on disbursements by a debtor.[61] The quarterly fees add to the administrative cost of Chapter 11 and if not paid can be the basis for dismissal or conversion of a case.[62] Adding to the administrative costs of Chapter 11 are a panoply of reporting requirements,[63] which may require legal or professional assistance to prepare adding to the administrative costs. As with the quarterly fees, the failure to comply with the reporting requirements can result in dismissal or conversion of a case.[64]

These potential barriers to confirmation and administrative costs were limiting the access of small business debtors' ability to Chapter 11 as a rescue tool.[65] SBRA was designed to address these concerns[66] and "facilitate the reorganization of small businesses."[67] It is important to recognize that the BAPCPA small business case provisions were not repealed by SBRA and are still available as an option to small business debtors.[68] The new provisions added by SBRA and creation of the subchapter V option is an additional avenue for small business debtors to seek Relief under Chapter 11. Thus, a small business debtor can file Chapter 11 and proceed under the BAPCPA small business case provisions or can elect to proceed under the SBRA provisions,[69] as detailed in Part IV.

IV. MAJOR ASPECTS OF SBRA AND POTENTIAL DRAWBACKS

---

[60] *See* Edward T. Gavin, *First Glance:, Legislative Update, How to Lessen the Big Costs of Small-Business Bankruptcy*, 35 AM. BANKR. INST. J. 12, 101 (2016) (discussing the negative impact of administrative costs imposed on small businesses filing for Chapter 11).

[61] 28 U.S.C. § 1930(a) (2020) (statutory basis for collecting of quarterly fees based on disbursements for Chapter 11 debtors).

[62] 11 U.S.C. § 1112(b)(4)(k).

[63] *See* Bodenstein, *supra* note 47 (summarizing the reporting requirements under BAPCPA for small business cases).

[64] 11 U.S.C. § 1112(b)(4)(f).

[65] *See, e.g.,* Robert Keach & Adam Prescott, *Fixing Ch. 11 for Small Biz: The SBRA Is Working As Intended*, LAW360 (Feb. 19, 2021, 3:39 PM), https://www.law360.com/articles/1356936/print?section=bankruptcy [https://perma.cc/J8UR-9V2R] (noting "that small businesses were avoiding Chapter 11 due to high barriers to confirmation and high costs").

[66] *See*, *e.g.*, Morris, *supra* note 48, at 138 ("SBRA . . . arose out of qualms with the BAPCPA. . .").

[67] *Id.*

[68] Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 AM. BANKR. L.J. 571, 576 (2019) ("SBRA does not repeal existing provisions that govern small business debtors in chapter 11").

[69] 2 THE LAW OF DEBTORS AND CREDITORS § 16A:17 (Nov. 2020) (recognizing the dual options for small business debtors as a BAPCPA small business case or a SBRA sub-V debtor).

These practical problems with Chapter 11 for small business debtors outlined in Part III served as part of the impetus for SBRA.[70] SBRA created subchapter V as a new option for small business debtors to reorganize under Chapter 11. The changes are substantial to Chapter 11 law and practice[71] and the largest overall of Chapter 11 for small businesses since BAPCA in 2005. The major aspects of the legislation can be analyzed under three general categories: (1) qualifying as a small business debtor, (2) governance and (3) plans, confirmation and discharge. These three areas will be discussed along with potential drawbacks or problems with the reforms in these areas for subchapter V cases in this section.

A. *Qualifying as a Small Business Debtor*

1. *Statutory Framework*

Debtors can choose to proceed under subchapter V if the eligible.[72] There are two eligibility requirements for a chapter 11 debtor seeking relief under subchapter V. First, the debtor must be a small business debtor,[73] which includes individuals, partnerships and corporations under the definition of "person" under the Code.[74] SBRA modified the definition of small business debtor[75] which is applicable whether or not a debtor seeks relief under subchapter V.[76] Under amended § 101(51D)[77] to qualify as a small business debtor the following criteria must be met:

(1) the debtor must be engaged in commercial or business activities;

(2) have no more than $2,725,625 of noncontingent liquidated secured and unsecured debt as the date of filing or the order for relief;

(3) 50 percent of such debt must be from business and commercial activities; and,

---

[70] H.R. REP. NO. 116–171, at 2–3 (2019); s*ee also* Morris, *supra* note 48, at 138–39 (detailing the underlying rationale for SBRA in addressing shortcomings of Chapter 11 for small businesses).

[71] Clifford J. White, III, *Small Business Reorganization Act: Implementation and Trends,* 40 AM. BANKR. INST. J. 54, 54 (2021).

[72] Blackmon, *supra* note 13, at 346.

[73] 11 U.S.C. § 1182(1) (2020).

[74] *See id.* § 101(41).

[75] Blackmon, *supra* note 13, at 350.

[76] 11 U.S.C. § 101(51C) defines a "small business case" as one filed by a "small business debtor." Amended 11 U.S.C. § 101(51D) tweaks the definition of "small business debtor" without any limitation to subchapter V cases. SBRA modified the definition of small business debtor is not limited to subchapter V cases. For a detailed discussion of the definitional changes, see generally Bonapfel, *supra* note 68, at 580–82.

[77] Small Business Reorganization Act of 2019, Pub. L. No. 116-54, § 4(a)(1), 133 Stat. 424.

(4) and the debtor cannot have as its primary activity the owning of single asset real estate.[78]

Secondly, a debtor must-opt in to be a small business debtor under subchapter V.[79] The SBRA is silent on the mechanics of opting in, so the Bankruptcy Rules were amended to address the procedure.[80] The voluntary petition includes an opt-in box to select treatment as a subchapter V debtor.[81]

If a debtor fits within the definition of a small business debtor and does not opt-in to subchapter V, the current small business case provisions in chapter 11 are applicable. The non-subchapter V provisions currently in place in chapter 11 applicable to small business cases are mandatory.[82] Thus, subchapter V does not replace the current small business case requirements in chapter 11, but rather, adds another filing option for debtors classified as a small business debtor that the debtor can opt-in to. In this way, SBRA adds flexibility to small business debtors that seek relief under Chapter 11.

2. DRAWBACKS

A key issue with the definition of small business debtor, which applies to both BAPCPA small business cases and subchapter V debtors is that the debt limit is too restrictive. The debt limit curtails the scope of the availability of subchapter V to businesses.[83] If the purpose behind SBRA is to enhance the ability of a small business to reorganize, the limits should be expanded to offer this avenue of relief to more businesses.[84] The debt limitation excludes medium size businesses that may well need the very relief afforded by subchapter V to small businesses.[85] The measure has been

---

[78] 11 U.S.C. § 101(51D).

[79] *Id.* § 103(i); s*ee also* Blackmon, *supra* note 13, at 346 ("A debtor, who meets the current definition of small business debtor, has a choice of proceeding as either a Subchapter V case or as a BAPCPA 'small business case.'").

[80] FED. R. BANKR. P. 1020(a) (Interim Rule 2019) (includes the option to elect to proceed under subchapter V on the voluntary petition); Bonapfel, *supra* note 68, at 579; s*ee also Small Statement*, *supra* note 17, at 1 (recognizing need to amend the Bankruptcy Rules to provide for opting in).

[81] Official Form 101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); Official Form 201 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy); s*ee also* Bonapfel, *supra* note 68, at 579 (recognizing the changes to the official forms in light of subchapter V).

[82] *See, e.g.*, 11 U.S.C. § 1116 (mandatory nature of duties in a small business case); 11 U.S.C. § 1121(e) (requirements pertaining to plan, disclosure statement and confirmation in small business case).

[83] Morrison & Saavedra, *supra* note 14, at 9 ("The trouble with the new law [SBRA] is its limited scope.").

[84] *See* Blackmon, *supra* note 13, at 343 (collecting authorities arguing to increase the debt limits in SBRA).

[85] *Id.* at 353.

characterized as a "half-measure."[86] There is no clear policy rationale for the disparate treatment between small and medium sized businesses.

This problem is not new as the debt limit has been part of the small business debtor definition since BAPCPA.[87] Both the ABI and the NBC recommended higher debt limits for small business debtors.[88] The NBC recommended a debt limit of 7.5 million in its proposed legislation and the ABI recommended a debt limit of 10 million or assets less than 10 million.[89] Under limits such as these proposed, 85% to 90% of small business debtors would be eligible for relief under Chapter 11 as a small business debtor.[90] However, under the lower statutory debt limit, about 40% of Chapter 11 debtors will be eligible for relief as a small business debtor and be able garner the beneficial aspects of subchapter V.[91]

The problematic nature of the low debt limit applicable to small business debtors is evidenced by statutory reforms put in place in light of the Pandemic. SBRA and the subchapter V option therein became effective on February 19, 2020,[92] which coincided with the onset of the Pandemic.[93] On March 27, 2020, just a little more than a month later, the CARES Act[94] went into effect and temporarily provided for an increase in the debt limit for subchapter V debtors to $7,500,000.[95] The increased debt limit was set to expire or sunset one year after enactment on March 27, 2021.[96] Just as the increased debt limit was hours away from expiring President Biden signed the COVID-19 Bankruptcy Relief Extension Act of 2021[97] on March 27,

---

[86] *Id.* at 352–53.
[87] Brubaker, *supra* note 1, at 5 (noting the debt limit provisions applicable under BAPCPA and SBRA are the same).
[88] *Id.*
[89] *Id.*
[90] *See id.* (summarizing studies analyzing the impact of increased of proposed debt limit).
[91] *See id.* (summarizing analysis of prior filings to determine potential eligibility under subchapter V).
[92] William L. Norton, III, *Introduction to Subchapter V*, 5 NORTON BANKR. L. & PRAC. 3d § 107:8, 1 (Jan. 2021 update).
[93] Keach & Prescott, *supra* note 65 (noting the convergence of the effective date of SBRA and onset of the Pandemic); s*ee also* Brook Gotberg, *Fixing Ch. 11 For Small Biz: SBRA Has Room For Improvement*, LAW360 (Feb. 12, 2021, 8:42 AM), https://www.law360.com/articles/1352870/print?section=bankruptcy [https://perma.cc/2BZM-JJTJ] (recognizing the effective date of SBRA was just weeks after the Pandemic outbreak).
[94] Coronavirus, Aid, Relief, and Economic Security Act of 2020 ("CARES Act"), Pub. L. No. 116–136, 134 Stat. 281; Morris, *supra* note 48, at 141 (noting the close proximity in time of the onset of the Pandemic and the effective date of SBRA).
[95] Norton, *supra* note 92, at 1.
[96] *Id.*
[97] *See generally* COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117–5, 135 Stat. 249.

2021 which extended the increased debt limits for an additional year to March 27, 2022.[98]

It is not clear why an increase of the debt limit for subchapter V debtors in light of the Pandemic should not be applicable beyond the two-year timeframe. If the intent of SBRA and subchapter V is to enhance a small business debtor's ability to reorganize or be rescued, to limit the availability of the relief to medium size businesses under subchapter V outside of the disruption caused by COVID-19, is not logical. The benefits of subchapter V for small or medium size business debtors will not end by an arbitrary date. The arbitrary nature of the time limit is evident from the initial time limit of a year being extended for another year. As a practical matter, the impact of the Pandemic and the need for effective rescue tools in Chapter 11 for businesses will last much longer than the current crisis.[99] The Pandemic may cause small and medium sized business continuing problems such as "low revenues, debt overhang and uncertainty in the future."[100] The firms may need SBRA as a rescue tool.[101] This opportunity for relief for a wider group of business debtors with the increased debt limit should not be curtailed or limited arbitrarily, but expanded. Other disruptions will come and go causing financial distress to small and medium businesses. If these firms are viable and Chapter 11 can serve as a rescue tool, the eligibility requirements – namely debt limits - should be generous and enhance access to subchapter V as a rescue tool.[102] Congresses own action to increase the debt limit in the context of the Pandemic "is an acknowledgement that the debt limit for the small business debtor was set too low"[103] in SBRA.

It is noteworthy that at the time SBRA was passed with the $2,725,625 debt limit, Congress increased the debt limit for family farmers under Chapter 12 to $10 million[104] or less to help more family farmers have access to bankruptcy relief.[105] There is no logical rationale to curtail access to Chapter 11 under subchapter V relief for small businesses while enhancing such access through the increased debt limit for family farmers. If the

---

[98] Andrew Kragie, *Biden Signs Trimmed Extension of COVID Bankruptcy Relief*, LAW360 (Mar. 29, 2021, 10:25 PM), https://www.law360.com/articles/1369810/biden-signs-trimmed-extension-of-covid-bankruptcy-relief [https://perma.cc/K3ST-JAKL].

[99] *See, e.g.*, Gotberg, *supra* note 93 ("Given the ongoing nature of the crisis, this sunset provision [debt limit increase] should be revisited. . .").

[100] *Id.*

[101] *Id.* ("SBRA may ultimately be a vital mechanism for reorganization.").

[102] *See* Blackmon, *supra* note 13, at 353 (recognizing that broadening the debt limit would permit medium-sized businesses to avail themselves of the reorganization tools under subchapter V).

[103] *Id.* at 364.

[104] *See generally* Family Farmer Relief Act of 2019 ("FFRA"), Pub. L. No. 116–51, 133 Stat. 1075.

[105] Keach & Prescott, *supra* note 65; Blackmon, *supra* note 13, at 341 ("FFRA will allow more farmers to meet the Code's definition of 'family farmer' by raising the debt limit for family farmers from roughly $4.4 million to $10 million.").

purpose of SBRA is to enhance rescue for small businesses, the disparate treatment between small businesses and family farmers appears to be grounded on inconsistent policy justifications. SBRA's debt limit eligibility requirement is inconsistent with the "clear congressional mandate to further the reorganization of small businesses whenever feasible."[106] Moreover, anecdotal accounts suggest that as a practical matter the increased debt limit under the CARES Act has increased the businesses that have qualified for relief under subchapter V.[107] Increasing access to subchapter V increases the chances for a successful rescue under Chapter 11.

B. *Governance – Debtor, Trustee, U.S. Trustee and Court*

1. *Statutory Framework*

a. Debtor. From a debtor vantagepoint, under SBRA the small business debtor is a debtor-in-possession (DIP) as under current law.[108] As a DIP, absent a confirmed plan or confirmation order directing otherwise, the DIP remains in possession of property of the estate.[109] The DIP also has the rights, powers, and duties of a trustee under chapter 11 in a non-subchapter V case under § 1106(a)(1), including operating the business.[110] Importantly, the SBRA provides that only the debtor has the power to file a plan of reorganization,[111] which tilts the governance power in favor of the debtor and away from creditors.[112] The current duties of small business debtors as detailed in § 1116(1) – (7), as well as required reports under § 308, are applicable to subchapter V debtors.[113] An essential check on the DIP's power is the removal of DIP status by the court for cause including "fraud, dishonesty, incompetence, or gross mismanagement . . . or failure to perform obligations . . ." under a confirmed plan.[114] In the case of termination of DIP status, a trustee, will have the DIP duties under §§ 704(a)(8) and 1106(a), including the operation of the business.[115]

---

[106] Keach & Prescott, *supra* note 65.
[107] Leslie A. Pappas, *Expiring Debt Cap to Limit Small Business Bankruptcy Fast Lane*, BLOOMBERG LAW (Mar. 3, 2021, 6:01 AM), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XB8BJH7O000000?bna_news_filter=bankruptcy-law#jcite [https://perma.cc/VAG3-XQQW].
[108] 11 U.S.C. § 1182(2) (2020) (retaining the DIP model is also consistent with the proposed ABI reform of small and medium enterprises); ABI REPORT, *supra* note 18, at 292.
[109] 11 U.S.C. § 1186(b).
[110] *Id.* § 1184.
[111] *Id.* § 1189(a).
[112] This reinforces the Code's underlying policy fostering reorganization by giving the debtor this important tool – the exclusive right to file plan.
[113] 11 U.S.C. § 1187(a)–(b).
[114] *See id.* § 1185(a)–(b) (note that DIP status can be reinstated).
[115] *Id.* § 1183(b)(5).

b. Trustee. A key change[116] to the governance structure is a required standing trustee or a case trustee in all subchapter V cases.[117] This change is important for at least two reasons. First, in small Chapter 11 cases there is a lack of creditor engagement and the absence of an engaged committee to effectively oversee small cases.[118] Secondly, the trustee's role is to help "facilitate the development of a consensual plan of reorganization."[119] To that end the trustee is required to appear and be heard at required status conferences[120] and has duties that replicate those of trustees under Chapter 12. [121]

The duration of the trustee's activity in a case will vary. A trustee services terminate in one of three ways. First, if a consensual plan[122] is confirmed the trustee services terminate upon substantial consummation of the plan.[123] Secondly, in the context of non-consensual confirmation of the plan[124] the default rule, absent the plan or confirmation order providing otherwise, is that the trustee is required to make plan payments.[125] Therefore, services in such cases will presumably run the life of the plan.[126] And, thirdly, trustee services terminate if there is dismissal or conversion under § 1112.[127]

c. U.S. Trustee, Committees and Examiners. It is noteworthy, that although there is a trustee in every subchapter V case, the U.S. Trustee[128] will continue to carry out their mandated oversight functions, much as is done currently in non-subchapter V cases.[129] The exact role of the U.S. Trustee is not crystal clear from the statutory framework. What is clear is that

---

[116] White, *supra* note 71, at 54 (noting that this aspect of SBRA is a key component of the reform).
[117] 11 U.S.C. § 1183(a).
[118] *See* ABI REPORT, *supra* note 18, at 292 (noting oversight challenges in smaller chapter 11 cases).
[119] 11 U.S.C. § 1183(b)(7).
[120] *Id.* § 1183(b)(3), 1188.
[121] *See id.* § 1183(b)(1)–(7) (detailing trustee duties under subchapter V); *see also id.* § 1202(b)(1)-(6) (detailing trustee duties under Chapter 12).
[122] *Id.* § 1191(a) (requirements for consensual confirmation of plan).
[123] *See id.* § 1183(b)(7).
[124] *Id.* § 1191(b)-(e) (requirements for non-consensual confirmation of plan).
[125] *Id.* § 1191(b).
[126] SBRA does not address termination of services in this context.
[127] 28 U.S.C. § 586(e)(5) (2020) (noting services terminate by dismissal, conversion, or substantial consummation of a consensual plan).
[128] The U.S. Trustee Program, a component of the Department of Justice, has broad oversight and watchdog functions in the bankruptcy system, including Chapter 11. *See generally* 28 U.S.C. §§ 581–586 (detailing the basic framework and duties of the U.S. Trustee); The U.S. Trustee Program, *The U.S. Trustee Program Commemorates is Silver Anniversary*, 32 AM. BANKR. INST. J. 26 (Oct. 2013) (highlighting the duties and role of the U.S. Trustee).
[129] *See generally* Adam D. Herring & Walter W. Theus, *New Laws, New Duties: USTP's Implementation of the HAVEN Act and the SBRA*, 38-10 AM. BANKR. INST. J. 12 (Oct. 2019).

subchapter V debtors will be subject to two layers of oversight in every case – the trustee and the U.S. Trustee.

Even though there is this enhanced oversight, the default rule under SBRA is that there is no creditors' or equity security holders' committees unless the court orders such a committee for cause.[130] This change is consistent with the reality that in most smaller chapter 11 cases the costs associated with committees, creditor apathy, lack of engagement and representativeness of committees should make their appointment the exception, rather than the rule is small business cases.[131] And similarly, the of a trustee or examiner, is inapplicable under subchapter V,[132] as subchapter V already provides for a trustee.

d. Court. Another governance change pertains to the court and status conferences. The court is required to hold a status conference within 60 days of the petition date[133] to "further the expeditious and economic resolution of a case."[134] Prior to such a status conference the debtor must file a report detailing efforts to achieve a consensual plan of reorganization.[135] This replaces the flexible nature of the ability to hold status conferences under § 105(d),[136] but it may enhance the ability of reaching consensual plans with the required accountability of the debtor and required involvement of the trustee.[137]

2. *Drawbacks*

The change in governance and oversight will have an impact on the economic costs of a debtor opting for subchapter V. The trustee will be compensated either as a standing trustee, replicating chapter 12, receiving a percentage fee from payments made under a plan[138] or as a case trustee.[139]

---

[130] 11 U.S.C. § 1181(b); *see also* Blackmon, *supra* note 13, at 350 (noting the change in the default rule).

[131] *See* ABI REPORT, *supra* note 18, at 293.

[132] 11 U.S.C. § 1181(a) (making § 1104 inapplicable in a subchapter V case).

[133] This can be extended for circumstances "for which the debtor should not justly be held accountable." *Id.* § 1188(b).

[134] *Id.* § 1188(a).

[135] *Id.* § 1188(c).

[136] Section 105(d) is inapplicable in a subchapter V case. *Id.* § 1181(a).

[137] *Small Statement*, *supra* note 17, at 4 (noting how status conferences in chapter 12 cases have helped achieve consensual plans).

[138] 28 U.S.C. § 586(e)(5) (in the case of a consensual plan where a trustee's services are terminated upon substantial consummation, the court can award compensation "consistent with the service performed" to the trustee subject to the statutory limits for a standing trustee).

[139] SBRA does not expressly provide for compensating non-standing trustees – the case trustee; however, such a trustee is entitled to compensation under § 330(a)(1). Bonapfel, *supra* note 68, at 588–89. Section 330 expressly provides a court may award compensation to a trustee and this Code section is applicable to subchapter V cases. *See, e.g.*, 11 U.S.C. § 1181 (detailing sections inapplicable in subchapter

Although the fees of the case trustee must be reasonable and necessary, they are subject to review by the U.S. Trustee[140] and approval by the bankruptcy court,[141] the cost ultimately will be borne by the estate. However, under subchapter V, there are no required quarterly fees,[142] therefore the cost of the trustee will be offset, at least in part, with the elimination of the quarterly fees.[143] Moreover, the default rule against committees will likely eliminate that cost in most subchapter V cases,[144] further offsetting the costs associated with a trustee.

Trustee costs may be offset by other provisions of SBRA, that, hopefully, will make the process more efficient and drive down the administrative costs associated with chapter 11 relief under subchapter V. For example, the fast-track nature of the case[145] and the elimination of the disclosure statement[146] should both decrease administrative costs. Moreover, the increased leverage provided to DIP with elimination of the absolute priority rule[147] and relaxed acceptance requirements,[148] both of which should decrease contested litigation, likely will decrease administrative costs. Empirical work in the future can evaluate if SBRA saves costs in the long run, but at the outset, anecdotal indicators suggest on the aggregate the administrative costs, even with a trustee, may be lower than non-subchapter V cases.[149]

V). And, important to the case trustee, the limitations on compensation applicable to a standing trustee under § 326(b) are not applicable to the case trustee. Bonapfel, *supra* note 68, at 588–89*; see also* White, *supra* note 71, at 54 (discussing the compensation of the subchapter V case trustee under § 330).

[140] White, *supra* note 71, at 54 (noting fees must be reasonable and necessary and highlighting the oversight role of the U.S. Trustee).

[141] *See* 11 U.S.C. § 330 (providing the statutory framework for approval of fees by the bankruptcy court).

[142] The default rule in Chapter 11 is the requirement of debtors paying quarterly fees based on disbursements. *See* 28 U.S.C. § 1930(a)(6)(A) (2020) (providing for the collection of quarterly fees payable to the U.S. Trustee). Under subchapter V, this requirement is eliminated. Morris, *supra* note 48, at 141.

[143] Morris, *supra* note 48, at 141 (observing that subchapter V debtors will save the expense of paying quarterly fees).

[144] *See* Blackmon, *supra* note 13, at 350 (arguing the elimination of committees will lower administrative costs).

[145] 11 U.S.C. § 1189(b) (generally, if not extended, a debtor must file a plan within 90 days of filing).

[146] *Id.* § 1181(b) (default rule of no disclosure statement requirement).

[147] The absolute priority rule in § 1129(b) as applied to a dissenting impaired unsecured creditor class is eliminated and replaced with a disposable income test, feasibility finding, and provision for remedies if plan payments are not made. *See* U.S.C. § 1191(c); Bonapfel, *supra* note 68, at 606–08 (detailing new requirements).

[148] Section 1191(b) eliminates the requirement that at least one impaired class accept a plan as required under § 1129(a)(10).

[149] Keach & Prescott, *supra* note 65 ("[A]necdotal evidence indicates that Subchapter V cases are materially less expensive to prosecute, notwithstanding,

Moreover, a standing trustee in every subchapter V case may well serve as a disincentive for many debtors to opt for relief under SBRA.[150] Although, in general, the trustee will not operate a debtor's business[151] as the debtor will be a debtor-in-possession under subchapter V,[152] prior experience has shown that lenient standards in appointing Chapter 11 trustees would serve as a disincentive for a debtor to seek Chapter 11 relief, except in the most extreme cases.[153] Under SBRA the disincentive will be even greater as there will be a standing trustee in every subchapter V case, not just the potential for appointment of a Chapter 11 trustee.

C. *Plans, Confirmation, and Discharge*

1. Statutory Framework

a. Exclusivity, Timeframes, and Disclosure. An important provision under SBRA that provides the debtor leverage in formulating a plan of reorganization is debtor exclusivity—"[o]nly the debtor may file a plan under this subchapter [subchapter V]".[154] This provision is consistent with plan exclusivity to debtors in Chapters 12 and 13 and is a reflection of concern that secured creditors have exercised excessive creditor control in Chapter 11 small business cases.[155] This tilts the balance of power to the debtor in the plan formulation context under SBRA.

This balance tilted toward the debtor is offset by the short timeframe in which a debtor must file a plan. A debtor must file a plan within 90 days after the order for relief.[156] Although, this timeframe can be extended "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable,"[157] noncompliance with the deadline will make the case ripe for conversion or dismissal.[158] However, once a plan is filed, there is no statutory time limit on obtaining confirmation as under the BAPCPA small business case provisions. This gives the debtor and parties flexibility to formulate a plan. The short timeframe to file a plan gives creditors some leverage in the negotiation process with the debtor, but the

---

and, in many cases, perhaps because of, the automatic appointment of the facilitating trustee.").

[150] *See id.* ("[H]istory had suggested that debtors were reluctant to file cases under statutes where a trustee would automatically be appointed.").

[151] *Id.* ("[T]he SBRA trustee would not, absent exceptional circumstances, operate the business, and the trustee's role would be appropriately limited.").

[152] 11 U.S.C. § 1182(2).

[153] *See* Lynn M. LoPucki, *A Team Production Theory of Bankruptcy Reorganization*, 57 VAND. L. REV. 741, 771, n. 125 (2004).

[154] 11 U.S.C. § 1189(a).

[155] Brubaker, *supra* note 1, at 8.

[156] 11 U.S.C. § 1189(b).

[157] *Id.*

[158] Brubaker, *supra* note 1, at 8–9.

ability to extend the deadline to file a plan and the open-ended nature of obtaining confirmation is reflective of the dynamic nature of Chapter 11. Even with such flexibility, it does not seem that cases likely will linger on with no end in sight as a center point of SBRA is to move cases quickly to foster savings and rescue.

To aid in administrative cost savings and help foster a debtor's ability to move a case along quickly, SBRA provides the default rule that there is no required disclosure statement.[159] This default rule can be modified if the court the orders otherwise.[160] SBRA does require some disclosure of information the plan including a "brief history of the business operations of the debtor . . . a liquidation analysis . . . and projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization."[161] However, the exact standard to evaluate the adequacy of this information is not statutorily defined as it is under the disclosure statement standard of "adequate information."[162] This provides flexibility in drafting plans and should foster negotiation with creditors in the planning process to minimize objections to confirmation based on disclosure related issues.

b. Consensual Confirmation and Discharge. There are two paths to confirmation of a plan: consensual and non-consensual.[163] Consensual confirmation requires all impaired classes affirmative vote to accept a plan and compliance with all confirmation requirements under 1129(a),[164] except for subsection (a)(15),[165] which includes certain best-efforts requirements for individual debtors not making a subchapter V election.[166] With a consensual plan the debtor typically will make plan payments, receive a discharge upon confirmation,[167] property of the estate will revest in the debtor[168] and substantial consummation of the plan will terminate trustee services.[169]

These outcomes are very beneficial to debtors and creditors. Debtors can emerge from bankruptcy quicker in a consensual plan scenario and this removal from the Chapter 11 process and trustee oversight will save the costs,

---

[159] 11 U.S.C. § 1189(b).
[160] *See id.* § 1181(b) ("Unless the court for cause orders otherwise . . . section . . . 1125 of this title do[es] not apply in a case under this subchapter."); § 1187(c) ("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.").
[161] 11 U.S.C. § 1190(1).
[162] Brubaker, *supra* note 1, at 10.
[163] *See* Brubaker, *supra* note 1, at 9–10 (summarizing two paths to confirmation as consensual and cram-down, i.e. non-consensual); TRUSTEE HANDBOOK, *supra* note 11, at 3-10–3-12 (summarizing two approaches to confirmation).
[164] 11 U.S.C. § 1191(a).
[165] TRUSTEE HANDBOOK, *supra* note 11, at 3-10.
[166] Brubaker, *supra* note 1, at 12, n.77.
[167] 11 U.S.C. §§ 1141(d), 1181(a).
[168] 11 U.S.C. §§ 1141(b), 1181(a).
[169] TRUSTEE HANDBOOK, *supra* note 11, at 3-10; Brubaker, *supra* note 1, at 10.

which will be a benefit to creditors.[170] In light of these positive attributes, it is evident why consensual confirmation of a plan is a goal of subchapter V bankruptcy.[171]

c. Non-Consensual Confirmation and Discharge. The second path to confirmation of a plan—non-consensual—is possible if any class of impaired creditors do not accept the debtor's plan.[172] Moreover, confirmation can be obtained even if no class of impaired creditors accept the plan.[173] This is an important change in the non-consensual confirmation requirements from non-subchapter V cases. With this change a debtor can potentially obtain confirmation even if no class of impaired creditor have voted to accept a plan. Non-subchapter V Chapter 11 confirmation requires at least one class of impaired creditors accepting a plan.[174] This change gives a great deal of leverage to debtors in negotiation of a plan and achieving confirmation of a plan. In smaller cases debtors often had a situation where secured creditors with large deficiency claims could exercise significant influence in the plan development and confirmation effectively an obstacle to achieving confirmation.[175]

In order to obtain confirmation of a non-consensual plan a debtor will not have to satisfy the absolute priority rule (APR) under § 1129(b). The APR has been a barrier to confirmation on non-consensual plans as it prohibits the owners of a small business from retaining any property under the plan if higher up classes of creditors were not paid in full.[176] SBRA makes the APR generally inapplicable to small business debtors[177] and replaces it with a new framework to effectuate a cross-class cram down. New § 1191(b) provides that a court shall confirm a non-consensual plan "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."[178] "Fair and equitable" is statutorily defined and provides the

---

[170] Brubaker, *supra* note 1, at 10.
[171] *See* TRUSTEE HANDBOOK, *supra* note 11, at 3-10 (noting a goal of subchapter V is consensual confirmation).
[172] 11 U.S.C. § 1191(b) (confirmation can be obtained even if all classes of impaired creditors have not accepted the plan under § 1129(a)(8)); TRUSTEE HANDBOOK, *supra* note 11, at 3-10.
[173] 11 U.S.C. § 1191(b) (confirmation can be obtained even if no classes of impaired creditors have not accepted the plan under § 1129(a)(10)); TRUSTEE HANDBOOK, *supra* note 11, at 3-11.
[174] 11 U.S.C. § 1129(a)(10) (requires at least one class of impaired creditors accept the plan as a prerequisite to confirmation).
[175] Brubaker, *supra* note 1, at 11.
[176] *See* Blackmon, *supra* note 13, at 349 (explaining that the APR can be a problem in Chapter 11 as small business owners are not able to retain ownership of the business in non-consensual plan confirmations).
[177] 11 U.S.C. § 1181(a).
[178] *Id*. § 1191(b).

framework to satisfy the cramdown requirements for a non-consensual plan under subchapter V.[179]

Under the new "fair and equitable" standard, a small business debtor can obtain confirmation over an objecting class of secured creditors as long as the plan provides that the secured creditor retain their lien and received payment equal to value of claim or indubitable equivalent.[180] Confirmation of an objecting class of unsecured claimholders is available if the plan offers all disposable income of the debtor over a 3 to 5 year period.[181] If these requirements are met, the owners of the business can retain their ownership interest without paying senior interests in full.[182] This allows the owners of a company to "flush the debt . . . in a bankruptcy proceeding and still keep the company."[183] This removes a significant barrier to confirmation for some small business debtors and enhances the opportunity to achieve rescue.[184]

Importantly, confirmation of a non-consensual plan will have several different legal outcomes in comparison with confirmation of a consensual plan.[185] First, property of the estate will *include* post-petition income and property.[186] In the confirmation of a consensual plan property of the estate will revest in the debtor upon confirmation.[187] Secondly, in a non-consensual confirmation of a plan the subchapter V trustee continues to service post-confirmation[188] and the trustee makes payments to creditors under the plan.[189] The trustee's continued service will increase administrative costs as the trustee will be due compensation post-confirmation.[190] In consensual confirmation the debtor typically makes payments directly[191] and the trustee

---

[179] *Id*. § 1191(c).
[180] *Id*. § 1191(c)(1) (incorporating requirements for cram down of secured creditor class in 11 U.S.C. § 1129(b)(2)(A)).
[181] Small Business Reorganization Act § 1191(c)(2).
[182] Theresa A. Driscoll, *U.S. Senators Propose Legislation That May Make Chapter 11 Reorganization a Viable Option for Small Businesses*, N.Y.L.J. (Dec. 5, 2018).
[183] Jeremey Hill & Katherine Doherty, *Subchapter V Surge Expected as Familiarity Expands*, BLOOMBERG L.: BANKR. NEWS NEWSL. (Feb. 24, 2021, 7:15 AM), https://www.bloomberg.com/news/articles/2021-02-23/u-s-bankruptcy-tracker-texas-energy-crisis-subchapter-v-surge [https://perma.cc/Y2V8-E4SV].
[184] *See, e.g.*, Gotberg, *supra* note 93 (recognizing that the modification of the APR to allow owners to retain their interest in a business over objecting creditors was notable and that, this provision, along with other was thought to "allow for more successful bankruptcy filings among smaller businesses.").
[185] *See* Brubaker, *supra* note 1, at 10–11 (detailing the legal significance and differences of consensual versus non-consensual confirmation).
[186] 11 U.S.C. § 1186(a).
[187] *Id*. § 1141(b).
[188] Brubaker, *supra* note 1, at 10.
[189] 11 U.S.C. § 1194(b).
[190] *Id*. § 326(b).
[191] The default rule is the debtor makes payments in consensual plans and the trustee makes payments in a nonconsensual plan, but that can be modified by the court. *See* 11 U.S.C. § 1194(b) (providing for trustee to make payments in nonconsensual plan unless ordered otherwise by the court).

services are terminated upon substantial consummation,[192] thus, minimizing administrative costs associated with the trustee post-confirmation. Thirdly, and perhaps most important, unlike discharge upon confirmation in a consensual confirmation, a debtor will not receive a discharge in a non-consensual confirmation until "after completion by the debtor all payments due."[193]

2. *Drawbacks*

There are a host of positive attributes regarding the reforms pertaining to plans, confirmation and discharge. The reforms providing plan exclusivity to the debtor should help foster rescue and give the debtor leverage in the Chapter 11 process to work toward a consensual plan. The end of the required extensive disclosures prior to putting for a reorganization plan should help fast-track subchapter V cases[194] is positive and should help reduce costs in the process. The legal benefits of consensual confirmation should provide incentives to both the debtor and the creditors to work toward a compromise. Both of these reforms should enhance rescue on the whole. Moreover, the modification of the APR in favor of the debtor in non-consensual plans likely gives the debtor leverage that may well entice creditors' willingness to negotiate a consensual plan. The legal ramifications of a non-consensual confirmation with continued administrative costs and trustee in place for years, may serve as an incentive to consensual resolution.

Even with these positive attributes in subchapter V and the ability for debtor to overcome the impediment the APR presents to owners retaining an interest in a debtor post-confirmation in small business cases, there is room for improvement. The reform – particularly the abrogation of the APR - is too narrow. First, the notion of the APR is well engrained in Chapter 11. The new framework does not expressly provide for the sale of a business to other junior classes of claims or interests. Thus, in the context of rescuing a business through a sale, there may still be some barriers to the sale as the sale may run afoul of the protections afforded to creditors under subchapter V. Secondly, concerns about the APR protections can arise in non-sale contexts such as first-day orders or other interim distributions that run afoul of the priority scheme of the Bankruptcy Code. The reform does not eliminate this area of concern. Thirdly, it does not apply to all business debtors. It applies to a small business debtor – a debtor with approximately $2.7 million in debt,[195] except as temporarily raised by the CARES Act. The rationale for

[192] 11 U.S.C. § 1183(c)(1) (under consensual confirmation the trustee services are terminated upon substantial consummation of the plan).
[193] *Id*. § 1192.
[194] *See* Gotberg, *supra* note 93 (noting the fast-track nature of SBRA with the modification of required extensive disclosures).
[195] 11 U.S.C. § 101(51D) (defining small business debtor).

modifying or abrogating the APR[196] is not limited to small business debtors, but can apply to mid-sized and even larger debtors.

V. FURTHER RESEARCH AND POTENTIAL REFORMS

In all three areas addressed herein—eligibility, governance, and confirmation and discharge—there are positive attributes, but there are areas that need further research and possible reform to enhance rescue. These areas of research and potential areas of reform, that are evident in light of the convergence of the passage of SBRA and the onset of the Pandemic, are detailed below.

The limits on eligibility rooted in restricted debt limits is an area that should be permanently reformed. The COVID-19 disruption which led to temporary increase in the debt limit from $2.7 million to $7.5 should be permanent. The need to foster rescue of businesses and ability of businesses to avail themselves of Chapter 11 relief under subchapter V should not be tethered to a particular crisis. There will be other crises and other less dramatic factors that come and go in the business cycle that can lead firms into financial distress. If a business is in financial distress and the rescue tools in subchapter V can aid in that rescue, overly constrictive eligibility requirements based on low debt levels should be eased to increase access to those tools. At its core, eligibility and the parameters of eligibility to subchapter V is an access to justice issue. The Pandemic has shown that the eligibility requirements are too restrictive and without permanently easing those restrictions businesses will be denied access to justice that is available through a subchapter V rescue.

The governance and oversight attributes of SBRA are not perfect in all respects, but are a reasonable effort to balance the panoply of interests in a chapter 11 with an eye towards facilitating the rescue of small business under chapter 11, while at the same time providing governance and oversight mechanisms that are designed to protect minority interests. It is too early to call for specific reforms pertaining to governance, but as time passes and data becomes available research should be conducted to access whether the default rule of a trustee enhances rescue, and specifically, consensual confirmation.

Moreover, empirical work should be conducted to analyze the administrative costs associated with a default trustee model are more advantageous than Chapter 11 with required statutory quarterly fees. It has been assumed that the trustee model will not increase the administrative costs, but there is a need for empirical research to answer this question. Overtime, this economic cost should be quantified and analyzed in relation to the outcomes subchapter V deliver in terms of rescue. Higher economic costs may not indicate that the default trustee model is problematic if the overall outcomes under subchapter V enhance rescue.

---

[196] *See* Hill & Doherty, *supra* note 183; *see* Gotberg, *supra* note 93 and accompanying text.

The subchapter V reforms to confirmation, particularly consensual confirmation coupled with discharge and revesting of property to the estate are quite beneficial to enhancing rescue. And the non-consensual track is positive in that it eliminates the APR and the overall structure of subchapter V likely enhances negotiation and compromise. However, the abrogation of the APR is too limited in nature. Specifically, subchapter V should be amended to expressly authorize sales and other non-plan distributions that violate the priority scheme if it is in the best of the estate and promotes rescue of the business or company. And the limited application of the abrogated APR to the narrowly defined small business debtor should be expanded. This can be achieved through modifying the eligibility requirements to broaden the ability of larger businesses to afford itself of subchapter V. Alternatively, policymakers should consider modifying the application of the APR generally in Chapter 11 so that Chapter 11 can more effectively promote rescue. This could be through abrogating APR as it is in subchapter V and making it applicable in Chapter 11 generally, or some other reform that infuses judicial discretion – statutorily - into the application of the APR. The key policy point is that if the APR is problematic or serves as an impediment to rescue, that impediment if not limited to just smaller businesses with an arbitrary debt level.

VI. CONCLUSION

The SBRA is certainly a step in the right direction toward enhancing a small business debtor's opportunity for a successful rescue. Anecdotal early evidence suggests that subchapter V may enhance plan confirmation rates, move cases long quicker and be more cost-effective than non-subchapter V small business cases.[197] Even so, the disruption to the economy caused by the Pandemic has highlighted the need for enhancement of rescue tools in Chapter 11. As time progresses and we move out of the grip of the Pandemic the economic impact on businesses will continue, and bankruptcy which is a lagging indicator, will likely be an avenue of last resort for businesses to seek rescue. Further research and reform to subchapter V is needed to make SBRA help achieve the goal of rescue as firms seek relief.

---

[197] As SBRA is still quite new, empirical data of the effectiveness of subchapter V is not available, however, the UST Program is working to analyze the impact of SBRA. The UST Program has reported that in an early analysis of 625 cases filed through June 20, 2020 the confirmation rate was about 20%, a confirmation rate 6 times higher than other non-subchapter V cases. White, *supra* note 71, at 55. Without any empirical analysis of the average time for confirmation, the UST Program reports that data indicates "subchapter V cases are confirming more quickly than other small business cases not proceeding under subchapter V." *Id*. And, without empirical data, the UST Program, based on anecdotal evidence that the subchapter V ability to resolve "disputes prior to litigation . . . should further reduce or eliminate unnecessary costs." *Id*.

In the meantime, other tools to facilitate rescue, such as bailouts to help firms stay afloat are needed. Bailouts and Chapter 11 actually can work in tandem.[198] Bailouts can help firms survive the storm that have strong underlying business models, that but for the disruption, would not be in financial dire straits.[199] For some firms, the temporary relief may not be enough, even if the underlying business model is strong or if there are other underlying issues exacerbated by the Pandemic. In such cases Chapter 11 relief may be necessary.[200] Chapter 11 can be employed to help preserve value, minimize waste and saved companies "for future prosperity through a reorganization plan."[201] This is when we need the "relief-valve" of Chapter 11 bankruptcy to be accessible to businesses,[202] small and large, so that rescue will not be an elusive goal available to some business and not others.

---

[198] Some scholars argue that bail-outs are a better policy tool to address the financial distress caused by the Pandemic than bankruptcy mechanisms. *See* Horst Eidenmueller & Javier Paz Valbuena, *Towards a Principled Approach for Bailouts of COVID-distressed Critical/Systemic Firms* 6–11 (Eur. Corp. Governance Inst. L. Working Paper No. 571, 2021), https://ssrn.com/abstract=3795942 [https://perma.cc/P7DJ-3MMH]. The underlying logic for advocating such a position which is rooted in nature of the underlying cause of the financial distress—lockdowns and other governmental measures—for which bankruptcy may not be a good solution is not in dispute. *See id.* at 1 (noting the cause of the current financial crisis are "lockdowns and related measures . . . [that make] it impossible for businesses to conduct their operations."). However, the need for bail-outs does not mitigate the need for Chapter 11 as a rescue tool. Both bail-outs and bankruptcy may be needed to effectuate a rescue of a business. They may work alone or may work in tandem. *See id.* at n. 22 (bankruptcy may be insufficient to address the financial problems caused by COVID-19 and may need to be combined with bail-out relief)*; see also* Morris, *supra* note 48, at 143 (observing that bankruptcy relief under SBRA along with certain bail-out legislation, such as the CARES Act, may work together to be a "saving grace" to businesses in COVID-19 related distress).

[199] *See* Eidenmueller & Valbuena, *supra* note 198, at 7–8 (recognizing that for firms experiencing "temporary cash-flow problem[s] because of lockdown-induced trading disruptions" bail-outs that provide "temporary and limited financial assistance" are a better than solution than bankruptcy).

[200] *See* Morrison & Saavedra, *supra* note 14, at 14 (explaining that for "small businesses, while bankruptcy is not as immediately helpful as forbearance or direct income supplements, it will certainly be utilized if this short-term liquidity crisis becomes long term."); *see also* Morris, *supra* note 48 (raising concern that businesses may not be able to survive the shut down and a surge of bankruptcies may be on the horizon).

[201] Gotberg, *supra* note 93, at 3.

[202] *See* Morrison & Saavedra, *supra* note 14, at 12 (for small businesses "bankruptcy can serve as a relief-valve" when other government policies prove insufficient to provide needed relief for such businesses).