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The U.S. Small Business Bankruptcy Amendments: A Global Model for Reform?

Edward J. Janger

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The U.S. small business bankruptcy amendments: A global model for reform?

Prof. Edward J. Janger

Brooklyn Law School, New York, New York, USA

Correspondence
Edward J. Janger, Brooklyn Law School, New York, NY.
Email: edward.janger@brooklaw.edu

Abstract

On February 19, 2020, the Small Business Reorganization Act of 2019 went into effect in the United States. This statute was intended to make the rescue regime of Chapter 11 of the United States Bankruptcy Code more effective for smaller businesses that would not otherwise have the financial wherewithal to complete a traditional Chapter 11 reorganization. This article describes the central innovations of the new statute, and considers whether they might be adaptable by other countries.

1 | INTRODUCTION

International organizations such as the World Bank and UNCITRAL are currently hard at work crafting legislative templates to address the insolvency of "Micro, Small and Medium Sized Enterprises" (MSMEs). Such instruments, it is believed, have the potential to benefit national economies in three ways:

1 rehabilitating failed entrepreneurs;
2 rescuing viable businesses; and
3 improving financial recoveries to creditors.[1]

Corporate restructuring, as practiced in the United States, UK, and elsewhere, is tailored to the insolvency of firms worth hundreds of millions or even billions of U.S. Dollars. Corporate rescue regimes, such as U.S. Chapter 11 or the UK scheme of arrangement are simply too cumbersome and expensive to work for small to mid-size businesses. This is equally true in developed and developing economies. Small to mid-sized businesses make up the largest part of the economy worldwide. A rescue regime that works for smaller firms would certainly be a boon to the world economy. The recent global pandemic makes that need even more urgent.

Recently, the otherwise gridlocked U.S. Congress enacted the Small Business Reorganization Act of 2019 (the "SBRA") as Subchapter V of Chapter 11 of the U.S. Bankruptcy Code, aimed at facilitating the rescue of small businesses.[2] The new subchapter went into force on February 19, 2020. Recognizing the importance of these provisions in the wake of the COVID-19 related shutdowns, Congress further temporarily increased the debt limit for businesses eligible to use Subchapter V as part of the CARES Act.[3]

This article seeks to describe and evaluate these reforms, both on their own terms, and as a model for other jurisdictions. The answer is a mixed one. Within the U.S. context, the Amendments provide a salutary reform. Globally, this legislation provides a number of lessons, but to understand those lessons, and whether they are generalizable, it is essential to understand how the Amendments work within the U.S. bankruptcy regime, which already has:

1 a well-developed regime for discharging individual debtors;
2 a well-developed rescue regime for large businesses; and
3 existing rehabilitation chapters for individual wage earners and family farmers.[4]

This article will proceed in three steps. First it will describe the perceived shortcomings in Chapter 11 for small businesses. Then it will describe the solutions embodied in the Amendments, and the specific approach taken. Finally, it will explore whether the Amendments provide a template for other jurisdictions that might wish to facilitate small business rescue. In particular, it will highlight the importance of other legal and institutional features that are necessary for an effective rescue regime.

2 | CHAPTER 11 AND ITS SHORTCOMINGS: THE NBC AND ABI PROPOSALS

Chapter 11 has proven to be very effective for reorganizing or selling large businesses. It has, however, a number of features that make it problematic for reorganizing smaller firms. Chapter 11 envisions that a restructuring will be negotiated through a court-supervised process of disclosure,[5] negotiation, and voting.[6] The concept is that negotiation happens in the shadow of class voting and a possible cramdown plan that binds dissenters. The problem is that this process can be quite expensive. Negotiation is conducted with key creditors and a creditors' committee. Disclosure requires the preparation of a detailed disclosure statement, court approval of the information, voting and a hearing on confirmation. In small cases, the fees associated with the mandated process will simply eat through the value of the business.

This dissatisfaction with Chapter 11 as a forum for small business bankruptcies led two important NGOs—the National Bankruptcy Conference and the American Bankruptcy Institute—to make proposals for reform.[7] Both raised similar concerns about Chapter 11 but took somewhat different approaches. The ABI proposal can be described as "Chapter 11 Light," while the NBC proposal has been described as "Chapter 12 Heavy." The ABI envisioned a corporate debtor whose size made Chapter 11 impractical, but still a business of significant size and sophistication—a medium sized business. The NBC proposal envisioned truly small businesses, where the debtor was a sole proprietor or very small corporate debtor. The Amendments, by and large, track the NBC proposal, but draw features from both.

The two proposals agreed on the major broad points. They agreed about the need for greater simplicity and speed to reduce costs. They agreed that most small cases could not support a creditors' committee, and that the disclosure and voting process needed to be streamlined.[8] They also agreed that the absolute priority rule needed to be modified to allow an entrepreneur to redeem the business from the creditors as a going concern.

They differed on a number of important details, however:

- With regard to eligibility, the NBC set a liability cap of USD 7.5 million.[9] The ABI would have looked at both assets and liabilities and would have set a USD 10 million cap on either assets and liabilities, and would have permitted small business treatment in appropriate cases up to USD 50 million.[10] The legislation initially adopted a much smaller eligibility cap of just over USD 2.7 million, though, as noted above, it has been temporarily increased to USD 7.5 million in the wake of the COVID pandemic.[11]
- The NBC proposal envisioned that the debtor would remain in possession, but the case would be assisted and supervised by, and payments would be managed by a trustee,[12] while the ABI proposal would have generally left the debtor-in-possession, it left open the possibility of appointment of an "estate neutral."[13] The final legislation followed the NBC recommendation.[14]
- A major difference between the two proposals turned on voting. Both proposals contemplated that a plan could be approved through class voting. However, the NBC proposal would have changed the voting rule such that a failure to vote would be deemed an acceptance.[15] Here, the legislation left the voting rules unchanged.
- Finally, both proposed modifications to the cramdown rules. First, they eliminated the requirement that the plan be supported by an impaired accepting class, and second, they modified the so-called "absolute priority rule." This will be discussed in more detail below, but in both cases, the debtor would be able to redeem the business from creditors, without a vote, by paying substantially all of the surplus cash flow to creditors over a period of three to 5 years.[16] The Amendments ultimately followed the NBC's version of equity retention rather than that of the Commission Report.[17]

The areas of agreement were greater than the areas of disagreement, and the Amendments, while principally based on the NBC proposal, retain elements of both.

3 | A NEW (OLD) APPROACH

The intuition behind the Amendments, and in particular the NBC proposal, derive from the fact that the United States. Bankruptcy Code already contains two chapters that, together, form the model for a simplified rescue regime. Chapter 13 provides a mechanism for rehabilitating individuals with regular income who wish to keep their non-exempt assets, and instead pay their creditors through a repayment plan, funded by their wages. Chapter 12 allows family farmers to redeem the farm from their creditors by paying creditors over time, with the income from the farm. Both chapters are oriented toward rehabilitation. Wage earners submit to a repayment plan under which they commit to pay their disposable income for a period of 3–5 years and are allowed to redeem their nonexempt assets—usually home equity.[18] Farmers redeem the farm. While Chapter 13 is only available to individual debtors it can be used by sole proprietors who meet the debt limits to retain business assets as well.[19]

The key difference between Chapter 11 and Chapters 12 and 13, is that Chapter 11 is organized around obtaining consent through a structured process of negotiation and voting. That negotiation is conducted against the backdrop of either liquidation or nonconsensual confirmation, but the goal is to gain the required majorities. Under Chapters 12 and 13, voting is not required (or even permitted). Plans are confirmed based on statutory entitlements instead.

3.1 | The Chapter 12/13 entitlement template

The principal prerequisites to confirming both a Chapter 12 and Chapter 13 plan are:

1 unsecured creditors must receive at least as much under the plan as they would in a liquidation[20];
2 secured creditors retain their liens and must receive payments with a present value equal to the value of their collateral at the time the plan becomes effective[21]; and
3 the debtor must pay substantially all of their "disposable" income to creditors for a period of 3–5 years.[22]

The Small Business Amendments seek to translate this framework to small businesses as a rehabilitation model. However, rather than creating their own chapter for small business debtor, the Small Business Amendments create a new Subchapter V of Chapter 11 that subtracts parts from Chapter 11. The three key changes relate to simplified governance, simplified disclosure, and simplified confirmation.

3.1.1 | Governance

When large companies are in play, governance is a complicated proposition. The debtor remains in possession, but a complicated architecture remains in place to supervise, consisting of the court, a creditors' committee as well as requiring notice to creditors and an opportunity to object to major decisions. With smaller cases this architecture is not feasible, both because of cost and creditor passivity. For smaller debtors, there is no need for a committee because there may be a manageable number of creditors. The bigger issue may be that the creditors are simply not involved in the case, so cannot be relied on to monitor.

On the other hand, displacing management with a trustee or other fiduciary may not be desirable, because of both the expense, and the fact that in many cases the business and the entrepreneur may be difficult to separate. Accordingly, for small business cases, no creditors' committee is contemplated.[23] Instead, the debtor remains in possession, and, like Chapter 12, the SBRA permits supervision by either a standing trustee, or a case trustee to serve alongside the debtor-in-possession.[24]

The trustee model being followed under the SBRA is somewhat novel in the United States but would be more familiar in other countries that do not recognize a debtor-in-possession. The Office of the United States Trustee has chosen to move in the direction of "case" trustees and has qualified 250 trustees to serve in this role.[25] It is contemplated that these trustees would not necessarily displace incumbent management, but would instead assist management in determining the best course for the business, assist in negotiations with the creditors, and provide information to the court.

3.1.2 | Disclosure

Again, for large cases, and particularly public companies, where voting is contemplated, disclosure can be a cumbersome and complicated process requiring a prospectus-like disclosure statement subject to approval by the court. In smaller cases, disclosure is necessary for purposes of transparency, but there simply may not be that much to disclose. Also, voting may not be an issue. In many cases, there need only be enough information so that the creditor can decide whether to object. Accordingly, in a small business case, the debtor need only provide the following information[26]:

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 of reorganization.

Beyond this, the ordinary disclosure requirements of section 1125 do not apply unless the court orders otherwise.[27]

3.1.3 | Confirmation

Finally, the plan can be confirmed if the relevant classes accept, by sufficient majorities.[28] If a class rejects the plan, however, the Amendments make a significant departure from Chapter 11. SBRA significantly alters the so-called cramdown standard -- the standard by which a plan can be confirmed over the objection of a creditor or class of creditors.

First, unlike in Chapter 11, there is no requirement that an impaired class accept the plan. Crucially, this means that no voting is required for a plan to be approved. Second, the usual requirement for secured creditor cramdown applies—the secured creditor is entitled to retain its liens and receive payments over time with the present value equal to the value of the collateral.[29]Also, SBRA makes it possible to modify a residential mortgage where the proceeds of the mortgage were used to fund the business.[30] Third, the Amendments modify the requirement tha the plan be "fair and equitable" -- the so-called absolute priority rule.

This recodification of the “fair and equitable” standard is perhaps the most important provision of the Amendments. Section 1191(c) provides that a plan will be viewed as “fair and equitable” if[31]:

1 the plan provides that all 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 that the first payment is due under the plan will be applied to make payments under the plan; or
2 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 as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

This provision statutorily reverses a famous U.S. Supreme Court case, *Norwest Bank Worthington v. Ahlers*,[32] which stated that the “absolute priority rule” barred confirmation of a plan where the old owners' sought to redeem the company through a contribution of "sweat equity." The SBRA specifically validates this approach. If the debtor (for an individual) or the shareholders (for a corporation) submit all of the free income of the business to the creditors for 3–5 years, at the end of that period, the individual will receive a discharge and/or the shareholders will again own the business, whether or not the creditors agree. This provides a path to rehabilitation and business rescue that can be achieved without a complicated process of bargaining and voting.

3.2 | Evaluation of the small business amendments

From the U.S. perspective, the Small Business Amendments represent a promising approach to reorganizing small and medium sized businesses. Three aspects bear additional discussion:

1 the uncertain future of the eligibility threshold;
2 the ability to confirm a plan without a vote; and
3 modification of the absolute priority rule.

3.2.1 | The eligibility threshold

As noted above, the NBC recommended an eligibility threshold of USD 7.5 Million, while the ABI recommended an eligibility threshold of USD 10 million (and up to USD 50 million with court approval). When enacted, the Amendments defined a small business as a business with less than USD 2.7 million in debts. This was criticized as far too low, precluding use of the streamlined process by a large portion of the debtors who would benefit from it. About 87% of the filed Chapter 11 cases are under USD 10 million,[33] while only about 40% fall within the Amendments' eligibility criteria.[34] In other words, the eligibility criteria for the statute exclude about half of the cases that might benefit from small business treatment.

This shortcoming was partially and temporarily corrected in the wake of the Coronavirus pandemic. Section 1113 of the CARES Act, enacted in early 2020, temporarily increases the eligibility threshold to include cases where the debtor has debts that do not exceed USD 7.5 million.[35] This threshold would capture 56.7% of the current Chapter 11 docket,[36] though that is likely to increase as more small debtors take advantage of the new subchapter.

3.2.2 | No-vote confirmation

While the SBRA contemplates that many, if not most plans will be confirmed through a vote, and acceptance of the plan by the requisite statutory majorities, it provides a second route to confirmation—cramdown. A traditional Chapter 11 allows confirmation of a plan over the objection of a class of creditors, but only if at least one impaired class of creditors accepts. Even in large Chapter 11 cases, this requirement has provenproblematic. Many debtors have sought to confirm plans by gerrymandering—manipulating the requirements for classification and impairment to satisfy the requirement, leading to costly fights over classification.[37]

In small cases, the requirement of an impaired accepting class is problematic for a number of additional reasons. First, small businesses may have relatively few creditors, and, in particular a dominant lender, along with diffuse trade creditors. This may give a practical veto to the dominant lender. Second, small cases are characterized by creditor passivity. The case may not be large enough to cause, even the principal financial creditor to invest sufficient time to negotiate a restructuring. So, third, the vote may create an expensive and perhaps insuperable obstacle to reorganization.

The solution in the SBRA is to eliminate the requirement of an impaired accepting class. Instead, Subchapter V follows the model used for individual wage earners (Chapter 13) and family farmers (Chapter 12). It allows confirmation of a plan based on statutory entitlements rather than a vote. This approach is discussed below.

3.2.3 | "Fair and equitable" treatment of secured and unsecured creditors

As noted above, another important innovation of the SBRA is its reinterpretation of the "fair and equitable" standard for cramdown. It does this by providing entitlement baseline to:

1 form the basis for negotiations; and
2 provide an off the shelf route to rescue, even where negotiations fail.[38]

Secured creditors

As an initial matter, it should be noted that the SBRA does not alter the entitlement baseline available to secured creditors. The cramdown standard for secured creditors is the same as that used under "regular" Chapter 11. The secured creditor is entitled to the "value of its collateral" on the effective date of the plan, but no more. Specifically, the creditor can insist that it be allowed to retain liens, stripped down to the value of the collateral, to secure payments with a present value also equal to the value of the collateral.

Sweat equity and the absolute priority rule

The "magic" of the SBRA lies in its reinterpretation of the so-called "absolute priority rule" for treatment of unsecured creditors. "Absolute priority" is colloquially understood to mean that, unless creditors are paid in full, equity is "wiped out." Specifically, section 1129(b)(2)(B)(ii) provides that a plan is not "fair and equitable" unless:

> [T]he 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...[39]

The owners may not retain any "property" on "account of" their prior ownership interest.

There has, however, always been an exception to this rule. Old equity can buy back in for a fair price. This "exception," (really a corollary) has its roots in a pre-Code case, *Case v. Los Angeles Lumber.*[40] Since 1939, it has been understood that the old owners of an insolvent firm may repurchase the equity of the reorganized (recapitalized) firm by making a "new value" contribution of "money or money's worth." This "new value corollary" to the "absolute priority rule" has been subject to much controversy. Two U.S. Supreme Court decisions have set its parameters in modern Chapter 11. First, in *Norwest Bank v. Ahlers,*[41] the Supreme Court declared that (in the context of a family farm) "sweat equity" did not constitute "money or money's worth", and therefore could not be counted as part of the new value contribution by the old owners. Second, in *Bank of America v. 203N. LaSalle Street Partnership*, the Supreme Court held that the debtor had to expose the equity of the reorganized firm to the market in order to ensure that the "new value" being contributed was a fair value for purchasing an interest in the firm.[42]

Hemmed in by current Chapter 11 case law, the new value corollary was not, as a practical matter, available to small businesses. The combination of creditor passivity (described above), the shortage of cash, and the inability to prove valuation, meant that for small businesses, old equity participation was simply not an option. Since, for many small businesses, the entrepreneur "is" the business, the absolute priority rule spelled the death knell for efforts to reorganize.

Thus, a workable small business rescue regime needed to find a way to permit participation by the entrepreneur, while treating creditors fairly. The key innovation of the SBRA was twofold: it overruled *Ahlers*, allowing "sweat equity" to count as "money's worth", and provides a safe harbor valuation—three to 5 years of disposable income (EBITDA).[43] Specifically, section 1191(c) of the SBRA allows an entrepreneur to redeem the business from creditors by paying any surplus income to creditors for 3–5 years without a creditor vote.[44]

While many commenters on the Amendments have characterized these confirmation provisions as an abrogation of the so-called absolute priority rule, this is a mischaracterization. It is merely an adaptation of the rule to the realities of small business rescue.

Examples for individuals and small corporates

To illustrate how the SBRA approach might work, two examples might be useful, first for sole proprietors, and second for small corporates.

- For individuals, imagine a pizza shop, operated by an entrepreneur and her family. The business is sound, but due to a failed attempt to expand to a second location, the shop has more debt than it can handle. The entrepreneur owns the building but has a mortgage which is undersecured. The pizza ovens and fixtures are also encumbered by the mortgage lender. Trade creditors are current. Under section 1191, the entrepreneur could satisfy the liens on the encumbered assets by paying their current value over time. The deficiency would be addressed by paying the operating profit ("disposable income") of the business, minus a reasonable salary for the owner.[45]
- If the pizza shop was incorporated, the analysis would be similar, except the "disposable income" would be calculated by deducting "the ...expenditures necessary for the continuation, preservation, or operation of the business of the debtor."[46] This too would include a reasonable salary for the debtor.

In both cases, the debtor's "sweat equity" would be used to repurchase the business from its creditors.

This revision of the cramdown standard is perhaps the most practically useful of the SBRA's innovations. Where continuation of the business is the goal, the availability of an "off the shelf" mandatory threshold for proceeding without creditor consent is a significant remedy to this problem.

4 | THE SMALL BUSINESS CHAPTER 11 AS A TEMPLATE

The SBRA appears to offer a useful template to rehabilitate small businesses in financial distress. Hopefully, for many countries it will be. However, Subchapter V exists against the backdrop of Chapter 11 itself. There are additional pieces of the legal and institutional framework that must exist for a complete and workable small business rescue regime. As the present author has noted elsewhere,[47] Chapter 11 in the U.S. contains a large number of provisions that facilitate the continuation of the business enterprise. For a workable template, these features must also be adapted to the small business environment.

4.1 | Continuing business operations

To paint with broad strokes, to save the business from the onslaught of creditors, Chapter 11 has the following distinctive features:

1. a broad stay (that covers secured creditors);
2. leaving incumbent management in place (the "debtor-in-possession");
3. the power to operate the business in the ordinary course;
4. the power to incur debt in the ordinary course, and to arrange debtor-in-possession financing; and
5. the power to assume or reject executory contracts.

Each of these, in its own way, is designed to help separate the mechanics of continuing the business from the process of allocating the business's value through negotiation (in a consensual Chapter 11), or through legal entitlement in cramdown.

4.1.1 | The broad automatic stay

While every bankruptcy system contains some form of a moratorium on debt collection, they differ in scope and the preconditions for their availability. The U.S. stay is both immediate and broad.[48] First, Section 362 of the Code provides for a stay that goes into effect automatically upon filing of the bankruptcy petition. Second, the stay does not merely stay unsecured creditors. It also stays secured creditors who might seek to reclaim and foreclose on their collateral and stays set-off by banks and other creditors. Section 365(e), discussed below, also overrides any contractual provisions that would allow for termination upon bankruptcy ("ipso facto clauses").

4.1.2 | The debtor-in-possession

Perhaps the most unique feature of Chapter 11 is the fact that the filing does not occasion the appointment of an estate fiduciary. Incumbent management continues to operate the debtor.[49] The debtor-in-possession does not go unsupervised. Its authority to act without court approval is limited to activities in the "ordinary course".[50] The debtor-in-possession has the power to continue to operate the business but must give notice to the creditors and an opportunity to object to any extraordinary actions. While the standard for approval is one of "business judgment," that approval must be obtained before acting, and creditors will have an opportunity to weigh in, either on their own or through the Creditors' Committee.[51]

As noted above, the Amendments contemplate a debtor-in-possession with a standing or case trustee assisting only in administering the payments under the plan. Both of these concepts may be foreign or novel in many jurisdictions.

4.1.3 | Power to assume or reject executory contracts

One of the most powerful tools available in Chapter 11 is the power to assume or reject executory contracts. Section 365 of the Bankruptcy Code gives the debtor the ability to choose among its various contractual relationships. Where the contract is, on balance, valuable, the debtor may choose to assume it and perform. If the contract is likely to be a burden on the estate, the debtor-in-possession can elect to breach the contract and reject it. If the debtor elects to perform, it must cure all defaults. If it elects to reject, any claims for breach of contract are treated as unsecured prepetition claims. Without the ability to continue to perform its prepetition contracts, rescue would be impossible.

4.1.4 | The power to pay critical vendors

Early in a case, while the debtor struggles to continue operations, trade creditors with leverage may insist on payment of any outstanding debt as condition of continuing to trade. While no particular statutory provision authorizes this and courts are divided, many courts have allowed debtors to pay the trade under the so-called "doctrine of necessity," using the bankruptcy court's general equity power pursuan to Section 105 of the Code. More recently, in the *K-Mart* case, the Seventh Circuit rejected this rationale, but suggested that payments to critical vendors might be permitted, where absolutely, necessary, pursuant to the debtor's power to operate the business under Section 363 of the Code.[52]

4.1.5 | Debtor-in-possession financing

Continuing the business also requires the availability to obtain credit. Section 363 gives the debtor the power to "incur debt" in the ordinary course of business without court approval.[53] Further, subject to court approval, the debtor may also incur new post-petition working capital by negotiating so-called "Debtor-in-Possession Financing."[54]

4.2 | Judicial or other institutional oversight

The features described above, as well as the power to judicially impose a repayment plan, require the existence of legal institutions with the flexibility to administer and supervise the case, to make the findings with regard to disputed claims to entitlement, as well as to enforce both the stay and the discharge. Some jurisdictions may have an existing legal framework that can be adapted to administer a small business rescue regime, while others may not.

Indeed, a focus on small business rescue may be putting the cart before the horse. The first question to ask may be whether the legal system has in place a working rescue regime that can be adapted to small businesses. Where that is the case, the Amendments provide an excellent template for the modifications necessary to accommodate smaller businesses. Where no such legal infrastructure exists, it may be necessary to start there.

In this regard, it bears mentioning that the UNCITRAL Legislative Guide offers a more complete guide to a rescue regime and Working Group V of UNCITRAL is currently working on a supplement to the Legislative Guide that will address small business bankruptcies within that context. Hopefully, it will incorporate the innovations described here, in the broader context of its recommended rescue regime.

5 | CONCLUSION

As this article was going to press, the COVID-19 pandemic imposed considerable hardship on small businesses in the United States, Europe and elsewhere. It is hoped that the streamlined process and flexibility will play an important role in allowing small businesses in the US and the larger economy to recover. In some ways, it seems to be particularly well timed. To the extent that the shutdown of COVID-19 has saddled otherwise sound businesses with unmanageable debt overhang, the SBRA provides a mechanism for addressing that debt. However, there are a few problems that are likely to remain. First, one of the goals of the SBRA was to move the cases through quickly and cheaply. To that end, it requires the debtor to file a plan within 90 days (unless extended by the Court). In many countries, shutdown orders and social distancing regulations have already stretched beyond 90 days, and the businesses may not yet be in a position to reopen or return to profitability. In short, more time, rather than less may be necessary. Second, interest on secured debt and rent accrued during the shutdown may not be dischargeable under current rules. Oversecured creditors are entitled to interest on their claim[55] and a tenant who wishes to assume a lease must cure any defaults. Without a mechanism for addressing this debt overhang, small businesses may find themselves with unsustainable debtloads, just as they are trying to emerge. The drafters of the SBRA cannot be faulted for not considering the possibility of a pandemic, and as such, these problems may need to be solved with additional crisis specific legislation.

In sum, the Small Business Bankruptcy Amendments, adopted this year in the United States, are a salutary modification to the existing U.S. rescue regime. They hold the promise of making bankruptcy work better for smaller businesses. However, whether the Amendments will serve as a useful template for reform outside the United States will turn on whether that country has created, more generally, the legal and institutional mechanisms for administering a rescue regime.

ENDNOTES

[1]The World Bank Insolvency and Creditor Debtor Regimes Task Force has been addressing the issue of small business bankruptcy for several years. See World Bank Group Insolvency and Creditor/Debtor Regimes Task Force, *Report on the Treatment of MSME Insolvency* (May 2018), available at: <http://documents.worldbank.org/curated/en/973331494264489956/pdf/114823-REVISED-PUBLIC-MSME-Insolvency-report-low-res-final.pdf>. UNCITRAL is currently preparing an addition to its Legislative Guide on Insolvency to address small business bankruptcies. See United Nations Commission on International Trade Law Working Group V, Working Paper

168: Draft Text on a Simplified Insolvency Regime (September 25, 2019), available at: <https://undocs.org/en/A/CN.9/WG.V/WP.168>.

[2]HR 3311, The Small Business Bankruptcy Act of 2019, available at: <https://www.congress.gov/bill/116th-congress/house-bill/3311/text>.

[3]P.L. 116-136 §1113, H.R. 748 § 1113 (2020), amended 11 USC § 101(51D) to increase the eligibility threshold from USD 2.7 million to USD 7.5 million for one year.

[4]11 USC 700 *et. seq.* (liquidation); 11 USC 1100 et seq. (reorganization); 11 USC 1300 *et seq.* (wage earners); and 11 USC 1200 *et seq.* (family farmers).

[5]11 USC 1125.

[6]11 USC 1126.

[7]The National Bankruptcy Conference Proposal, and a comparison with the ABI proposal can be found at: <https://drive.google.com/file/d/1KGsW5xjaI8If-DLSdl9GNbQ07bwL2B24/view> ("NBC Report"). The American Bankruptcy Institute Commission Report on the Reform of Chapter 11 proposal for small and medium businesses can be found here: <https://abiworld.app.box.com/s/uzc6yo7dr8lt1g2m4uxs> ("ABI Commission Report").

[8]NBC Report, 12; ABI Commission Report, 280.

[9]NBC Report, 12.

[10]ABI Commission Report, 288.

[11]11 USC 101(51d) (adjusted for inflation), and temporarily amended pursuant to the CARES Act of 2020, 116-136 §1113, H.R. 748 § 1113 (2020).

[12]NBC Report, 12.

[13]ABI Commission Report, 291.

[14]11 USC 1183.

[15]NBC Report, 5.

[16]NBC Report, 6; ABI Commission Report, 296–98.

[17]11 USC 1191(c).

[18]They also must submit substantially all of their disposable income to payment of creditors for 3–5 years.

[19]Robert Lawless and Elizabeth Warren, "The Myth of the Disappearing Business Bankruptcy" (2005) 93 California Law Review 743, 772–73, available at SSRN: <https://ssrn.com/abstract=1262362> (some Chapter 13 debtors show "self-employment" as the source of their income).

[20]11 USC 1225(a)(4), 1325(a)(4).

[21]11 USC 1225(a)(5), 1325(a)(5).

[22]11 USC 1225(b)(1), 1325(b)(1).

[23]11 USC 1181(b).

[24]11 USC 1183.

[25]The Office of the US Trustee's website currently states: "As part of the USTP's intensive preparation to implement the SBRA, U.S. Trustees conducted a nationwide search for qualified candidates to serve as subchapter V trustees, ultimately selecting about 250 candidates from more than 3,000 applications. These trustees offer a diverse set of business, accounting, turn-around management, and legal skills. In addition, the USTP developed a comprehensive manual and handbook to guide staff and subchapter V trustees in carrying out their new SBRA responsibilities; provided extensive training to staff, subchapter V trustees, bankruptcy professionals, and others interested in the new law; and coordinated with the bankruptcy courts on administrative issues to ensure a successful implementation." A copy is available at: <https://www.justice.gov/opa/pr/us-trustee-program-ready-implement-small-business-reorganization-act-2019>.

[26]11 USC 1190.

[27]11 USC 1181(b), 1187(c).

[28]11 USC 1191(a).

[29]11 USC 1129(b)(2)(A).

[30]11 USC 1190(3).

[31]11 USC 1191(b).

[32]108 S. Ct. 963 (1988).

[33]ABI Commission Report, 287.

[34]See: <https://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html>.

[35]Above Note 3.

[36]See: <https://www.creditslips.org/creditslips/2020/03/the-small-business-reorganization-act-of-2019-and-covid-19.html>; the estimate for cases covered stems from private correspondence with Robert Lawless, who has been collecting the statistics.

[37]Compare *Matter of Windsor on the River Associates, Ltd.*, 7 F.3d 127 (8th Cir. 1993) with *Western Real Estate Equities, LLC v. Village at Camp Bowie I, LP* (In re *Village at Camp Bowie I, LP*), 2013 BL 50530 (5th Cir. Feb. 26, 2013) and *L & J Anaheim Assocs. v. Kawasaki Leasing Intl., Inc.* (*In re L & J Anaheim Assocs.*), 995 F.2d 940 (9th Cir. 1993). See also *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture* (*In re Greystone III Joint Venture*), 995 F.2d 1274 (5th Cir. 1991); *Travellers Ins. Co. v. Bryson Props., XVIII* (*In re Bryson Props., XVIII*), 961 F.2d 496 (4th Cir. 1992).

[38]In so doing, it is important to note that the SBRA is not writing on a clean slate, but instead offering small businesses the same treatment that is available to individual wage earners under Chapter 13 (11 USC 1125(d)), and to farmers and fishermen under Chapter 12 (11 USC 1225(b)).

[39]11 USC 1129 (b)(2)(B)(ii).

[40]308 U.S. 106 (1939).

[41]*Norwest Bank Worthington v. Ahlers*, 108 S. Ct. 963 (1988).

[42]*Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*, 526 US 434 (1999).

[43]11 USC 1191(c).

[44]11 USC 1191(b).

[45]11 USC 1191(c)(2)(A) defines "disposable income" as income necessary for the "maintenance or support" of the debtor and his or her "dependents".

[46]11 USC 1191(c)(2)(B).

[47]Edward Janger, "The Idea of Rescue," in Jennifer Gant and Paul Omar (eds), *Corporate Restructuring and Insolvency Handbook* (Elgar, 2020) (forthcoming), where these attributes are developed in greater detail and with more generality.

[48]11 USC 362.

[49]11 USC 1107.

[50]11 USC 363(c), 364(b).

[51]*Medical Malpractice Insurance Association v. Hirsh* (*In re Lavigne)*, 183 B.R. 65 (Bankr. SDNY 1995).

[52]*In re Kmart*, 359 F3d 866 (7th Cir 2004).

[53]11 USC 364(b).

[54]11 USC 364(c), (d).

[55]11 USC 506(b).

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