MICHIGAN BANKRUPTCY JOURNAL

FALL 2019

UNDERWRITTEN BY THE BANKRUPTCY SECTION FOR THE
FEDERAL BAR ASSOCIATION -- WESTERN DISTRICT OF MICHIGAN

IN THIS ISSUE

Good News for Family Farmers: Congress Raises the Debt Ceiling in Chapter 12
Laura J. Genovich

In August 2019, President Trump signed into law the Family Farmer Relief Act of 2019. The Act amends Section 101(18) of the Bankruptcy Code, 11 U.S.C. 101(18), to increase the maximum debt ceiling for a family farmer from approximately $4.4 million to $10 million. This amendment will greatly expand Chapter 12 eligibility.

The increase comes at the heels of a difficult period for family farmers. In recent years, farmers have faced unpredictable (and disastrous) weather events, crop overproduction, low crop prices, falling income, and rising debt. As of July 2019, farm loan delinquencies and farm bankruptcies were rising across the country. According to Farm Bureau, American farm debt is projected to reach a record high of $416 billion in 2019.

Although the debt limit for Chapter 12 debtors is adjusted incrementally for inflation, proponents of the amendment argued that inflation did not keep up with these rising debts. As a result, many "small" family farmers were ineligible for Chapter 12 bankruptcy. Chapter 12 offers tax advantages and other benefits to farmers, and it is generally viewed as less complicated and expensive than Chapter 12. Some of the differences between Chapter 12 and Chapter 11 include the following:

- In Chapter 12, a trustee is appointed, but no Unsecured Creditors' Committee is appointed. The Chapter 12 Trustee often works together with the debtor and creditors to negotiate the plan of reorganization.

- In Chapter 12, the debtor has a greater ability to "cram down" secured debts.

- Creditors do not vote on Chapter 12 plans (although they may, of course, object).

- Chapter 12 debtors with consumer debts enjoy the co-debtor stay, as in Chapter 13.

The American Bankers Association, which opposed the bill before its passage, cautioned that the increase could be "detrimental to the costs of credit for farmers in the long run" and questioned the need for the increase in light of the adjustments for inflation. A similar proposal to increase the debt limit had failed last year.

The number of Chapter 12 filings in the Western District of Michigan have varied over the past five years, with sharp upticks in 2015 and 2019:

	2014	2015	2016	2017	2018	2019 (through 11/18/19)
Ch 12 Filings	3	15	4	4	2	9

As of this writing, one farm has filed a Chapter 12 case in the Western District of Michigan under the new debt limit.

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SMALL BUSINESS REORGANIZATION ACT OF 2019: SWEEPING CHANGES TO CHAPTER 11 SHOULD MAKE REORGANIZATION EASIER FOR SMALL BUSINESSES

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MILLER CANFIELD

The partisan warfare in Washington was temporarily sidelined when President Trump recently signed into law the Small Business Reorganization Act of 2019 ("SBRA"), 11 U.S.C. §§ 1181 – 1195. The SBRA takes effect on February 19, 2020, and makes sweeping changes to chapter 11 for small business debtors.

The SBRA creates a new subchapter V of chapter 11 for the reorganization of small business debtors. Existing chapter 11 provisions regarding small business debtors are not repealed. Instead, the SBRA creates an alternative procedure for persons or entities engaged in business activity with aggregate secured and unsecured debts of not more than $2,725,625. 11 U.S.C. § 101 (51D)(A). If a small business debtor elects to use the new procedure, the case will be considered a case under subchapter V of chapter 11.

This article will highlight some of the SBRA's provisions.

Small Business (Subchapter V) Trustee.

The United States Trustee shall appoint a small business trustee in every case. 11 U.S.C. § 1183(a). Although standing trustees can serve as a subchapter V trustee, the United States Trustee is soliciting applications from other qualified individuals to serve. *See* Adam D. Herring and Walter W. Theus, "New Law, New Duties: USTP's Implementation of the HAVEN Act and the SBRA," XXXVIII ABI Journal 10, 12-13, 68 (October, 2019).

The small business trustee is accountable for all property received, examines proofs of claims, objects to the allowance of improper claims, can oppose the debtor's discharge, furnishes information concerning the estate, and completes the final report and account of the estate's administration. 11 U.S.C. §§ 1183(b)(1) and 704(a)(2), (5), (6), (7) and (9).

The small business trustee retains payments and funds until the plan is confirmed or confirmation is denied. 11 U.S.C. § 1194(a). If a plan is confirmed, the trustee distributes payments in accordance with the plan. *Id*. If the debtor uses the section 1191(b) cram down provisions discussed below, the trustee shall make payments to creditors under the plan, except as otherwise provided in the plan or in the confirmation order. 11 U.S.C. § 1194(b). Prior to plan confirmation, the court may authorize the trustee to make adequate protection payments to secured creditors. 11 U.S.C. § 1194(c).

If the court for cause so orders, the small business trustee also investigates the debtor's financial condition, the operation of the debtor's business, the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan. 11 U.S.C. §§ 1183(b)(2) and 1106(a)(3).

The small business trustee appears at the court's status conference which is required not later than 60 days after the order for relief. 11 U.S.C. § 1183(b)(3). The small business trustee also appears at any hearing that concerns the value of property subject to a lien, confirmation of a plan, modification of a plan after confirmation, and the sale of property of the estate. *Id.*

The small business trustee ensures that the debtor commences making timely payments required under a confirmed plan and facilitates the development of a consensual plan of reorganization. 11 U.S.C. § 1183(b)(4) and (7). If the debtor ceases to be a debtor in possession (if the court finds fraud, dishonesty, incompetence or gross mismanagement), the small business trustee operates the debtor's business. 11 U.S.C. §§ 1183(b)(5) and 1185(a). The small business trustee's service is terminated when the plan has been substantially consummated. 11 U.S.C. §§ 1183(c) and 1101(2).

Filing Requirements.

Upon electing to use subchapter V, the debtor must file its most recent balance sheet, statement of operations, cash flow statement and federal income tax return, or a sworn statement that any such documents do not exist. 11 U.S.C. §§ 1187(a) and 1116(1).

Creditors' Committees Disfavored.

Unless the court for cause orders otherwise, there is no creditors' committee. 11 U.S.C. § 1181(b).

Status Conference.

Not later than 60 days after the entry of the order for relief, the court shall hold a status conference to further an expeditious and economical case resolution. 11 U.S.C. § 1188(a). The court may extend the time period for holding the status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable. 11 U.S.C. § 1188(b). Not later than 14 days before the status conference, the debtor shall file a report that details the efforts the debtor has undertaken to attain a consensual reorganization plan. 11 U.S.C. § 1188(c).

Filing of the Plan.

Only the debtor may file a plan. 11 U.S.C. § 1189(a). The debtor shall file a plan within 90 days after the order for relief, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable. 11 U.S.C. § 1189(b).

Plan Contents.

In a small business case, the plan itself provides adequate information and a separate disclosure statement is not necessary. 11 U.S.C. § 1125(f). The subchapter V plan shall include a brief history of the debtor's business operations, liquidation analysis, and projections with respect to the debtor's ability to make payments under the proposed plan. 11 U.S.C. § 1190(1). The plan shall also provide for the submission of future earnings or income to the trustee's supervision and control as is necessary to execute the plan. 11 U.S.C. § 1190(2). Individual small business debtors can modify a mortgage on the debtor's principal residence in the plan, provided that the loan was not used primarily to acquire the residence, but was used primarily in connection with the debtor's business. 11 U.S.C. § 1190(3).

Plan Confirmation.

The confirmation standards contained in 11 U.S.C. § 1129(a) largely survive in a subchapter V case, except that the small business debtor does not need to obtain the acceptance of an impaired class of creditors to confirm a plan. 11 U.S.C. § 1191(a) and (b). The debtor also does not need to pay administrative expenses at plan confirmation, but can pay such expenses over the life of the plan. 11 U.S.C. § 1191(e).

Cram down in a subchapter V case has not changed in regard to secured claims. The small business debtor must still comply with section 1129(b)(2)(A) of the Bankruptcy Code to cram down a secured claim. 11 U.S.C. § 1191(c)(1).

However, the treatment of classes of unsecured claims and interests under sections 1129(b)(2)(B) and (C) has changed. Equity holders in the small business can retain their interests in the business even if the plan does not pay unsecured claims in full. As long as the plan does not discriminate unfairly, and is fair and equitable with respect to each class of impaired unsecured claims or interests that do not accept the plan, the court shall confirm the plan. 11 U.S.C. § 1191(b). Therefore, small business equity holders will not need to provide "new value" to retain their equity interests if creditors are not paid in full.

"Fair and equitable" means that the plan provides that all of the small business debtor's projected disposable income to be received for a minimum of three and a maximum of five years, or property of equivalent value, will be applied to make plan payments. 11 U.S.C. § 1191(c)(2). "Fair and equitable" also means that there is a reasonable likelihood the debtor will be able to make all plan payments and that the plan provides appropriate remedies, including the liquidation of non-exempt assets, to protect creditors if payments are not made. 11 U.S.C. § 1191(c)(3).

"Disposable income" means income that is not reasonably necessary to be expended for the debtor's maintenance or support, for a domestic support obligation, or for the payment of expenditures necessary for the continuation, preservation, or operation of the debtor's business. 11 U.S.C. § 1191(d).

Discharge.

If the small business debtor uses the section 1191(b) cram down provisions, a discharge is entered as soon as practicable after the debtor completes all payments. 11 U.S.C. § 1192. This contrasts with the typical chapter 11 case, where the discharge is granted upon plan confirmation. 11 U.S.C. § 1141(d)(1)(A). A discharge is not provided for long-term debts on which the last payment is due after the three- to five-year payment period. 11 U.S.C. § 1192(1). Exceptions to discharge contained in section 523(a) of the Bankruptcy Code also apply to the small business debtor. 11 U.S.C. § 1192(2).

Employment of Professionals.

Attorneys, accountants, appraisers, auctioneers and other professionals are not disqualified for employment solely because the professional holds a pre-petition claim of less than $10,000. 11 U.S.C. § 1195. This provision recognizes that some small business debtors lack the financial resources to provide a retainer and allows pre-petition professionals to be retained despite holding a claim.

Preference Law Changes.

The SBRA also makes changes to existing preference laws. The SBRA amends 28 U.S.C. § 1409(b), purportedly so that non-insider defendants would need to be sued in the district where the defendant resides, rather than where the bankruptcy case is filed, for claims less than $25,000. The majority of cases, however, hold that section 1409(b) does not apply to preference actions. Former Chief Judge Gregg authored one opinion on the subject. *Moyer v. Bank of Am., N.A. (In re Rosenberger)*, 400 B.R. 569 (Bankr. W.D. Mich. 2008). Judge Gregg found that preference cases "arise under" the Bankruptcy Code, whereas section 1409(b) applies only to cases "arising in" or "related to" a debtor's bankruptcy case. *Id.* at 572-74. Although some courts have looked past the clear language of section 1409(b) to apply the venue exception (*see, e.g., Dynamerica Mfg. LLC v. Johnson Oil Co., LLC (In re Dynamerica Mfg. LLC)*, No. 08-11515, 2010 WL 1930269, at *2 (Bankr. D. Del. May 10, 2010)), the majority has held that when a statute is unambiguous, it must be applied as written. *Webster v. Rep. Nat'l Distrib. Co., (In re Tadich Grill of Washington DC LLC)*, 598 B.R. 65, 67 (Bankr. D.D.C. 2019). Thus it seems unlikely that the increase in the section 1409(b) claim cap will yield the results promised.

The SBRA also adds a requirement to section 547(b) of the Bankruptcy Code that, before filing the preference action, the trustee or debtor in possession must exercise reasonable due diligence and must take into account a party's known or reasonably knowable affirmative defenses. Whether the foregoing provision actually results in significant changes to preference action procedure remains to be seen.

Federal Rules of Bankruptcy Procedure.

Changes to the Federal Rules of Bankruptcy Procedure typically take three years or more under the process established by the Rules Enabling Act, 28 U.S.C. §§ 2071-77. Since the SBRA's effective date is rapidly approaching, the Advisory Committee on Bankruptcy Rules has drafted interim bankruptcy rules that can be adopted by courts as local rules or by general order

in each district. If there are no delays in the approval process, distribution of the new rules and official forms should occur by late December 2019. The proposed amendments to the Federal Rules of Bankruptcy Procedure can be viewed at https://www.regulations.gov/docket?D=USC-RULES-BK-2019-0004.

Conclusion.

Small business debtors often have difficulty confirming a plan and can be overwhelmed by high costs and administrative burdens. With the SBRA's more favorable plan confirmation standards, the debtor should have a better chance of confirming a plan and retaining control of the business. Costs and procedural burdens should be reduced with no creditors' committee and no disclosure statement requirement. The benefits of the SBRA may not be fully realized because the debt limit of $2,725,625 could be too low; however, there is discussion on raising this limit if the SBRA proves to be effective.

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Lion of Justice Award
Honoring Steven L. Rayman
December 4, 2019
Amway Grand Plaza Hotel, Grand Rapids, Michigan

FROM TIME TO TIME, BUT NOT EVERY YEAR, THE FEDERAL BAR ASSOCIATION BANKRUPTCY SECTION BESTOWS THE LION OF JUSTICE AWARD UPON ONE OF US WHO, OVER A SIGNIFICANT PERIOD OF TIME, HAS EXHIBITED A HIGH LEVEL OF SKILL IN THE PRACTICE OF BANKRUPTCY LAW, DEMONSTRATED A HIGH LEVEL OF PROFESSIONALISM AND ETHICS, AND HAS MADE A SIGNIFICANT CONTRIBUTION TO THE PRACTICE OF BANKRUPTCY LAW IN THE WESTERN DISTRICT OF MICHIGAN. THIS AWARD IS GIVEN NOT ANNUALLY BUT ONLY WHEN THE FBA BANKRUPTCY STEERING COMMITTEE IDENTIFIES A CANDIDATE WHO PERSONIFIES AND MERITS THE AWARD.

EACH OF OUR RETIRED BANKRUPTCY JUDGES HAS RECEIVED THE AWARD, STARTING WITH JUDGE NIMS IN 1992, AND OTHER HONOREES INCLUDE TIM CURTIN, JIM ENGBERS, BRETT RODGERS AND HAL NELSON. THIS YEAR, THE FBA'S STEERING COMMITTEE (OBVIOUSLY WITHOUT CONSULTING ME) HAS NAMED STEVE RAYMAN AS A LION OF JUSTICE AWARD WINNER.

SINCE GIVING THE FIRST AWARD IN 1992, OUR BAR HAS NAMED ONLY TEN RECIPIENTS – TEN RECIPIENTS IN ALMOST THIRTY YEARS. AS YOU CAN TELL, THE LION OF JUSTICE AWARD IS A LIFETIME ACHIEVEMENT AWARD, CONFERRED SPARINGLY, MUCH LIKE THE AWARD THAT THE ACADEMY OF MOTION PICTURES GIVES FROM TIME TO TIME TO A VERY SELECT FEW.

LOOKING AT STEVE TONIGHT IT IS EASY TO SEE THE MAKINGS OF A HOLLYWOOD STAR. INDEED, A SEARCH THIS WEEK OF THE COURT'S CM/ECF DATA BASE SHOWS THAT STEVE HAS APPEARED IN NEARLY 5,600 DRAMAS THAT HAVE PLAYED OUT ON THE BANKRUPTCY STAGE AND SCREEN OF OUR DISTRICT, DATING BACK TO 1979, AND NOT JUST AS A SUPPORTING CHARACTER. HE HAS HELD MANY STARRING ROLES THAT INCLUDE CREDITOR COUNSEL, COMMITTEE COUNSEL, TRUSTEE'S COUNSEL, MEDIATOR, AND OF COURSE DEBTOR'S COUNSEL.

ALL THE WHILE, STEVE DRIPS WITH GLAMOUR (AND MAYBE JUST A LITTLE AU JUS). HE REGULARLY SERVES WITH APLOMB AS EMCEE AT SEMINARS AND OTHER COURT AND BAR EVENTS AND GENERALLY HAS ALL THE TRAPPINGS OF STARDOM, LIKE HOBNOBBING WITH OTHER GLITERATTI INCLUDING JEFF MOYER, THOMAS BRUINSMA, AND MARCIA MEOLI TO NAME A FEW. I AM TOLD THAT JUST TODAY HE MADE ARRANGEMENTS WITH THE GENERAL SERVICES ADMINISTRATION TO PLACE A GOLDEN STAR ON THE SIDEWALK IN FRONT OF THE BANKRUPTCY COURT A FEW BLOCKS FROM HERE. A FITTING TRIBUTE TO HIMSELF.

HE DRIVES A MERCEDES BENZ, GETS HIS FLU SHOTS AT THE MAYO CLINIC, AND HAS HIS OWN STUNT DOUBLE IN THE EASTERN DISTRICT NAMED DAVID LERNER. STEVE RAYMAN IS A STAR.

BUT UNLIKE MOST LIFETIME ACHIEVEMENT HONOREES AT THE OSCARS, STEVE HAS NOT FOUND SUCCESS IN MAKING US BELIEVE HE IS SOMETHING HE IS NOT. INSTEAD HE HAS WON OUR LASTING RESPECT AND ADMIRATION BY BEING EXACTLY WHO HE IS: A SKILLED ATTORNEY AND COUNSELOR, AND A BANKRUPTCY PEACEMAKER, AS WELL AS A MAN OF COMPASSION AND INTEGRITY. HIS LAW PARTNER AND FRIEND, CODY KNIGHT SAID TO ME ON MONDAY, "[W]ITH STEVE, WHAT YOU SEE IS WHAT YOU GET." THERE IS NO ILLUSION OR ARTIFICE, UNLIKE THE MOVIES.

A FEW WEEKS BACK I READ A MOVIE REVIEW IN THE WALL STREET JOURNAL ABOUT THE NEW TOM HANKS FILM, "A BEAUTIFUL DAY IN THE NEIGHBORHOOD," DEPICTING FRED ROGERS. THE REVIEW ACTUALLY DESCRIBES A SCENE FROM ANOTHER MOVIE ABOUT MR. ROGERS, LAST YEAR'S DOCUMENTARY, "WON'T YOU BE MY NEIGHBOR." IT SHOWS MR. ROGERS, COMING OUT OF RETIREMENT TO TAPE A SHOW ABOUT THE SEPTEMBER 11 TERRORIST ATTACKS, AND HE FIRST WONDERS ALOUD WHAT GOOD WOULD THE SHOW DO IN THE FACE OF SUCH HORROR. BUT, THEN MR. ROGERS (AN ORDAINED PRESBYTERIAN MINISTER) SPONTANEOUSLY USES A HEBREW PHRASE, REMINDING US THAT "WE ALL ARE CALLED TO BE TIKKUN OLAM, REPAIRERS OF CREATION."

THE TERM TIKKUN OLAM IS OFTEN USED WHEN DISCUSSING SOCIAL POLICY AND INSURING A SAFEGUARD TO THOSE WHO MAY BE AT A DISADVANTAGE. I SUPPOSE IT IS IN THIS SENSE THAT THE PHRASE OR QUOTE CAME BACK TO ME THIS WEEK AS I WAS GATHERING MY THOUGHTS ABOUT

STEVE AND LISTENING TO OTHERS DESCRIBE HIM. HE TRULY IS A REPAIRER OF CREATION, TIKKUN OLAM.

FOR EVERY ALOFS, OR BROUCHEK, OR CYBERCO, OR SECOND CHANCE BODY ARMOR, OR OTHER HIGH-PROFILE CASE IN WHICH STEVE PLAYED A STARRING ROLE, THERE ARE HUNDREDS OF MORE OBSCURE CASES IN WHICH HE ALSO FAITHFULLY PLAYED HIS PART: WILBUR RAY JENISON, DAVID LEE VALLE, HEIDI W. VOGLEY, KIMBERLEY LYNN GORBITZ, DANIEL JAMES O'CONNOR AND SO ON, IN WHICH STEVE HAS HELPED OTHER — REGULAR PEOPLE— REPAIR THEIR WORLDS. HE TOLD ME THIS WEEK THAT IT IS MORE FUN TO HELP REGULAR PEOPLE, AND QUITE TELLINGLY THE RAYMAN AND KNIGHT WEBSITE SAYS THIS ABOUT THEIR CLIENTS:

> OUR TYPICAL CLIENTS ARE HONORABLE PEOPLE WHO HAVE DONE EVERYTHING IN THEIR POWER TO RESOLVE THEIR OWN FINANCIAL PROBLEMS.

I KNOW HE BELIEVES IN THE DIGNITY OF HIS CLIENTS, AND HE MAKES THEM BELIEVE IN THEIR OWN DIGNITY AND VALUE. HE ALSO MAKES THE REST OF US BELIEVE IT, TOO, JUST LIKE MR. ROGERS.

MY COLLEAGUE JIM BOYD WHO USUALLY HAS VERY LITTLE TO SAY (THANK HEAVEN FOR SMALL MERCIES!), SAID THIS ABOUT STEVE:

> STEVE IS AN EXEMPLARY ATTORNEY, MEDIATOR AND PROBABLY MOST IMPORTANTLY, PERSON. AT ONE POINT OR ANOTHER, HE HAS MADE US ALL BETTER AT WHAT WE DO PROFESSIONALLY AND HOW WE LIVE PERSONALLY. HE FREQUENTLY REMINDS US OF WHAT IT MEANS TO BE COURTEOUS AND COMPASSIONATE, EVEN IN THE MOST DIFFICULT CIRCUMSTANCES. AND, NO MATTER WHAT THE CIRCUMSTANCE, HE

CARES ABOUT YOU, REGARDLESS OF WHETHER HE HAS KNOWN YOU FOR TWENTY YEARS OR TWENTY MINUTES.

STEVE, I KNOW YOUR WIFE JUDY COULDN'T BE HERE (OR MAYBE WOULDN'T BE HERE!), BUT YOUR FAMILY IS REPRESENTED TONIGHT BY YOUR SONS, DAVID AND TOMMY, AS WELL AS CODY, JO AND JACKIE FROM THE FIRM.

I WANT TO SAY THIS TO DAVID AND TOMMY: AS YOUNG CHILDREN YOU PROBABLY LOOKED UP TO YOUR PARENTS – EVEN IF YOU HAD TO LOOK DOWN TO LOOK UP TO YOUR DAD -- BECAUSE OUR PARENTS ARE OUR ENTIRE WORLD AT FIRST, FEEDING, CLOTHING, SHELTERING US. BUT AS WE GET OLDER, OUR VIEW OF THEM CHANGES, BECOMES MORE CRITICAL OR AT LEAST LESS REVERENTIAL. HIS SENSE OF HUMOR IS LEGENDARY AND PERVASIVE, BUT SOMETIMES MAKES IT DIFFICULT TO SEE THE MORE SERIOUS SIDE OF HIM. I HOPE THAT BY COMING HERE TONIGHT FOR THIS AWARD PRESENTATION, YOU GET A GLIMPSE OF HOW YOUR FATHER'S IMMEDIATE CO-WORKERS AS WELL AS THE LARGER COMMUNITY OF THE BENCH AND BAR SEE HIM, AND THAT YOU CONTINUE TO SEE HIM IN THIS LIGHT. HE IS A REPAIRER OF CREATION WHO INSPIRES US ALL AND MAKES US ALL GLAD THAT WE PRACTICE AND LIVE IN MR. RAYMAN'S NEIGHBORHOOD. CONGRATULATIONS, STEVE, TO YOU AND YOUR FAMILY.

NOW, IN FAIRNESS, I SHOULD ALLOW TIME FOR REBUTTAL.