

SO YOU WANT TO FILE A CHAPTER 11 CASE?

THE BENCH AND BAR COMMITTEE

LUNCH & LEARN PROGRAM

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What Chapter Do You Step Into?

CHAPTER 7 – LIQUIDATION

CHAPTER 11 – REORGANIZATION

Small Business

Subchapter V

Standard

CHAPTER 12

CHAPTER 13

Different Types of Chapter 11 Cases

- ▶ Subchapter V for eligible debtor who elects it
- ▶ Small business case for debtor with debts less than \$3,024,724 who does not elect Subchapter V
- ▶ Traditional chapter 11 case for debtor who is not a small business debtor and either does not qualify for Subchapter V or does not elect it

Small Business Reorganization Act of 2019

Enacted August 23, Effective February 19, 2020

- ▶ Changes applicable in all Small Business Cases
 - ▶ New definition of “Small Business Debtor” – § 101(51D)
 - ▶ No committee of unsecured creditors unless court orders otherwise
- ▶ Enacted new Subchapter V as option for small business debtors who elect it



Types of Chapter 11 Cases

- ▶ Business debtor with debts up to \$7.5 million that elects subchapter V is in a subchapter V case
- ▶ Business debtor with debts up to \$3,024,724 that does not elect subchapter V is in a small business case
- ▶ Business debtor with debts over \$3,024,724 that does not elect Subchapter V is in a traditional chapter 11 case



Eligibility – Chapter 11 Subchapter V

- ▶ Must be engaged in “commercial or business activities”
- ▶ At least 50% of debt must arise from business activities
- ▶ Can be engaged in real estate business, but not an SARE debtor
- ▶ Not eligible for Subchapter V:
 - ▶ Public company or affiliate of public company
 - ▶ SARE debtor

Eligibility – Subchapter V Debtor Must Be Engaged in “Commercial or Business Activities”

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- ▶ Must the debtor be engaged in commercial or business activities on the petition date?
- ▶ Is active operation of a business required?

Eligibility – What Are Debts Arising From Commercial or Business Activities?

- ▶ *In re Sullivan*, 626 B.R. 326 (Bankr. D. Colo. 2021) – obligation under divorce decree to purchase spouse's interest in debtor's business does not arise from commercial or business activities
- ▶ *In re Blue*, 2021 WL 1964085 (Bankr. M.D. N.C. 2021) – debts incurred to repair former residence rented to tenant who damaged the property qualify

§ 101(51D) – Definition of Small Business Debtor

- ▶ Debt limit of \$3,024,724
 - ▶ Noncontingent and liquidated
 - ▶ Excludes debts to affiliates
- ▶ 50 percent of debt must arise from commercial or business activities
- ▶ Debtor engaged in owning or operating real estate may be a small business debtor, unless the debtor is a single asset real estate debtor
- ▶ Debtor must be engaged in business activity
- ▶ § 101(51C) provides that a “small business case” is the case of a small business debtor that does not elect subchapter V

Highlights of Subchapter V

- ▶ Trustee is appointed in every case with duty to facilitate confirmation of a consensual plan
- ▶ No U.S. Trustee fees
- ▶ Only the debtor may file a plan and must do so within 90 days
- ▶ Plan may modify residential mortgage if new value was not primarily to acquire it and loan proceeds were used for the small business. § 1190(3)
- ▶ Changes in confirmation rules

Comparison of Subchapter V with Chapter 11

- ▶ No creditor's committee or quarterly fees
- ▶ No accepting class required for cramdown; no absolute priority rule
- ▶ Plan can modify residential mortgage
- ▶ Immediate discharge upon confirmation of consensual plan
- ▶ No modification of plan by trustee or creditors
- ▶ Different PDI rules: (1) No PDI requirement for consensual plan; (2) Minimum time for payment of PDI may be three years instead of five

Comparison of Subchapter V with Small Business Chapter 11

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- ▶ Subchapter V has all of the advantage just listed
- ▶ Shorter period for filing of plan, but no deadline for confirmation
- ▶ Same reporting requirements

Eligibility – Chapter 13

- ▶ New debt limits (secured & unsecured debt) < \$2,750,000
- ▶ Only individuals qualify
- ▶ Administration by Chapter 13 Trustee

Comparison of Subchapter V with Chapter 13

- ▶ Different PDI rules: (1) No PDI requirement for consensual plan; (2) Means test does not apply; and (3) time for payment of PDI may be three years instead of five
- ▶ Post-petition assets and earnings are not initially property of the estate
- ▶ Plan can modify residential mortgage
- ▶ Immediate discharge upon confirmation of consensual plan
- ▶ No modification of plan by trustee or creditors
- ▶ Possible increase in professional fees or trustee fees

Bankruptcy Petition Requirements

- ▶ Skeletal Petition
- ▶ List of 20 Largest Unsecured Creditors
- ▶ Mailing Matrix
- ▶ Filing Fee
- ▶ Corporate Resolution authorizing Petition for any entity
- ▶ Statement of Financial Affairs & Schedules (14 days)

Inquiry– Administrative Matters

- ▶ Initial submission of case data to the UST
- ▶ Subchapter V trustee in a Sub V case (admin costs)

Small Business Debtor Financials

- ▶ Small business debtors must comply with § 1116
 - ▶ Most recent financial statements and federal tax return must be submitted
 - ▶ File required operating reports

Initial Debtor Interview and Section 341 Meeting of Creditors

IDI CONDUCTED BY UST'S CASE AUDITOR

341 CONDUCTED BY UST'S TRIAL ATTORNEY

TIMING OF THE IDI

WHO SHOULD ATTEND THE IDI

Information Gathering at 341

- ▶ Verification of insurance and condition of collateral
- ▶ Cash collateral perfection/use
- ▶ Pre-petition bank account
 - ▶ Closing of pre-petition account and opening of DIP account at “authorized depositories”

Debtor-in-Possession (DIP) Account

- ▶ List of Authorized Depositories approved by the United States Trustee
- ▶ https://www.justice.gov/ust-regions-r21/file/ad_ndga.pdf/download

- Axos Bank
- Bank of America
- Century Bank of Georgia
- J.P. Morgan Chase Manhattan Bank
- CIBC
- Citizens Bank, N.A.
- Citizens Trust Bank
- Comerica Bank
- East West Bank
- PNC Bank
- Regions Bank
- Signature Bank
- Truist Bank
- Union Bank
- United Community Bank
- Webster Bank, (FKA Sterling)
- Wells Fargo Bank

Maintenance of Pre-Petition Bank Account?

- ▶ UST strongly discourages such motions
- ▶ Consider motion to approve use of pre-petition bank account (only for a limited time for emergency reasons)

Employment of Professionals

COMPENSATION OF A SUBCHAPTER V TRUSTEE

Application to Employ Attorneys

- ▶ Verify disinterestedness based upon pre-petition conflict check
- ▶ Disclosure of pre-petition payments received and retainer held for post-petition services
- ▶ Disqualification of professionals based upon existence of pre-petition claims held

Application to Employ Accountants

- ▶ Same disinterestedness requirements as attorneys
- ▶ Getting the accountants paid?

“Ordinary Course” Professionals?

- ▶ Do not attempt to avoid fee applications required by the Code

Disinterestedness

- ▶ Disclose any representation or relationship with insiders or affiliates
- ▶ Disclose any relationship with United States Trustee or creditors
- ▶ Representation is of the debtor and not principals/owners of any debtor entity (per engagement terms)

Creditor's Initial Considerations

- ▶ Primary Effects of Chapter 11 on Creditors' Rights
- ▶ Eligibility Considerations
- ▶ Interactions with the Subchapter V Trustee
- ▶ Negotiated Plan Treatment
- ▶ Timing Considerations
- ▶ Loan Considerations



The Primary Effects of Subchapter V on Creditors' Rights

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- ▶ Creditor leverage is reduced due to the:
 - ▶ Elimination of the absolute priority rule;
 - ▶ Implementation of a flexible disposable income test;
 - ▶ Elimination of the requirement to have the consent of an impaired class of creditors; and
 - ▶ Elimination of the opportunity for an unsecured creditor committee

Questions?