

Considerations for the Not-So-Small Small Business Owner in Seeking Relief Under the Bankruptcy Code

Articles, COVID 19: Answers to Business Challenges March 30, 2020

The historic Coronavirus Aid, Relief, and Economic Security Act (“CARES” Act) enacted into law on March 27, 2020 includes assistance for small businesses seeking relief under chapter 11 of the Bankruptcy Code and makes filing and working through a chapter 11 bankruptcy case easier for the not-so-small “small business debtor”.

The Small Business Reorganization Act of 2019 (“SBRA”) that went into effect on February 22, 2020 is intended to minimize both the time and expense of small business reorganization, in comparison to those of a standard chapter 11 case, and to ease the confirmation process. A debtor wishing to take advantage of the provisions of the SBRA must elect classification as a “small business debtor.” The SBRA defines a “small business debtor” as “a person or entity engaged in commercial or business activity with aggregate secured and unsecured debts of \$2,725,625.” The debt ceiling of \$2,725,625 is increased under the CARES Act, to \$7,500,000. This increase will be in effect through March 26, 2021 and will apply only to debtors filing chapter 11 after enactment.

Small businesses facing significant pressures due to the financial downturn should understand the benefits of the SBRA which is designed to be faster and less costly than a traditional chapter 11:

- **Trustee.** A small business chapter 11 trustee is appointed with a role similar to that of a chapter 13 trustee. The trustee will help the debtor put together a plan and monitor distributions under that plan. Within 60 days of filing, the court will schedule a substantive status conference to help chart the course for the debtor.
- **Your lawyer who helped you before the case may be able to keep representing you.** The lawyer that did work for the debtor before the case was filed, and is owed money, can keep doing work provided that the unpaid fees are \$10,000 or less.
- **No U.S. Trustee Fees.** There are no quarterly U.S. Trustee fees. This is in contrast to a typical chapter 11 case, where quarterly fees are due to the U.S. Trustee based upon a debtor’s receipts in a given quarter.
- **No Creditors Committee.** No creditors’ committee will be appointed unless the court orders otherwise. Because a debtor’s estate pays the cost of counsel for the committee, this will help keep expenses of administration down in a small business chapter 11.
- **The Plan.** It will be simpler to get a plan of reorganization confirmed:
 - Only the debtor can file the plan, which is due within 90 days of the bankruptcy filing. In a traditional chapter 11, the debtor has an exclusive period to file a plan, after which time any creditor or party can file a plan.
 - Discharge under an SBRA plan is at the conclusion of the plan term.
 - The debtor does not need to file a separate disclosure statement, but the plan must set out a history of the debtor’s operations, a liquidation analysis and a feasibility analysis (*i.e.*, debtor’s analysis and projections of their ability to perform under the plan and make payments).
 - Impaired creditors cannot hold up confirmation of a plan, but if the court confirms the plan without impaired class approval, the debtor must use all disposable income to fund the plan over the plan’s life.
 - The SBRA debtor can retain its equity even though creditors are not paid in full because the SBRA gets rid of the “absolute priority rule”.
 - The plan needs to be fair and equitable—meaning creditors must be paid more than they would have been paid under chapter 7 and the plan cannot discriminate unfairly in its treatment of creditors.
 - Residential mortgages may be modified by an individual debtor.

- Administrative expenses do not need to be paid in full upon confirmation but can be paid over the life of the plan.

If you need legal advice on bankruptcy issues and options, the attorneys of the Bankruptcy & Creditors' Rights Group of Tucker Arensberg, P.C. have significant experience and are available to help now. Or contact Beverly Weiss Manne or Maribeth Thomas