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**PROGRAM MATERIALS**

**Program #30120**

**April 27, 2020**

**Just in the Nick of Time:  
Understanding the Changes to  
Chapter 11 Practice for Small  
Businesses in the Small Business  
Reorganization Act in the Age of  
Covid-19**

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*Just in the Nick of Time: The Small Business  
Reorganization Act of 2019 in the Age of Covid-19.*

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The Small Business Reorganization Act of 2019 became effective on February 19, 2020. As enacted, it applies to business debtors and individuals with non-contingent claims (without regard to insider claims) of \$2,725,625 million or less on the date of the commencement of their cases. The CARES Act created a temporary, one (1) year, increase of the debt threshold to \$7,500,000.00. The Act also provides unique relief to individuals who secured their principal residence with business debts that were acquired and utilized primarily in their business. Because historically a substantial number of debtors who seek chapter 11 relief have less than \$2.725 million in debt, the SBRA has the potential to provide effective relief these same debtors might otherwise obtain in a standard chapter 11 case.



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## “Types” of Chapter 11 Debtors

Standard-everything else.

Single asset real estate- real property consisting of 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 the debtor other than the business of operating the real property and activities incidental thereto. See U.S.C. § 101(51)(B).

Individual- See U.S.C. § 1129(a)(15), administrative closing, court may grant discharge if debtor’s distributions to unsecured creditors are not less than the unsecured creditors would have received under chapter 7, modification is not practicable and there is no reasonable cause to believe that 11 U.S.C. § 522(q) applies (real or personal property exemptions in excess of \$170,350) and there is a proceeding for violations of securities law, any criminal act or intentional tort or willful or reckless conduct that caused serious physical injury or death to another individual in the preceding five (5) years. See 11 U.S.C. § 1143. There is a different definition of property of the estate, includes post-petition property and earnings.

“Small business case” 11 U.S.C. § 101(51)(C)-small business debtor who has not elected that subchapter V of chapter 11 applies. Benefits-exclusivity under 11 U.S.C. § 1121(e) up to 300 days and court has 45 days from filing of plan to confirm plan (11 U.S.C. § 1141(e)), the debtor may request no committee (11 U.S.C. § 1102(a)(3), the court may excuse requirement of a disclosure statement if the debtor provides disclosures in plan or combine or conditionally approve disclosure statement (11 U.S.C. 1125(f)).

“Small business debtor 11 U.S.C. § 101(51)(D)-person engaged in commercial or business activities (including affiliate that is not a single asset debtor) that has aggregate noncontingent liquidated secured and unsecured debts as of the petition date or the date of the order for relief in an amount not more than \$2,725,625 excluding debts owed to insiders. Election must be made in bankruptcy petition.



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## Public Policy Considerations:

Preservation of Homestead

Preservation of Going Concern

Equality of Distribution/Non-Discrimination

Forgive Failure

## Debtor Weapons

Value real or personal property

Cure defaults

Avoid transfers



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## Classification of Claims:

Type:	§1126 VOTING?
Secured Claims	Yes
Administrative Expense Claims	No
Priority Claims	Yes
Executory Contract Assumption Claims	No
Unsecured Claims	Yes
Bondholders	Yes
Equity	Yes
(Insiders)	No



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## Standard Confirmation Issues:

11 U.S.C. § 1121-exclusivity for 120 days. Gives the debtor the exclusive right to file a plan and solicit acceptances.

11 U.S.C. § 1122-classification of claims-a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C. § 1124-Impairment-alters the legal or equitable rights of the holder of the claim.

11 U.S.C. § 1125-information that would enable a hypothetical investor to make an informed judgment about the plan.

***11 U.S.C. § 1126-Acceptance. Holders of at least two-thirds (2/3) in an amount and more than one-half in number. Insider acceptances do not count. See 11 U.S.C. § 1129(10).***

## Types of Plans

True reorganizations

Liquidations

Asset/business sales



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## 11 U.S.C. § 1129

(a) The Court shall confirm a plan if:

- (1) plan complies with the applicable provisions of title 11,
- (2) the plan proponent complies with the applicable provisions of title 11,
- (3) plan has been proposed in good faith and not by any means forbidden by law,
- (4) any payments to be made to professionals under the plan have been approved by the court,
- (5) plan proponent has disclosed the identity and affiliations with any individual proposed to serve after confirmation as an officer, director or voting trustee of the debtor, an affiliate of the debtor or successor to the debtor under the plan and the appointment or continuance of such individual is consistent with the interests of creditors, equity security holders and public policy and any discloses the identity of any insider and the nature of their compensation,
- (6) any governmental agency with jurisdiction over the debtor's rates has approved any rate change or the rate change is conditioned upon approval,
- (7) with respect to each class, the class has accepted the plan or will receive or *retain under the plan on account of such claim or interest value, as of the effective date of the plan, than is not less than the amount the holder would receive if the case was under chapter 7 or if 111(b)(2) applies, such claims will receive or retain under the plan that is not less than the value of such holder's interest in the estate's interest in the property that secured the claim,*
- (8) *with respect to each class of claims or interests, such class has accepted the plan or is not impaired under the plan,***
- (9) unless holder agrees otherwise, the plan provides that the holders of claims under §§ 507(a)(2) or 507(a)(3) the holder will receive the allowed amount of their claim, with respect to claims under §§ 507(a)(4), (5), (6) or (7), if the holder of such claims have accepted the plan, they will receive deferred cash payments of a value as of the effective date of the plan equal to the allowed amount of their claims or if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of their claims, with respect to a claim under § 507(a)(8) the holder of such claim will receive deferred cash payments equal to the allowed amount of their claims over a period ending not later than 5 five years from the date of the order for relief,



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*(10) if a class is impaired under the plan, at least one class has accepted the plan with regard to the acceptances of insiders,*

(11) confirmation is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor or successor of the debtor unless the liquidation is proposed under the plan,

(12) all fees required to be paid under 28 U.S.C. § 1930 have been paid or will be paid on the effective date of the plan,

(13) the plan provides for the continuation after the effective date of the payment of retiree benefits,

(14) if the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or statute that became due after the petition date,

(15) if the debtor is an individual and the holder of an allowed unsecured creditor has rejected the plan, the value, as of the effective date of the plan, of the property to be distributed under the plan is not less than the amount of such claim or the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor as defined by 11 U.S.C § 1325(b)(2) to be received during the 5 year period on the date the first payment becomes due or during the period the plan provides for payments, whichever is longer,

(16) all transfers of property under the plan shall be made in accordance with the applicable provisions of nonbankruptcy law that govern transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.



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## CRAMDOWN

11 U.S.C. §1129(b)(1). If all the requirements of 1129(a) are met with the exception of 1129(a)(8), the court on request of the proponent of the plan, shall confirm the 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.

11 U.S.C. § 1129(b)(2), fair and equitable means-

(A) With respect to secured claims-the holders of such claims will retain their liens securing such claims, whether the property is to be retained by the debtor and the holder of such claim will receive on account of such claim deferred cash payments totaling at least the allowed amount of the 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, or if the property is to be sold attaches to the proceeds or realizes the indubitable equivalent of such claim.

(B) With respect to unsecured claims-the plan provides that each holder receive or retain value as of the effective date of the plan equal to the allowed amount of their claim ***or 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 the case of an individual debtor, the debtor may retain property included in 11 U.S.C. § 1115 subject to postpetition domestic support obligations.



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## One Vote: The First Hurdle

### Land

1.	1 <sup>st</sup> Mortgage	\$ 1,000,000.00
	Value	(A) \$ 1,500,000.00 (B) \$ 750,000.00
2.	1 <sup>st</sup> Mortgage	\$1,000,000.00
	2 <sup>nd</sup> Mortgage	\$ 250,000.00
	Real Estate Taxes	\$ 10,000.00
	Value	(A) \$1,500,000.00 (B) \$ 750,000.00 (C) \$ 900,000.00
3.	Restaurant	
	Lease (delinquency)	\$ 20,000.00
	Wage claims/payroll taxes	\$ 20,000.00
	Vendor Claims (5)	\$ 50,000.00
	Breach of contract claims	\$ 50,000.00
	Equipment Lease (\$1.00 buyback)	\$ 10,000.00
	Personal Property	\$ 10,000.00
	Disposable Income	\$ ?



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## THE SBRA-The Game Changer

### Comparing Standard and Small Business Debtors.

- (1) Alters but does not eliminate §1129 voting requirements but not without consequence.
- (2) Eliminates absolute priority rule.
- (3) Allows individual debtors who secured business loans on their principal residence to modify those liens unlike “standard” individual debtors or chapter 13 debtors.
- (4) Only permits Debtor to file a plan (within 90 days).
- (5) Redefines feasibility.
- (6) Eliminates disclosure statement.
- (7) No Committees- Subchapter V Trustee.



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## The Downside: Be Careful What You Wish For

Cramdown v. Consensual.

Issues:

Property of the estate

Discharge

Modification

Length of Plan (tax issues, capital reserves)

Disposable income and liquidation analysis

Remedies in the event of default

Appointment of a Trustee. Standing v. non-standing



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## SBRA: 11 U.S.C. §§ 1181-1195

11 U.S.C. §1181-Inapplicability of other sections. Sections 105(d), 1101(1), 1104, 1105, 1106, 1107, 1108, 1115, 1116, 1121, 1123(a)(8), 1127, 1129(b), 1129(c), 1129(e) and 1141(d)(5) do not apply.

Unless the court for cause orders otherwise, §§1102(a)(1), (2) and (4), 1102(b), 1103 and 1125 do not apply.

If a plan is confirmed under section 1191(b) (cramdown), §1141 does not apply except as provided in 1192.

11 U.S.C. §1182-Definitions of debtor and debtor in possession.

11 U.S.C. §1183 Trustee. US Trustee either appoints a standing US Trustee or appoints a disinterested individual to serve.

### Duties-

(1) perform duties of trustee under 11 U.S.C. §§ 704(a)(2), (5), (6), (7) and (9).

(2) perform the duties in 11 U.S.C. § 1106(a)(3), (4) and (7) if the court orders for cause on request of a party in interest.

(3) appear and be heard at the status conference under section 1188 on any hearing that concerns (a) the value of property subject to a lien, (b) confirmation of a plan, (c) modification of a plan after confirmation or (d) the sale of property.



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(4) ensure that the debtor commences making timely payments required by a plan confirmed under Subchapter V.

(5) if the debtor ceases to be a debtor in possession perform the duties in § 704(a)(8) and § 1106(a)(1), (2) and (6) including operating the business.

(6) if there is a claim for domestic support obligation perform the duties specified in 11 U.S.C. § 704(c).

(7) facilitate the development of a consensual plan.

Termination of trustee. If the plan is confirmed under § 1191(a), the trustee's service is terminated when the plan is substantially consummated. Debtor is required to file a notice of substantial consummation within 14 days of substantial consummation.

11 U.S.C. §1184-Rights and powers of debtor in possession. The debtor has the powers of a chapter 11 trustee, other than the right to compensation, as a chapter 11 trustee except under § 1106(a)((2), (3), and (4).

11 U.S.C. §1185-Removal of the debtor in possession. On request of a party in interest and after notice and hearing, the court shall order the debtor 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 the commencement of the case, or for failure to perform the obligations of the debtor under a confirmed plan. The court may reinstate the debtor in possession upon the request of a party in interest.



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11 U.S.C. §1186-Property of the estate. If the plan is confirmed under § 1191(b), property of the estate included, in addition to property under § 541, all property that the debtor acquires after the date of the commencement of the case but before the case is closed, dismissed or converted to a case under chapter 7, 12, 13.

11 U.S.C. §1187- Reporting requirements. Upon electing to be a subchapter V debtor, the debtor shall file documents required by § 1161(A) and (B). In addition, the debtor shall also comply with the requirements of § 308 and § 1116(a)(2), (3), (4), (5), (6) and (7).

11 U.S.C. §1188 Status Conference. Not later than 60 days after the order for relief the court shall hold a status conference which may be extended for circumstances for which the debtor should not justly be held accountable.

11 U.S.C. §1189-Only the debtor may file a plan. The debtor shall file a plan within 90 days. The court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not be justly held accountable.

11 U.S.C. §1190 Contents of a plan. The plan shall include 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 plan, provide for the submission of all or such portion of 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



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Notwithstanding §1123(b)(5), the debtor 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 not used primarily to acquire the property and used primarily in connection with the small business of the debtor.

11 U.S.C. § 1191 Confirmation of the plan.

(a) The Court shall confirm a plan under this subchapter only if all of the all of the requirements of §1129(a), other than paragraph (15) of that section, are met.

(b) Notwithstanding section 510(a), if all applicable requirements of § 1129 are met other than paragraphs (8), (10) and (15), the court on request of the debtor, shall confirm the 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.

(c) Fair and equitable means:

(1) Secured claims-the plan meets the requirements of §1129(b)(2)(A).

(2) as of the effective date of the plan-

(A) the plan provides that 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 the first payment is due under the plan will be applied to make payments under the plan or



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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 is not less than the projected disposable income of the debtor.

(3) the debtor will be able to make all payments under the plan or there is a reasonable likelihood that the debtor will be able to make all payments under the plan and the plan provides appropriate remedies, which 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-the term disposable income means the income that is received by the debtor and that is not reasonably necessary to be expended for (A) the maintenance or support of the debtor or a dependent of the debtor, (B) a domestic support obligations that arose postpetition, or *the payment of expenditures necessary for the continuation, preservation or operation of the business of the debtor.*

(e) Domestic support obligations under §§ 507(a)(2) or (3) may be paid through the plan instead of upon the effective date.

11 U.S.C. §1192-Discharge. If the plan is confirmed under §1191(b), as soon as practicable after completion of the payments, the court shall grant the discharge except payments that are due after the 3 year or 5 year period and §523 claims.

11 U.S.C. § 1193-Modification of the plan. The debtor may modify at any time before confirmation, but may not modify the plain if it fails to meet the requirements of §§ 1122 and 1123 with the exception of §1123(a)(8).



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Modification after confirmation. If the plan is confirmed under § 1191(a) the debtor may modify the plan at any time after confirmation and before substantial consummation.

If the plan is confirmed under § 1191(b), the debtor may modify the plan at any time but the plan modifications may not modify the plan so that it fails to meet the requirements of §1191. The plan modifications become the modified plan only if the circumstances warrant the modification.

If the plan has been confirmed under §1191(a), the holder of any claim or interest that has accepted or rejected the plan is deemed to have accepted or rejected the plan as modified unless with the time fixed by the court, such holder changes their previous acceptance or rejection.

11 U.S.C. §1194 Payments. 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 make any payments received in accordance with the plan. If the plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting any unpaid allowed claims under § 503, any payment made for the purpose of providing adequate protection payments and any fees owing to the trustee.

If the plan is confirmed under § 1191(b), except as otherwise provided in the plan or order confirming the plan, the trustee shall make payments to creditors under the plan.

Prior to confirmation, the court may authorize the trustee to make payments to the holder of a secured claim for the purpose of making adequate protection payments.



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11 U.S.C. §1195. Notwithstanding § 327(a), a person is not disqualified for employment solely because that person holds a claim of less than \$10,000 that arose prior to the commencement of the case.

## Questions?

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