

**XVI. *The Small Business Reorganization Act of 2019:  
A Bipartisan Effort to Correct the Balance of the  
Bankruptcy Code***

**A. Introduction**

Enacted in 1978, Title 11 of the United States Code (Bankruptcy Code) provides many different avenues for resolving outstanding debts both for individuals and businesses that are struggling financially or facing insolvency.<sup>1</sup> The avenue most favorable for a company entering bankruptcy with the goal of remaining in operation is to file under Chapter 11 of the Bankruptcy Code.<sup>2</sup> Chapter 11 of the Bankruptcy Code (Chapter 11) was intended to provide a “breathing spell” for a debtor company to rehabilitate its affairs and create a plan to continue operations while fulfilling their obligations to creditors.<sup>3</sup> Chapter 11 provides mechanisms for companies in financial distress to reorganize their financial affairs so that they may remain in operation, continuing to employ, produce, pay creditors, and garner returns for their shareholders.<sup>4</sup> Simply stated, in order to file under Chapter 11, a debtor must file a petition with the bankruptcy court in the jurisdiction where it is domiciled and must include company or personal information, a plan of reorganization, and a request or relief under Chapter 11, as well as pay all required fees.<sup>5</sup> Chapter 11 is intended to provide substantial benefits to debtor companies that choose to reorganize; however, such benefits are only attainable if the debtor companies actually file under Chapter 11 in the first place.<sup>6</sup> Recent years have

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<sup>1</sup> 11 U.S.C. § 1015 et seq.

<sup>2</sup> *Chapter 11 – Bankruptcy Basics*, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [<https://perma.cc/9RHG-8FYU>] (last visited Oct. 27, 2019) (“A chapter 11 debtor usually proposes a plan of reorganization to keep its business alive and pay creditors over time.”).

<sup>3</sup> H.R. Rep. No. 95-595, at 340 (1978) (“The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws . . . It stops all collection efforts . . . It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.”).

<sup>4</sup> *Id.* at 220.

<sup>5</sup> *Chapter 11 – Bankruptcy Basics*, *supra* note 2 (explaining the procedure of filing in bankruptcy court).

<sup>6</sup> AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11 6 (2014).

shown a trend in Chapter 11 filings: fewer and fewer financially distressed companies are attempting to reorganize under Chapter 11.<sup>7</sup> This trend has more serious implications for small businesses, as they are more likely than large companies to feel the effects of financial distress and the least equipped to withstand economic downturns.<sup>8</sup> Realizing the difficulty that small businesses may face in reorganization in comparison to large companies, Chapter 11 considers the existence of the “small business debtor;”<sup>9</sup> however, even these special considerations have been insufficient to incentivize small business to file.<sup>10</sup>

This article will first explore key contributing factors to the decline of small business Chapter 11 filings, the continued hurdles faced by small businesses in achieving a successful Chapter 11 reorganization, and will introduce the newly enacted bankruptcy legislation aimed at remedying these issues. The second section will explore key changes introduced to the Bankruptcy Code in the Small Business Reorganization Act of 2019 and how these changes can be expected to benefit small business debtors. The final section will address some continuing concerns for small business reorganizations and will discuss whether the newly enacted legislation will place small businesses in a stronger position to survive a future economic downturn than small business were in during the last economic downturn.

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<sup>7</sup> See *id.* at 12 (stating that more distressed companies are choosing to liquidate or, instead, just “closing their doors” with no attempt of rehabilitation); see also Judiciary News, *Bankruptcy Filings Continue to Decline*, UNITED STATES COURTS, <https://www.uscourts.gov/news/2019/04/22/bankruptcy-filings-continue-decline> [<https://perma.cc/NR5S-EEEZ>] (Apr. 22, 2019).

<sup>8</sup> Practical Law Bankruptcy & Restructuring, *Small Business Chapter 11 Case: Overview*, WESTLAW (2019) (“Small businesses generally avoid filing a Chapter 11 bankruptcy case because they can be expensive, risky, time-consuming, and complex.”).

<sup>9</sup> 11 U.S.C. § 101(51D).

<sup>10</sup> See generally Ian Mount, *Adviser to Businesses Laments Changes to Bankruptcy Law*, N.Y. TIMES (Feb. 29, 2012) (“Today, if [small businesses] have to go into Chapter 11, the odds of the owner keeping the business are much lower. So there’s no incentive for the owners to enter Chapter 11 and reorganize”).

## **B. Key Contributing Factors to Decline of Small Business Chapter 11 Filings**

As mentioned above, the aid of Chapter 11 can only be conferred on a small business that takes action to petition for aid from the bankruptcy court.<sup>11</sup> The decline in Chapter 11 filings by small businesses can be attributed to various factors; however, this article contends that there are two significant events from the past two decades that are likely to have had a clear negative impact on the number of Chapter 11 filings: the Bankruptcy Abuse and Consumer Protection Act of 2005<sup>12</sup> and the Financial Crisis of 2008.

### *1. The Bankruptcy Abuse and Consumer Protection Act of 2005*

In response to the abuse of bankruptcy proceedings, Congress passed the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA).<sup>13</sup> BAPCPA sought to remedy the “lack of personal financial responsibility, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse of the system.”<sup>14</sup> BAPCPA implemented a multitude of deadlines, time frames, and mechanisms to ensure proper compliance and to “weed out” the small business debtors who are not likely to be able to organize successfully, based on the theory that those are the most likely to file bankruptcy for improper reasons.<sup>15</sup> However, in endeavoring to crack down on improper debtor use of the bankruptcy system, BAPCPA threw off the delicate balance that the Bankruptcy Code, and all of its revisions, attempted to strike: the balance between protection of creditor recovery rights and of debtor rehabilitation attempts.<sup>16</sup> In providing stricter regulations and tighter hoops through which a debtor needed to jump through, BAPCPA eliminated the possibility for many debtors to have “a fair

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<sup>11</sup> See COMMISSION TO STUDY THE REFORM OF CHAPTER 11 *supra* note 4, at 12 (explaining that the Chapter 11 process is too expensive for small businesses and many small businesses wait too long to file or simply forego filing altogether).

<sup>12</sup> 119 Stat. 23–217 (codifying the Bankruptcy Abuse and Consumer Protection Act).

<sup>13</sup> H.R. Rep. No. 109-31, at 2 (2005) (codifying BAPCPA).

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 19.

<sup>16</sup> *Id.* at 11.

opportunity to reorganize in Chapter 11.”<sup>17</sup> The American Bankruptcy Institute (ABI) conducted a three-year study, lasting from 2012 to the end of 2014, and found that, generally, Chapter 11 is no longer a viable option for many small business debtors.<sup>18</sup> This is, in part, because “the deadlines imposed by the BAPCPA amendments were particularly challenging and counterproductive for small business debtors.”<sup>19</sup> After the passage of BAPCPA provided more power to unsecured creditors and made the Chapter 11 process more expensive and time consuming, many financially distressed small businesses chose to liquidate their assets or to sell off their property in a 363 sale<sup>20</sup> to satisfy their debts, instead of filing for relief.<sup>21</sup>

The passage of BAPCPA shifted the Bankruptcy Code’s balance toward creditor protection with the addition of a number of provisions which had a negative impact on successful restructuring of small business debtors under Chapter 11.<sup>22</sup> For example, BAPCPA mandated shorter exclusivity periods in which the small business debtor could file a plan of reorganization without interference by creditors.<sup>23</sup> BAPCPA also prohibited “incentive bonuses,” which were used by business debtors to keep key employees with the distressed company after filing.<sup>24</sup> Finally, and notably, BAPCPA granted additional rights to creditor committees, including a right of action against the debtor by suppliers who had sold the debtor goods within a short time frame prior to the debtor’s bankruptcy filing.<sup>25</sup> In conclusion, the balance-shifting provisions of BAPCPA clearly contributed to the sharp decrease in Chapter 11 filings.<sup>26</sup>

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<sup>17</sup> *Id.* at 281.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 11 U.S.C.A. § 363 (West 2019) (codifying a “363” sale).

<sup>21</sup> See Mount *supra* note 7 (explaining that while 363 sales can be lucrative, ultimately the original owners lose control, the company goes under, and employees lose their jobs).

<sup>22</sup> Elizabeth M. Bohn, *Faster, but Not Cheaper*, 17 AMER. BAR ASS’N: BUS. L. SEC. 1 (2007) (discussing various negative impacts that BAPCPA had on restructuring small businesses).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (stating that, as a result of the BAPCPA additions to the Bankruptcy Code, business reorganizations were down 50% in 2006, the year following BAPCPA’s enactment, and there was an increase in restructuring outside of Bankruptcy).

## 2. *The Financial Crisis of 2008*

For the reasons discussed above, the negative impact of BAPCPA alone would have been sufficient to create extreme difficulties for a small business attempting to restructure. However, the impact of BAPCPA was subsequently complemented by the Financial Crisis of 2008, dubbed the “Great Recession.”<sup>27</sup> Along with some of the nation’s largest and well-known companies, such as Lehman Brothers, General Motors, and Washington Mutual, the Great Recession claimed countless small businesses.<sup>28</sup> Over the course of the Great Recession, small businesses suffered first and most severely, with 74% of small businesses filing for bankruptcy.<sup>29</sup> The massively detrimental impact of the Financial Crisis on the economy in general combined with the debtor-unfriendly provisions of BAPCPA created an extremely poor environment for successful Chapter 11 filings for small businesses because small businesses lacked the financial resources, large capital assets, and the security which inspires bank loans.<sup>30</sup> These small business specific difficulties combined with the typical features of recession—lack of demand, decreases in revenue and profit, and employee lay-offs—resulted in the shockingly high quantity of small business failures.<sup>31</sup>

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<sup>27</sup> Robert Rich, *The Great Recession*, FED. RES. HIST. (Nov. 22, 2013), [https://www.federalreservehistory.org/essays/great\\_recession\\_of\\_200709](https://www.federalreservehistory.org/essays/great_recession_of_200709) [https://perma.cc/L7JH-GP4F] (describing the recession as the longest economic downturn since World War II).

<sup>28</sup> *The Great Recession’s 25 Biggest Bankruptcies*, FORBES, <https://www.forbes.com/pictures/eddk45ihkf/the-great-recessions-25-biggest-bankruptcies/#5f5771352b46> [https://perma.cc/RP6R-4VWC] (last visited Oct. 27, 2019); see also Brian Moran, *I Lost My Business in the Great Recession, but at least I Learned How to Prepare for the Next One*, CNBC: SMALL BUSINESS PLAYBOOK (Oct. 20, 2019), <https://www.cnbc.com/2019/10/20/i-lost-my-business-in-great-recession-im-prepared-for-next-one.html> [https://perma.cc/H2AK-MBG3].

<sup>29</sup> *Id.* (stating that more than one million small business bankruptcy cases were filed in federal court in 2009).

<sup>30</sup> Marc Davis, *The Impact of Recessions on Businesses*, INVESTOPEDIA (Jun. 25, 2019), <https://www.investopedia.com/articles/economics/08/recession-affecting-business.asp> [https://perma.cc/D4ZB-8J9K].

<sup>31</sup> See *id.*

3. *Continuing Challenges Facing Small Business Reorganization under Current Chapter 11 Code and the Need for New Legislation*

The coalescence of the economic crash and the unfavorable debtor bankruptcy conditions created by BAPCPA left small businesses with a very poor environment in which to achieve a successful reorganization.<sup>32</sup> In this unfriendly environment, small businesses have been trying to find alternatives and solutions outside of filing bankruptcy cases, “potentially at the expense of their creditors, shareholders, and employees.”<sup>33</sup> The ABI’s study resulted in four main conclusions about how the Chapter 11 cases have changed over time<sup>34</sup> and found that the primary factors deterring small businesses from Chapter 11 filings are the increased cost, the time consumption, and the procedural hurdles that are too high for small businesses with limited resources to achieve.<sup>35</sup> An additional characteristic of the Bankruptcy Code that challenges smaller businesses is the Bankruptcy Code’s assumption that creditors will monitor the bankruptcy process of a debtor.<sup>36</sup> In the ideal scenario, a creditor would pay close attention to the plan of reorganization, the financial status of the debtor, the court dates and deadlines, and all other aspects of the bankruptcy proceedings to ensure that it is protecting its interests.<sup>37</sup> However, in reality, the creditor’s stake in a small business Chapter 11 filing is

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<sup>32</sup> See COMMISSION TO STUDY THE REFORM OF CHAPTER 11 *supra* note 8, at 11 (noting that the BCPAPA’s alterations of original debtor of creditor rights, mixed with the “changing economic environment” have led to the need of reform for chapter 11).

<sup>33</sup> *See id.*

<sup>34</sup> *Id.* at 15 (finding “(1) a perceived increase in the number and speed of asset sales under section 363 of the Bankruptcy Code; (2) a perceived decrease in stand-alone reorganizations; (3) a perceived decrease in recoveries to unsecured creditors; and (4) a perceived increase in the costs associated with chapter 11”).

<sup>35</sup> See Alex Wolf, *Bankruptcy Legislation to Watch in 2019*, LAW360 (Jan. 1, 2019) <https://www-law360-com.ezproxy.bu.edu/articles/1110591/bankruptcy-legislation-to-watch-in-2019> (“Chapter 11 process often contains high costs and procedural hurdles that work for large companies but make reorganization untenable for smaller companies”).

<sup>36</sup> H.R. Rep. No. 116-171, at 3 (2019).

<sup>37</sup> *See id.* (“While the Bankruptcy Code envisions that creditors will play a major role in the monitoring of these cases, this often does not occur . . .”).

often too minute to be worth the effort and expense of participating in the process; such a creditor would prefer to let the company liquidate its assets and maximize its recovery.<sup>38</sup> While the above discussion outlines a few of the major factors contributing to the decline of small business Chapter 11 filings, the overall consensus of the ABI's three year study was this: Chapter 11 of the Bankruptcy Code is no longer suited to achieve efficient and successful restructuring, especially for small business debtors.<sup>39</sup>

### C. The Small Business Reorganization Act of 2019

#### 1. Proposal and Enactment

In response to the ABI's study and in general recognition of the inefficacy of Chapter 11 for successful small business reorganizations, Congress has recently proposed and ratified the Small Business Reorganization Act of 2019 (SBRA) in the hopes of remedying these difficulties and making successful Chapter 11 filings a feasible option for small businesses in distress.<sup>40</sup> The new legislation was sponsored by Ben Cline, a Republican representative from Virginia, and co-sponsored by David Cicilline, a Democratic representative from Rhode Island, Steve Cohen, a Republican representative from Tennessee, and Doug Collins, a Republican representative from Georgia.<sup>41</sup> The bipartisan support demonstrated Congress's recognition and endorsement of the ABI's findings and recommendations, as well as the need to "reverse the current trend, where people are just choosing not to file."<sup>42</sup> In addition to the ABI, the legislation was also supported by the National Bankruptcy Conference, the American College of Bankruptcy, and the National Conference of Bankruptcy Judges.<sup>43</sup> Repre-

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<sup>38</sup> *Id.*

<sup>39</sup> See COMMISSION TO STUDY THE REFORM OF CHAPTER 11 *supra* note 8, at 277 ("Chapter 11 is now viewed as too slow and too costly for the majority of middle-market companies to do anything other than sell its going concern assets in a 363 sale or to simply liquidate the company . . . [usually] almost exclusively for the sole benefit of the secured lender").

<sup>40</sup> H.R. Rep. No. 116-171, at 2 (2019) (finding that small businesses file under Chapter 11 the most often and are also the least likely to reorganize successfully).

<sup>41</sup> *Id.* at 1.

<sup>42</sup> See Wolf, *supra* note 26.

<sup>43</sup> H.R. Rep. No. 116-171, at 2 (2019).

sentative Cline explained that “the legislation allows small business debtors to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business, [which] not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.”<sup>44</sup> The legislation is ultimately more debtor-friendly, with the stated goals of streamlining the Chapter 11 process for small businesses.<sup>45</sup> President Donald Trump enacted the SBRA on August 23, 2019, which will become effective on February 2020.<sup>46</sup>

## 2. *Application*

The SBRA is an elective framework, meaning that a small business must request relief under Chapter 11 Subchapter V when filing its voluntary petition with the bankruptcy court in its jurisdiction.<sup>47</sup> The SBRA modifies the current Bankruptcy Code’s definition of “small business debtor”<sup>48</sup> and declares about a dozen other provisions of the Bankruptcy Code inapplicable upon election of Subchapter V.<sup>49</sup> Furthermore, the SBRA has requirements which a small business must meet to be considered a “small business debtor” eligible for Subchapter V.<sup>50</sup> To be eligible for Subchapter V, a debtor must have less than \$2,725,625 in non-contingent secured and unsecured debt, be engaged in commercial or business activities (not including ownership of single-asset real estate),<sup>51</sup> and a majority of

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<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 3.

<sup>46</sup> See *President Trump Signs Law Reforming Bankruptcy Code for Small Business*, ABL ADVISOR (August 26, 2019), <http://www.abladvisor.com/news/16962/president-trump-signs-law-reforming-bankruptcy-code-for-small-businesses> [https://perma.cc/A8W2-WVTP] (“President Donald J. Trump signed the ‘Small Business Reorganization Act of 2019’ . . . into law.”).

<sup>47</sup> See *Chapter 11 – Bankruptcy Basics*, *supra* note 2 (explaining that Chapter 11 can be filed by voluntary petition or initiated involuntarily by a debtor’s creditors).

<sup>48</sup> 11 U.S.C. § 101(51D).

<sup>49</sup> 11 U.S.C. § 1181.

<sup>50</sup> 11 U.S.C. § 101(51D) (listing all requirements needed to be considered a small business debtor under Chapter 11).

<sup>51</sup> 11 U.S.C. § 101(51D) (“The term “small business debtor . . . means a person engaged in commercial or business activities . . .”).



that debt must have arisen from commercial or business activities.<sup>52</sup> Should a small business meet these criteria, it is eligible for the new provisions of the SBRA which are aimed at making Chapter 11 quicker and more cost-effective for small businesses.<sup>53</sup>

### 3. *Subchapter V*

The most significant component of the SBRA is the addition of an entirely new subchapter; Subchapter V provides a variety of new debtor-friendly provisions aimed at streamlining the entire reorganization process.<sup>54</sup> Subchapter V required a curtailed timeline with set deadlines to ensure the process is moving forward without dragging on and burying the small business debtor under all associated costs.<sup>55</sup> Furthermore, a standing trustee is appointed to every Chapter 11 Subchapter V case, in order to monitor the bankruptcy process and ensure that the plan of reorganization is followed and payments to creditors are made.<sup>56</sup> Contrary to bankruptcy law outside of Subchapter V, the trustee will not ordinarily take over operations of the small business debtor—that is to say, the small business debtor will remain a “debtor in possession.”<sup>57</sup> Also contrary to bankruptcy law outside of Subchapter V, a small business debtor is neither subject to a committee of its creditors (unless a court finds a cause for exception) nor required

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<sup>52</sup> Bryan Gifford & Laura Atack, *Chapter 11’s Double Whammy on Individual Debtors*, ABI J. (Oct. 16, 2019) (enumerating the criteria a debtor must meet in order fit into Subchapter V’s small business debtor category).

<sup>53</sup> *Id.* (“The definition of property of the estate is modified to include earnings and property acquired postpetition and postconfirmation until the case is closed, dismissed, or converted.”).

<sup>54</sup> Kyle F. Arendson, *The Small Business Reorganization Act Reintroduced: A Way Forward for Small Business Reorganization?*, NAT’L L. REV. (Apr. 23, 2019) <https://www.natlawreview.com/article/small-business-reorganization-act-reintroduced-way-forward-small-business> [<https://perma.cc/F3XQ-S4XA>].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; see also R. Scott Williams, *INSIGHT: Narrow Bankruptcy Reforms Make Big Changes for Small Business, Vets, Farmers*, BLOOMBERG L. (Oct. 23, 2019) <https://news.bloomberglaw.com/bankruptcy-law/insight-narrow-bankruptcy-reforms-make-big-changes-for-small-business-vets-farmers> [<https://perma.cc/2FJG-EG5C>] (“In addition to addressing eligibility, the SBRA created a new role in small business cases and established the automatic appointment of an independent trustee).

<sup>57</sup> 11 U.S.C. § 1183–1184 (allowing a small business debtor to have all the rights and powers of a trustee under Subchapter V, with a few exceptions).

to submit a plethora of disclosure statements with its initial petition.<sup>58</sup> Significantly, Subchapter V amends the definition of “Property of the Estate” to include property and earnings that were acquired after the filing of the bankruptcy petition and up until the closing of the case.<sup>59</sup> As the small business debtor is a “debtor in possession” under Subchapter V, this means that the small business debtor is entitled to retain a portion of its earnings and property to continue operations.<sup>60</sup> This change is particularly significant as it serves as a sort of abrogation of the “absolute priority rule”<sup>61</sup> by allowing the owner to keep their equity interest before all of its creditors are paid in full—so long as the plan is fair and equitable, as will be discussed below.<sup>62</sup>

Additionally, the process for submitting and confirming a plan of reorganization is much more favorable toward the small business debtor.<sup>63</sup> For one, the small business debtor is the only party-in-interest that may file a plan of reorganization and must do so in the first ninety days after filing.<sup>64</sup> This is beneficial for the small business debtor because its plan does not have to compete with any contrary plans submitted by creditors.<sup>65</sup> Ordinarily, “any party in interest” may file a plan after the end of the exclusivity period.<sup>66</sup> In fact, the small business debtor’s plan of reorganization may be submitted and approved over the objection of its creditors, so long as the plan is “fair and equitable” and does not discriminate unfairly.<sup>67</sup>

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<sup>58</sup> See Practical Law Bankruptcy & Restructuring, *supra* note 6.

<sup>59</sup> *Id.*

<sup>60</sup> See 11 U.S.C. § 1191.

<sup>61</sup> 11 U.S.C. § 1129(b)(2)(B)(ii) (stating that neither a junior class of creditors nor an equity holder may receive debtor property unless all senior classes have been paid in full or has accepted the plan).

<sup>62</sup> See Williams, *supra* note 43 (“A final, key feature of the SBRA is the absolute priority rule, which requires all creditors be paid in full before equity can retain its interests, is abrogated.”).

<sup>63</sup> *Id.*

<sup>64</sup> See David W. Dykhous, *Bankruptcy Update: Small Business Reorganization Act of 2019*, PATTERSON BELKNAP WEBB & TYLER LLP (Sept. 4, 2019), <https://www.pbwt.com/bankruptcy-update-blog/small-business-reorganization-act-of-2019> [<https://perma.cc/E8J4-BML9>].

<sup>65</sup> See Wolf, *supra* note 26.

<sup>66</sup> 11 U.S.C. § 1121(c).

<sup>67</sup> 11 U.S.C. § 1191; see also Arendson *supra* note 42 (explaining the two ways in which a small business may satisfy the “fair and equitable” standard).

#### 4. *Preferential Transfers*

The SBRA also includes amendments to provisions of the Bankruptcy Code outside of Chapter 11. Section 547(b) of the Bankruptcy Code authorizes a trustee to exercise “avoiding powers” to undo transfers of property that “are preferential to a creditor and to the detriment of similarly situated creditors.”<sup>68</sup> The SBRA amends Section 547(b) by hampering the trustee’s discretion and requiring the trustee to use “reasonable due diligence” and to consider a party’s affirmative defenses, as enumerated under Section 547(c).<sup>69</sup>

#### 5. *Venue*

The SBRA also modifies a provision outside of the Bankruptcy Code altogether. Prior to the enactment of the SBRA, an action to recover from a debtor for less than \$13,650 in connection to a bankruptcy case, must be commenced in the district where the debtor resides.<sup>70</sup> The SBRA modifies this provision by increasing the monetary requirement for which an attempted recovery needs to be made in the debtor’s resident district from \$13,650 to \$25,000.<sup>71</sup> This is another example of the SBRA’s aim to make restructurings more accessible and affordable because a small business debtor cannot be forced into a court in an outside jurisdiction unless the amount in controversy is much higher.

### **D. Efficacy of the SBRA**

An examination of the SBRA’s additions to the current Bankruptcy Code makes it clear that Congress is making a strong effort to right the “delicate balance that encourages appropriate growth and innovation in business, but provides sufficient protection and certainty to creditors” that was upset by BAPCPA.<sup>72</sup> However, the efficacy of these provisions in aiding successful small business restructurings can only be hypothesized until the SBRA becomes effective on February

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<sup>68</sup> H.R. Rep. No. 116-171, at 8.

<sup>69</sup> *Id.*

<sup>70</sup> 28 U.S.C. § 1409, amended by Pub. L. No. 116-54 § 3(b) (2019).

<sup>71</sup> H.R. Rep. No. 116-171, at 8.

<sup>72</sup> See COMMISSION TO STUDY THE REFORM OF CHAPTER 11, *supra* note 6, at 8.

2020.<sup>73</sup> While the provisions of the SBRA seem well calculated to address many factors that deter small business from filing under Chapter 11,<sup>74</sup> there remain unaddressed considerations and concerns that persist in light of the SBRA's enactment.

First, it is possible that the SBRA is too narrow in scope to provide the relief that it was intended to provide for small businesses.<sup>75</sup> For one, the liability limit to qualify for Subchapter V may be too low to allow the SBRA to have the remedial impact on small business reorganizations that Congress wanted.<sup>76</sup> As stated above, a small business that wishes to file under Chapter 11 Subchapter V, must have less than \$2,725,625 in non-contingent secured and unsecured debt.<sup>77</sup> Yet, the majority of small businesses have debts in excess of \$2.7 million, which means that they are not being served by the current bankruptcy laws.<sup>78</sup> Therefore, many small to medium-sized businesses in need continue to struggle outside of Chapter 11 Subchapter V.<sup>79</sup> The ABI Commission conducted a study which concluded that, in order for the SBRA to have a more meaningful impact on successful small

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<sup>73</sup> Small Business Reorganization Act, Pub. L. No. 116-54, § 101, 133 Stat. 1079, 1087 (2019) (codified as amended at 11 U.S.C. § 101 note).

<sup>74</sup> See *supra* Section B(iii).

<sup>75</sup> See Robert J. Keach, *ABI Testifies on Family Farmers and Small Business Reorganizations*, ABI LEGISLATIVE UPDATE 8, 9 (Aug. 8, 2019), [https://abi-abc.s3.amazonaws.com/journal-articles/2019-08-Legisupdate\\_ABITestifies.pdf](https://abi-abc.s3.amazonaws.com/journal-articles/2019-08-Legisupdate_ABITestifies.pdf) [<https://perma.cc/6YTN-GVQ4>] (excerpting Robert Keach's testimony before the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law for a hearing on Oversight of Bankruptcy Law); see also Donald L. Swanson, *Small Business Reorganization Act: A Great Law with a Major Flaw*, *MEDIABANKRY: ON BANKRUPTCY AND MEDIATION* (Oct. 18, 2019), [https://www.abi.org/feed-item/small-business-reorganization-act-a-great-law-with-a-major-flaw?gclid=EAIaIQobChMI1sSvuI\\_q5QIVjZOzCh1FIQYpEAAAYASAAEgJd1\\_D\\_BwE](https://www.abi.org/feed-item/small-business-reorganization-act-a-great-law-with-a-major-flaw?gclid=EAIaIQobChMI1sSvuI_q5QIVjZOzCh1FIQYpEAAAYASAAEgJd1_D_BwE) [<https://perma.cc/58JP-QY7G>] (republished by the American Bankruptcy Institute).

<sup>76</sup> See Keach *supra* note 75, at 9 ("This debt limit . . . is simply too low to provide meaningful help for small and medium-sized companies").

<sup>77</sup> Gifford & Attack, *supra* note 52 ("[T]he debt involved must not exceed a cap (currently set at \$2,725,625) on aggregate noncontingent liquidated secured and unsecured pre-petition debts. Finally, at least 50 percent of those debts must have arisen from the debtor's commercial or business activities").

<sup>78</sup> Keach, *supra* note 75, at 9 (recommending to the Subcommittee on Oversight in Bankruptcy Law that the liability limit be increased to \$10 million).

<sup>79</sup> See COMMISSION TO STUDY THE REFORM OF CHAPTER 11, *supra* note 8, at 287–88.

business reorganizations, a liability limit of \$10 million or less in assets or liabilities would be a more appropriate standard for achieving that goal.<sup>80</sup>

Another concern that remains unaddressed with the enactment of the SBRA is the retention of the discharge period that is set out in Chapter 13, which focuses on reorganization of an individual's finances.<sup>81</sup> Outside of Subchapter V, Chapter 11 cases allow discharge of prior debts immediately upon the confirmation of a plan of reorganization.<sup>82</sup> By contrast, Chapter 13 requires individual debtors to submit all of their disposable income to their creditors for a period of three to five years before their debts will be discharged.<sup>83</sup> First implemented in BAPCPA, this provision can be viewed as one of BAPCPA's more damaging provisions from the perspective of a debtor because it locks up a debtor's ability to save or reinvest money by mandating payments to creditors for three to five years.<sup>84</sup> The SBRA sets out the same requirement for discharge under Subchapter V.<sup>85</sup> This may constitute a problem for small businesses attempting to rehabilitate because it ties up all income that is not necessary for operation or maintenance of the business, thus preventing any growth or reinvestment for a period of up to five years.<sup>86</sup> Furthermore, this provision constitutes a problem for a small business's reorganization as it causes the business to begin its reorganization with a debt burden that is greater than the value of its assets.<sup>87</sup> As stated above, a plan cannot be confirmed unless it provides for repayments that equal the value of the business's assets, but the plan must also account for administrative, professional, and trustee fees.<sup>88</sup> This is an unfavorable position for a debtor, as the business must continue operating in this manner through the completion of the three-to-five year repayment period, before its debts are finally discharged.<sup>89</sup>

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<sup>80</sup> See *id.* at 288 (recognizing that a limit of \$10 million would "capture around 85 percent to 90 percent of chapter 11 filings . . .").

<sup>81</sup> 11 U.S.C. § 1382.

<sup>82</sup> 11 U.S.C. § 1141(d).

<sup>83</sup> 11 U.S.C. § 1328.

<sup>84</sup> Swanson, *supra* note 75 (calling the provision "abusive" and describing its implementation as a form of forced "penance" on debtors).

<sup>85</sup> 11 U.S.C. § 1192.

<sup>86</sup> See Swanson, *supra* note 75 ("They can't create a nest egg or rainy day fund. They can't even invest back into their business or try to grow it").

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

### E. Conclusion

The damage done by BAPCPA to the success of debtor rehabilitations became evident when its provisions were put to the test during the Great Recession a few years after the legislation became effective.<sup>90</sup> While there are remaining concerns that may limit its intended effectiveness, the SBRA seems well-designed to remedy the deficiencies in the current Bankruptcy Code.<sup>91</sup> The SBRA does not become effective until February 2020; therefore, only time will tell whether the legislation will benefit small businesses as Congress intended.<sup>92</sup> As it was for BAPCPA, it may be that the SBRA will shortly have the opportunity to be put to the test, as a financial downturn may be “overdue.”<sup>93</sup> While the occurrence of a recession is difficult to predict and authorities may differ on the imminence of a recession,<sup>94</sup> the effectiveness of the SBRA will likely prove vital to the health of the economy during the next market downturn.<sup>95</sup> According to the ABI’s 2014 study, small to medium-sized enterprises account for a significant percentage of the United States’ gross domestic product.<sup>96</sup> Small to medium-sized enterprises are also among the

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<sup>90</sup> *Supra* Section B.

<sup>91</sup> *Supra* Section D.

<sup>92</sup> *See President Trump Signs Law Reforming Bankruptcy Code for Small Business*, *supra* note 46.

<sup>93</sup> *See* Tom Holland & Jeff Katzin, *Beyond the Downturn: Recession Strategies to Take the Lead*, BAIN & COMPANY (May 16, 2019), <https://www.bain.com/insights/beyond-the-downturn-recession-strategies-to-take-the-lead/> [<https://perma.cc/PT8N-ZAN3>] (predicting that an economic downturn is coming, as the current economy has been experiencing growth for over ten years, which is “long by historical standards”).

<sup>94</sup> *See id.* (stating that the “overleverage in the corporate sector,” “geopolitical uncertainty,” and “economic instability in some European countries” are signs of an imminent recession). *But see* Bill Conerly, *4 Lessons on Recession Business Preparation*, FORBES (Jun. 6, 2019), <https://www.forbes.com/sites/billconerly/2019/06/06/4-lessons-on-recession-business-preparation/#418818de63ac> [<https://perma.cc/4A4X-X7KM>] (“Bain is overly confident in their . . . ability to forecast a recession. I would not say a recession is likely, but I agree that the possibility is high enough that businesses need a contingency plan”).

<sup>95</sup> *See* COMMISSION TO STUDY THE REFORM OF CHAPTER 11, *supra* note 8, at 276.

<sup>96</sup> *Id.* (“[I]n terms of output, the sheer number of mid-market firms accounts for the fact that, in aggregate, their revenues surpass those of the top 100 U.S.

entities to suffer most in economic downturns.<sup>97</sup> If an economic downturn is imminent, then the financial sector will shortly experience a large increase in bankruptcy filings; if the SBRA does what it was designed to do, hopefully, those bankruptcy filings will result in an increase in successful business reorganizations under Chapter 11 Subchapter V.<sup>98</sup>

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companies by capitalization and are equivalent to roughly 40 percent of the U.S. GDP”).

<sup>97</sup> *See id.*

<sup>98</sup> H.R. Rep. No. 109-31, at 4.

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