



ALBANY LAW SCHOOL
GOVERNMENT LAW CENTER



RURAL LAW INITIATIVE

Prescriptions for Small Business
Financial Distress –
Bankruptcy and Alternatives

January 15, 2021

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Speaker biographies

FRANCIS J. BRENNAN (FRANK), ESQ. '98, practices in the areas of bankruptcy and business reorganizations, commercial real estate, business law, and commercial litigation at Nolan Heller Kauffman LLP. He has successfully represented a number of substantial businesses in completing Chapter 11 reorganizations, litigated matters before the Bankruptcy Court and has argued appeals before the Bankruptcy Appellate Panel for the U.S. Court of Appeals for the Second Circuit and appellate courts of the State of New York. Mr. Brennan has represented secured lenders in commercial loan workouts and bankruptcy proceedings. He also serves as a Subchapter V Trustee for the Northern and Western Districts of New York and the District of Vermont. Mr. Brennan is a graduate of Union College (B.A.- Political Science), the College of St. Rose (MBA), and Albany Law School of Union University (JD). He is admitted to practice before the courts of the State of New York and the Federal District Courts for the Northern and Southern Districts of New York.

HON. NANCY HERSHEY LORD was appointed by the United States Court of Appeals for the Second Circuit to a 14-year term as a United States Bankruptcy Judge in the Eastern District of New York, Brooklyn, on February 29, 2012. Judge Lord has more than 40 years of bankruptcy law experience which began in the same court in which she now sits. She was a legal intern for the Honorable Joseph V. Costa during her first two years of law school. Upon graduation, she served as law clerk to the Hon. Saul Seidman from 1980–81, and thereafter from 1981–83 as Judge Conrad B. Duberstein's first law clerk. Prior to her appointment, Judge Lord was an Assistant Attorney General with the New York State Office of the Attorney General for twelve and a half years. During her tenure at the Attorney General's Office, she first served as Section Chief of the General Recoveries Unit of the Civil Recoveries Bureau. Several years later she launched and headed up a separate Bankruptcy Unit in the Office's Litigation Bureau. Throughout her service, she provided bankruptcy representation to New York State, protecting its interests as creditor, regulator, watchdog, and contract vendee in the realm of bankruptcy and insolvency. She generated substantial revenue for the State arising from her active representation of state agencies and other state entities as creditors in bankruptcy cases. In addition, she defended state agencies against preference actions, stay violations, overreaching bankruptcy plan provisions, and more. From November 2006 until September 2008, Judge Lord was the lead State attorney in connection with her representation of the State and various state agencies and entities in the New York Racing Association bankruptcy case. She also played a prominent role in protecting consumers in connection with going-out-of-business sales. Outside of the OAG, she was active with the bankruptcy section of the National Association of Attorneys General and for several years served as Vice-President of the State Association of Bankruptcy Attorneys (SABA). Prior to joining the State, Judge Lord was

a member of the Wall Street law firm of Herzfeld & Rubin, P.C., where she specialized in all aspects of commercial bankruptcy, creditors' rights, and debtor-creditor bankruptcy litigation. She is a graduate of Stony Brook University and Brooklyn Law School.

RICHARD L. WEISZ (DICK), ESQ. '78, of Hodgson Russ LLP, has represented debtors, creditors, and creditors' committees in Chapter 11 business reorganization proceedings. Mr. Weisz has represented several professionals in workouts and Chapter 11 bankruptcy matters. He has conducted trials on business valuation and corporate dissolutions, contested foreclosure proceedings, trade secret and unfair competition, administrative hearings, wrongful eviction, antitrust and breach of contract before jurors as well as non-jury cases. Mr. Weisz has successfully argued appeals to the Second Circuit Court of Appeals and the Appellate Division of the New York State Supreme Court. He is Listed in Upstate New York Super Lawyers, (Bankruptcy: Business) 2007–2020; Sigma Pi Sigma, National Physics Honor Society; and the Justinian Society, Albany Law School of Union University. Mr. Weisz is admitted to practice in the U.S. District Court, Northern District of New York; U.S. District Court, Southern District of New York; U.S. District Court, Eastern District of New York; U.S. District Court, Western District of New York; and in the U.S. Court of Appeals, Second Circuit. He is a graduate of Albany Law School.

RESOURCES FOR FINANCIALLY DISTRESSED SMALL BUSINESSES

Bankruptcy Resources

- The Central New York Bankruptcy Bar Association (CNYBBA).
Website – www.cnybba.com
- The Capital Region Bankruptcy Bar Association (CRBBA).
Website – www.crbba.com
- Text of the U.S. Bankruptcy Code (Via Cornell Law School Legal Information Institute). (You can find the text of the Subchapter V statutory provisions on this site.) Search 11 U.S.Code.
Website – www.law.cornell.edu
- “Bankruptcy Basics” A publication of the Administrative Office of the U.S. Courts. Search “Bankruptcy Basics”
Website – www.uscourts.gov

COVID-19 Resources

- Website for the NYS Governor Andrew Cuomo. This site should be consulted frequently for updates on NYS commercial and residential moratoriums on evictions and foreclosures and other relief or benefits that are or may become available through executive order or legislation.
Website – www.governor.ny.gov
- Recent NYS Law - COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020; Legislation (S.9114/A.11181) (signed into law on 12/28/2020). Text of the bill and forms for Hardship Declarations can be downloaded at:
Website – www.nysenate.gov

- Albany Law Government Law Center – Rural Law Initiative Legal Resources
 Website – www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative
- “What’s New? COVID-19 Resources.” Provides information on legislative, regulatory, judicial and executive responses in the United States to the COVID-19 pandemic
 Website – www.law.cornell.edu (Use link – “See them here”)
- New York Forward Small Business Lease Assistance Partnership - (LAP) is a public-private partnership between Empire State Development, the nonprofit Start Small Think Big, and the New York Bar Association, to help avoid business evictions.
 Websites – <https://www.governor.ny.gov/news/governor-cuomo-announces-launch-new-york-forward-small-business-lease-assistance-partnership> and <https://esd.ny.gov>
- Columbia Law School /COVID-19 Legal Resources; Small Business Pandemic Tool Kit and related links for support
 Website - <https://www.law.columbia.edu/academics/experiential/clinics/entrepreneurship/covid-19>
- New York State Bar Association COVID-19 Pro Bono Recovery Task Force.
 Website – <https://nysba.org/committees/covid-19-pro-bono-recovery-task-force>
- Lawyers for Good Government Foundation (L4GG) (nationwide effort). Aim is to provide Pro Bono Assistance to Help Small Businesses Survive Economic Impact of COVID-19.
 Website – www.lawyersforgoodgovernment.org

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NEW BANKRUPTCY OPTION-SUBCHAPTER V OF CHAPTER 11

Frank Brennan, Esq. Partner, Nolan Heller Kauffman LLP

Introduction

- Brand new type of bankruptcy case under Chapter 11.
- Many differences from regular chapter 11.
- Some similarities to chapters 12 and 13.
- Law went into effect right before pandemic – February 19, 2020.

Debt Limit Eligibility

New Law, as enacted, had a debt limit which was the same as regular small business chapter 11 – which is \$2,725,625. So, if you had more debt than that – not eligible for Subchapter V. The CARES Act increased the amount of debt – making any debtor with debts up to 7.5M eligible to elect subchapter V. However, that provision is due to expire on March 27, 2021, unless it is extended.

Key Features / Advantages over traditional Chapter 11 and non-sub V Chapter 11 small business bankruptcy provisions

- Could be a game changer for small businesses; many advantages over traditional chapter 11.
- A sponsor of the law stated that this new provision will allow small business debtors “to file bankruptcy in a timely, cost effective manner, and hopefully allow them to remain in business – which not only benefits the owners, but employees, suppliers, customers and others who rely on that business.”
- New law has streamlined procedures which should also reduce costs.
- Tighter timelines and shorter deadlines will speed up process which should result in faster recoveries for creditors.
- Problem with regular chapter 11 – prohibitively expensive because of legal fees and administrative fees and lengthy complicated process to reorganize or liquidate.
- Even if creditors do not go along with the reorganization plan, principals/stockholders/members will have a much easier time retaining their equity/ownership interests.
- Under certain circumstances, individual debtor will be able to cram down a mortgage on his or her personal residence.

Simplification of the Chapter 11 Process

Ways in which Congress simplified the process to make it less expensive, quicker and more user friendly:

- No creditors’ committee (unless the Court orders otherwise).

- No separate disclosure statement (unless the Court orders otherwise).
- Only the Debtor can propose a plan of reorganization (no creditor plan or legal fighting over competing plans).
- Elimination of fees paid to the Office of the United States Trustee.
- The creation of a new party – The Subchapter V Trustee

These changes it is thought will promote consensual plans and a greater possibility that non-consensual plans (when you can't get creditors to agree with Debtor's plan) can be confirmed so that Debtor can successfully emerge from Chapter 11.

Plan Approval Process

In terms of chapter 11 legal requirements, subchapter V of chapter 11 reflects the following changes in the plan of reorganization approval process:

- No longer a requirement for the Debtor to obtain a class of creditors to accept the plan.
- No more absolute priority rule.
- When creditors don't accept the plan, Debtor need only show that Debtor is dedicating Debtor's projected disposable income to make plan payments to creditors over the life of the plan (3-5 years).

Duties of the Subchapter V Trustee:

- To supervise and monitor progress of the case and participate in the development and confirmation of the Debtor's reorganization plan.
- To assist with negotiations between the Debtor and all the creditors.

- To attend Court hearings.
- Act as a neutral; a facilitator; an honest broker – a person who can call together all the parties to negotiate. Similar to an out-of-court workout when the Debtor calls together its creditors to attend a meeting and offer a settlement– except here the parties do not have to take the word of the Debtor regarding the Debtor’s financial conditions. The subchapter V trustee will be able to – in fact is tasked with the responsibility to – examine the Debtor’s operations, business model, projections, and indicate to the creditor body whether they appear reliable, reasonable, and likely or not to be brought to fruition.

Timetable

- The Court must hold a status conference within 60 days after the bankruptcy case is filed.
- The Debtor must file a report not later than 14 days before that status conference that “details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.”
- The Debtor must file its plan within 90 days of the date the bankruptcy case is started.

Plan Content Requirements

Because there is no separate, lengthy disclosure statement accompanying the plan, the plan must contain information regarding the history of the Debtor’s business operations, an analysis of how much money would be realized if the Debtor’s assets were liquidated and projections with respect to the ability of the Debtor to make payments under the plan. However, the plan of reorganization does not have to be as complex as a plan in a larger, traditional chapter 11. There is a form that can be used for a Subchapter V plan of reorganization.

Plan Confirmation

- Legal aspects and features of confirmation of the Debtor's plan are different depending upon whether all creditors consent or not, but clearly it is much easier for the Debtor to confirm a plan over creditor objections and still retain ownership interests than it is under a regular chapter 11.
- Court can confirm a plan if it is found to be "fair and equitable" and satisfies certain enumerated statutory requirements.

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TIPS FOR NEGOTIATING WITH CREDITORS TO AVOID BANKRUPTCY FILING IF POSSIBLE

Richard L. Weisz, Esq., Senior Counsel, Hodgson Russ, LLP

1. Know your creditor and limitations on what the creditor can do in response to your proposals
 - A. Bank lender issues
 - i) is loan guaranteed by government or other unrelated entity
 - ii) regulatory limitations on loan amendments (when must a loan be charged off or reserved against even if you can make some payments)
 - iii) fees of mortgage loan modifications
 - iv) other lien creditors
 - v) issues when you are a guarantor of your business's debt
 - B. Vendor creditor issues
 - i) prepayment for new goods and/or services vs. payment in full of all outstanding invoices
 - ii) factored accounts receivable

C. Dealing with debt collector calls

D. Unpaid taxes

i) real property taxes. (No ability to compromise but depending on county may be able to negotiate a payment plan)

ii) trust fund taxes (vs. corporate taxes) and personal income taxes

a. failure to file returns may lead to criminal charges

b. offers in compromise

b. may lead to lowered social security and other pensions payments not reachable by other creditors

2. If you are sued on debt

A. Confessions of judgment

B. Opposing claims by filing answer may require attorney

C. Impact of Judgement

i) lien on real property in county where judgment filed

ii) enforcement remedies including freezing and/or taking bank accounts and other assets subject to personal exemptions

D. Assignment of assets for benefit of creditors

E. Composition of Creditors /Out of Court Workout

F. Role of attorney

- i) explain bankruptcy outcome based on your assets, debts, etc (consultation)
- ii) negotiating with creditors
- iii) defending against lawsuits commenced by creditors
- iv) advising when it is best to file bankruptcy