

# Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

SEPTEMBER 2020

**EDITOR'S NOTE: DEBT CANCELLATION INCOME**

Victoria Prussen Spears

**AN OVERVIEW OF THE RULES REGARDING THE REALIZATION  
AND RECOGNITION OF DEBT CANCELLATION INCOME—PART I**

Thomas J. Gallagher and Dennis L. Cohen

**TOP 10 QUESTIONS HUMAN RESOURCES MAY HAVE WHEN  
THEIR COMPANY IS FILING FOR CHAPTER 11 PROTECTION**

H. Andrew Matzkin, Kaitlin R. Walsh, and William W. Kannel

**CARES ACT EXPANDS SIMPLER BANKRUPTCY RESTRUCTURING UNDER  
NEW SUBCHAPTER V TO BUSINESSES WITH UP TO \$7.5 MILLION IN DEBT**

Evan M. Jones and Jennifer Taylor

**BANKRUPTCY IMPLICATIONS FOR COMMERCIAL LANDLORDS  
WITH BANKRUPT OR NEAR-BANKRUPT TENANTS**

Amy Simon Klug and Meg Raker

**DON'T OPEN TILL DOOMSDAY: FDI SCREENING IN THE EU—  
A CURE FOR A COVID-19-STRUCK ECONOMY?**

Christian Peeters

**TEXAS APPEARS POISED TO ABANDON THE PONZI SCHEME PRESUMPTION**

Michael J. Summerhill and Tevin Hopkins

**TEXAS BANKRUPTCY COURT DENIES REJECTION OF CERTAIN  
PRODUCTION DEDICATION MIDSTREAM AGREEMENTS**

Jim Prince and Scott Looper

**DELAWARE BANKRUPTCY COURT VOIDS PREFERRED  
STOCKHOLDER'S RIGHT TO BLOCK BANKRUPTCY FILING**

Stephen B. Selbst and W. Conor Anderson



LexisNexis

# Pratt's Journal of Bankruptcy Law

---

VOLUME 16

NUMBER 6

September 2020

---

<b>Editor's Note: Debt Cancellation Income</b> Victoria Prussen Spears	261
<b>An Overview of the Rules Regarding the Realization and Recognition of Debt Cancellation Income—Part I</b> Thomas J. Gallagher and Dennis L. Cohen	264
<b>Top 10 Questions Human Resources May Have When Their Company Is Filing for Chapter 11 Protection</b> H. Andrew Matzkin, Kaitlin R. Walsh, and William W. Kannel	280
<b>CARES Act Expands Simpler Bankruptcy Restructuring Under New Subchapter V to Businesses with up to \$7.5 Million in Debt</b> Evan M. Jones and Jennifer Taylor	286
<b>Bankruptcy Implications for Commercial Landlords with Bankrupt or Near-Bankrupt Tenants</b> Amy Simon Klug and Meg Raker	290
<b>Don't Open Till Domsday: FDI Screening in the EU—A Cure for a Covid-19-Struck Economy?</b> Christian Peeters	298
<b>Texas Appears Poised to Abandon the Ponzi Scheme Presumption</b> Michael J. Summerhill and Tevin Hopkins	307
<b>Texas Bankruptcy Court Denies Rejection of Certain Production Dedication Midstream Agreements</b> Jim Prince and Scott Looper	312
<b>Delaware Bankruptcy Court Voids Preferred Stockholder's Right to Block Bankruptcy Filing</b> Stephen B. Selbst and W. Conor Anderson	316

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Kent K. B. Hanson, J.D., at ..... 415-908-3207  
Email: ..... kent.hanson@lexisnexis.com  
Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

**Example:** Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the “Rescue and Recovery” Culture for Business Recovery*, 10 PRATT’S JOURNAL OF BANKRUPTCY LAW 349 (2014)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

## **BOARD OF EDITORS**

**SCOTT L. BAENA**

*Bilzin Sumberg Baena Price & Axelrod LLP*

**ANDREW P. BROZMAN**

*Clifford Chance US LLP*

**MICHAEL L. COOK**

*Schulte Roth & Zabel LLP*

**MARK G. DOUGLAS**

*Jones Day*

**MARK J. FRIEDMAN**

*DLA Piper*

**STUART I. GORDON**

*Rivkin Radler LLP*

**PATRICK E. MEARS**

*Barnes & Thornburg LLP*

*Pratt's Journal of Bankruptcy Law* is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

# CARES Act Expands Simpler Bankruptcy Restructuring Under New Subchapter V to Businesses with up to \$7.5 Million in Debt

*By Evan M. Jones and Jennifer Taylor\**

*This article highlights the key differences of Subchapter V from a normal Chapter 11 restructuring.*

Small businesses have historically faced a high barrier to reorganizing through Chapter 11 because, perhaps counterintuitively, bankruptcy has simply been too expensive an option. Not only transaction costs and time required to complete the process, but the likely loss of ownership by small business owners kept small businesses away. To address these issues and provide small businesses a more meaningful opportunity to restructure in Chapter 11, Congress passed the Small Business Reorganization Act of 2019, which became effective in February 19, 2020.<sup>1</sup> More recently, the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act expanded the scope of small businesses that may qualify for Subchapter V relief. As more small businesses suffer the impact of the global pandemic, this newly available tool may provide the avenue to recovery for many small businesses—not to mention their vendors and employees. This article highlights the key differences of Subchapter V from a normal Chapter 11 restructuring.

## **ELIGIBILITY TO BE A SMALL BUSINESS DEBTOR**

When Subchapter V went into effect, eligibility was limited to debtors engaged in commercial or business activities with noncontingent liquidated debts in an amount no more than \$2,725,625 (excluding debt owing to affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor.<sup>2</sup> Under the CARES Act, this dollar threshold has been increased to \$7,500,000 temporarily through March

---

\* Evan M. Jones is a partner at O’Melveny & Myers LLP handling all facets of reorganization—both in and out of court—having represented bank groups, secured creditors, debtors, unsecured creditor committees, acquirers of distressed assets, and other constituents. Jennifer Taylor is a partner in the firm’s corporate finance and restructuring practice groups negotiating debt financing transactions of all varieties and representing clients in connection with workout transactions and Chapter 11 reorganizations. The authors may be contacted at [ejones@omm.com](mailto:ejones@omm.com) and [jtaylor@omm.com](mailto:jtaylor@omm.com), respectively.

<sup>1</sup> See 11 U.S.C. §§ 1181–1195.

<sup>2</sup> 11 U.S.C. § 101(51D).

27, 2021.<sup>3</sup> Single asset real estate debtors are not eligible.<sup>4</sup>

### **MANAGEMENT RETAINS CONTROL UNDER THE SUPERVISION OF A BANKRUPTCY TRUSTEE**

In a typical Chapter 11, either a debtor retains management control over the business and its assets *or*, for cause, a trustee is appointed that displaces management and takes over control. Under Subchapter V, both will co-exist: management of the small business retains control, but a trustee will also be automatically appointed. The trustee will have a narrower set of duties and powers and is tasked with, among other things, “ensur[ing] that the debtor commences making timely payments required by a plan” and “facilitat[ing] the development of a consensual plan of reorganization.”<sup>5</sup>

### **ABSENCE OF A CREDITORS' COMMITTEE**

Unlike a non-small business Chapter 11 case, the assumption in Subchapter V is that a committee of creditors is *not* appointed unless the bankruptcy court, for cause, orders otherwise.<sup>6</sup> Absence of a committee is intended to reduce administrative costs, avoiding the costs of the committee's professionals, and speed along the restructuring process.

### **EXCLUSIVE OPPORTUNITY TO PROPOSE A PLAN**

Outside of Subchapter V, a Chapter 11 debtor has a limited period during which it is the sole party permitted to file a plan, and after the lapse of this “exclusivity period,” other parties in interest have the opportunity to present a competing plan.<sup>7</sup> In Subchapter V, however, only the debtor will be permitted to file a plan.<sup>8</sup>

### **ACCELERATED AND STREAMLINED PLAN PROCESS**

Subchapter V requires a small business debtor to file its Chapter 11 plan within 90 days of the petition date. This deadline can be extended by the court “if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.”<sup>9</sup>

The plan process is further streamlined in Subchapter V by eliminating the

---

<sup>3</sup> CARES Act, Pub. L. No. 116-136, § 1113 (2020).

<sup>4</sup> 11 U.S.C. § 101(51D).

<sup>5</sup> 11 U.S.C. §§ 1183–1184.

<sup>6</sup> 11 U.S.C. § 1102(a)(3).

<sup>7</sup> 11 U.S.C. § 1121.

<sup>8</sup> 11 U.S.C. § 1189(a).

<sup>9</sup> 11 U.S.C. § 1189(b).

need to file a disclosure statement separate from the plan.<sup>10</sup> In lieu of a disclosure statement, the plan itself must include:

- (1) A brief history of the business operations of the debtor;
- (2) A liquidation analysis; and
- (3) Projections with respect to the ability of the debtor to make payments under the proposed plan.<sup>11</sup>

Lastly, there is no need to obtain the acceptance of an impaired consenting class of creditors for the confirmation of a Subchapter V plan as there would be for other Chapter 11 plans.<sup>12</sup> Although creditors still vote on the plan, the plan may be approved by the court even if no class of creditors accepts. As described below, whether creditors vote for the plan will determine the timing of the company's discharge from debts.

### **MODIFICATION OF ABSOLUTE PRIORITY RULE ALLOWS OWNERS TO RETAIN INTERESTS**

Under the "absolute priority" and "new value" rules, equity holders in a Chapter 11 case are not typically permitted to retain their interests in the company unless either all creditors have been paid in full or the equity holders have provided new value in exchange for the retention of their interests.<sup>13</sup> These rules simply do not apply in a Subchapter V proceeding. As a result, the equity holders of the small business may retain their interests without providing new value even if creditors are not paid in full.<sup>14</sup> The plan need only be "fair and equitable" to holders of unsecured claims. This phrase as used in Subchapter V takes on a meaning more akin to Chapter 13 than Chapter 11: the plan must provide that all of the projected disposable income of the small business debt is applied to pay creditors through the plan for a period of three to five years.<sup>15</sup>

### **PAYMENT OF ADMINISTRATIVE EXPENSE CLAIMS MAY BE DEFERRED**

Usually, to confirm a Chapter 11 plan, the plan must provide for payment

---

<sup>10</sup> 11 U.S.C. §§ 1181(b), 1187(c).

<sup>11</sup> 11 U.S.C. § 1190(1).

<sup>12</sup> 11 U.S.C. § 1191(b).

<sup>13</sup> 11 U.S.C. § 1129(b)(2)(B)(ii).

<sup>14</sup> 11 U.S.C. § 1191(c).

<sup>15</sup> 11 U.S.C. § 1191(c)(2). "Disposable income" means income received by the debtor that is not reasonably necessary for (1) maintenance or support of the debtor or a dependent, (2) a domestic support obligation that first become payable post-petition, or (3) the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor. 11 U.S.C. § 1191(d).



in full of all administrative expense claims (i.e. post-petition expenses) on the effective date of the plan.<sup>16</sup> Under Subchapter V, on the other hand, administrative expenses can be paid over the life of the plan.<sup>17</sup> As a result, creditors doing post-petition business with a debtor may see their claims stretched out over a three to five-year period.

## **DISCHARGE**

The ultimate goal of any bankruptcy is discharge of debts and an order by the court that the debtor is no longer liable for debts. A small business debtor is entitled to a discharge of liability on its unpaid debts either (1) upon confirmation of the Subchapter V plan if each class of creditors votes to accept the plan, or (2) otherwise, as soon as practicable after the debtor has completed all of the payments under its plan.<sup>18</sup>

## **CONCLUSION**

With the above departures from typical Chapter 11 requirements and the expanded size eligibility from the CARES Act, Subchapter V provides small business debtors with a cheaper and quicker restructuring alternative.

---

<sup>16</sup> 11 U.S.C. § 1129(a)(9).

<sup>17</sup> 11 U.S.C. § 1191(e).

<sup>18</sup> 11 U.S.C. § 1191(a) and (b).