

Bankruptcy by the Numbers

By ED FLYNN

Subchapter V's First 1,000 Cases

When the Small Business Reorganization Act of 2019 (SBRA) was enacted just over a year ago, no one had a clue of what 2020 had in store. At that time, the national unemployment rate was 3.7 percent, more than 20 Democrat candidates were running for President, and most economic indicators (except for the budget deficit) were positive.

The SBRA took effect on Feb. 19, 2020, just a few weeks before the national shutdown due to the COVID-19 pandemic. With the creation of subchapter V, the SBRA provided a streamlined path through chapter 11 for small business debtors.

This article presents a little statistical detail on what we know about the first 1,000 subchapter V cases that have been filed. It is not intended to cover the provisions of SBRA and subchapter V in detail. ABI has compiled a number of other resources regarding SBRA on its resource page,¹ and a very comprehensive e-publication authored by Hon. **Paul W. Bonapfel** (U.S. Bankruptcy Court (N.D. Ga.); Atlanta) is available for free from the ABI Store.² The following are the key dates regarding the SBRA and subchapter V:

Dec. 8, 2014: The ABI Commission to Study the Reform of Chapter 11 released its report. Chapter VII of the report included proposals regarding small and medium-sized enterprises.³

April 9, 2019: The SBRA was introduced in the Senate by Sen. Chuck Grassley (R-Iowa) and five other senators.

June 18, 2019: The SBRA was introduced in the House by Rep. Ben Cline (R-Va.).

June 25, 2019: The House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law held a hearing on the SBRA and other bankruptcy-related proposals. Past ABI President **Robert J. Keach** (Bernstein Shur; Portland, Maine) testified in support of the bill. Mr. Keach served as co-chair of the ABI Commission to Study the Reform of Chapter 11.

July 23, 2019: The SBRA was approved by the House of Representatives.

Aug. 1, 2019: The SBRA was approved by the Senate.

¹ To stay current on the effects of this legislation, bookmark ABI's SBRA Resources website at abi.org/sbra.

² See Bonapfel, *SBRA: A Guide to Subchapter V of the U.S. Bankruptcy Code*, available at store.abi.org/sbra-a-guide-to-subchapter-v-of-the-u-s-bankruptcy-code.html (unless otherwise specified, all links in this article were last visited on Oct. 12, 2020).

³ See "Proposed Recommendations: Small and Medium-Sized Enterprises (SME) Cases," available at abiworld.app.box.com/s/uzc6yo7dr8lt1g2m4uxs (excerpt of ABI Commission to Study the Reform of Chapter 11's Final Report published in 2014).

Aug. 23, 2019: President Donald J. Trump signed the SBRA into law.

Feb. 19, 2020: The SBRA took effect; 16 subchapter V cases were filed in 13 judicial districts on the first day.

March 27, 2020: The Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136) raised the debt ceiling for subchapter V eligibility from \$2,725,625 to \$7,500,000. (Absent further congressional action the threshold will return to \$2,725,625 after one year.)

Oct. 9, 2020: The 1,000th subchapter V case was filed.

Preparation for SBRA Effective Date

In a time when it often seems that government is dysfunctional, the SBRA has proven to be an exception, with each of the three branches of government having performed quite admirably. The bill was passed with widespread bipartisan support. By its effective date, the U.S. Trustee Program had appointed about 250 subchapter V trustees,⁴ and had prepared a handbook for them to follow.⁵ The Judicial Branch, through the Judicial Conference, had issued the interim rules and forms needed as a result of the SBRA.⁶ When the pandemic hit shortly after the effective date, Congress included a very helpful increase to the small business debt ceiling in the CARES Act.⁷

Identification of Subchapter V Cases

No official (e.g., government) figures on subchapter V cases have been released to date. In the absence of any official statistics, ABI has conducted a case-by-case review of PACER⁸ records of all chapter 11 cases filed since Feb. 19, 2020, to identify subchapter V filings.⁹

The "Case Summary" report in PACER indicates whether a case is considered a small business

⁴ See "U.S. Trustee Program Ready to Implement the Small Business Reorganization Act of 2019," Dep't of Justice (Feb. 19, 2020), available at justice.gov/opa/pr/us-trustee-program-ready-implement-small-business-reorganization-act-2019. In addition, at least 20 other trustees are serving in the six judicial districts in North Carolina and Alabama, which are supervised by Bankruptcy Administrators.

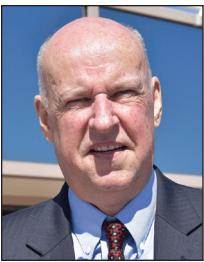
⁵ See "Handbook for Small Business Chapter 11 Subchapter V Trustees," Executive Office for U.S. Trustees (February 2020), available at justice.gov/ust/file/subchapterv_trustee_handbook.pdf.

⁶ See "Interim Amendments to the Federal Rules of Bankruptcy Procedure," available at uscourts.gov/sites/default/files/2019_sbra_interim_rules_amendments_redline_0.pdf.

⁷ See CARES Act, available at congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf.

⁸ PACER is the acronym for Public Access to Court Electronic Records (see pacer.uscourts.gov).

⁹ The "Case Summary" page for each case was reviewed to see whether there was any indication that it was subchapter V. All bankruptcy courts employ some sort of flag to identify these cases, although there is no uniformity on what the flag is (e.g., Subchapter V, SmbusSubV, SubChV, SmBusV, SubV, etc.). In addition, there were a few cases that did not have any flag listed, but a review of the case docket showed that the case was subchapter V.



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case and whether the debtor elected to proceed under subchapter V.¹⁰ This review provides very limited information on the cases (e.g., name of case, district, docket number, date filed and trustee name). ABI's website has posted this information on its SBRA Resources page.¹¹ Additional information on the cases will be available later this year when the Federal Judicial Center releases its FY 2020 update to the Integrated Data Base.¹²

However, official government statistics will be needed to truly assess the performance of subchapter V and to determine whether changes are in order. For example, in addition to an official count of the number of subchapter V cases filed, it would be helpful to know answers to the following questions:

- How many cases propose a consensual plan vs. how many propose a cramdown;
- How many plans are confirmed;
- What are the time intervals from filing to confirmation;
- What are the types of small businesses that are using subchapter V; and
- What are the amount of fees paid to subchapter V trustees?

Hopefully, the Administrative Office of the U.S. Courts will put in place statistical reporting systems to address these and other questions.

Filings by Month

Subchapter V case filings started out strong in February 2020. They dropped off during late March and April, likely due to the shutdowns as a result of the pandemic. However, filings have increased each month since April, and during each of the last four full months filings have set new records. Exhibit 1 provides a breakdown of these numbers.

¹⁰ This review probably missed a few cases. For example, PACER shows cases in their current chapter. The initial review conducted in June 2020 would have missed a few cases that had been converted out of chapter 11 prior to the PACER review. Cases that opted into subchapter V more than a few days after filing would not be identified. The review would also have missed cases filed prior to Feb. 19, 2020, that later opted into Subchapter V.

¹¹ See *supra* n.1.

¹² See Integrated Database, available at fjc.gov/research/ldb. This database contains a record for each bankruptcy case filed, and it is updated with data as of Sept. 30 each year the case is still open. Although the Fiscal Year 2020 update will not have a subchapter V identifier, it will be possible to match docket numbers from the ABI list to the individual case records. This will give further information on assets, liabilities, county of residence, prior filings, *pro se* cases and related filings in the subchapter V cases. The additional data could be helpful to inform the discussion on whether the increased debt ceiling from the CARES Act should be extended. It will be too soon after the SBRA's effective date to obtain any meaningful information on case outcomes.

Exhibit 1: Subchapter V Cases Filed (Feb. 19 to Oct. 9, 2020)

Month	Total Filed
February (19-29)	82
March	122
April	68
May	114
June	133
July	138
August	140
September	160
October (1-9)	43
Total Cases	1,000

Cases by State and District

Three states have accounted for more than one-third of the subchapter V cases filed to date: Florida (127), Texas (126) and California (99). At least one subchapter V case has been filed in every state except Rhode Island (where no chapter 11 cases have been filed since Feb. 19, 2020).

In fact, 88 of the 93 judicial districts have now had a subchapter V filing. None of the five judicial districts without a subchapter V case (Eastern District of Oklahoma and the Districts of Rhode Island, Guam, Virgin Islands and Northern Mariana Islands) have had a business chapter 11 case filed since Feb. 19, 2020. Exhibit 2 on p. 42 shows a breakdown by state.

Just under 20 percent of the chapter 11 cases filed since Feb. 19, 2020, have been subchapter V cases. However, this figure is misleading because since the pandemic, chapter 11 filing figures have been skewed by the large number of related filings by subsidiaries in a corporate group. Most of the related filings occur in the largest chapter 11 cases, and most of these cases are filed in the Southern District of New York, the District of Delaware and the Southern District of Texas. If we exclude these three districts from the calculation of subchapter V frequency, about 36 percent of chapter 11 cases have been subchapter V. In 22 states and the District of Columbia, at least one-half of the chapter 11 cases filed have been subchapter V.

Professionals Serving in Subchapter V Cases

Three categories of professionals are involved in nearly every subchapter V case: the bankruptcy judge, the subchapter V trustee and the attorney for the debtor.¹³ By this time, most of the more than 300 U.S. bankruptcy judges have been assigned at least a few subchapter V cases. The PACER records show that well over 500 individuals have served as lead attorney in one or more cases. The cases filed to date have been pretty well spread out among the subchapter V trustees. The PACER records indicate that more than 250 trustees have been assigned at least one case, but that only about a dozen trustees have been assigned 10 or more cases. So, in under eight months, about 1,000 bankruptcy professionals have served in a key role in a subchapter V case.

Types of Business

About 26 percent of the subchapter V cases were filed by individuals, who reported that a majority of their debt was business debt. Of these cases, 31 percent were joint filings, 18 percent were filed by female debtors and 51 percent were filed by male debtors.

The remaining subchapter V cases represent a wide range of business types. Based on the case name, case documents and online searches, it was possible to determine the type of business for most, but not all,¹⁴ of the subchapter V cases.

¹³ Of course, there is a bankruptcy judge and a trustee assigned in every case. However, the PACER records did not indicate an attorney for the debtor in about 2 percent of the cases.

¹⁴ For about 6 percent of the cases, the type of business could not be determined. Some subchapter V debtors have rather generic names, no online presence and no informative press coverage of their filing.

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Clearly, many of these businesses were in industries that were most disrupted by the pandemic. The leading categories of businesses include medical, including health care professionals and facilities (75); restaurants and bars (75); business services (53); retail (51); construction and development (48); trucking and transport (39); real estate, including realtors, property managers and investors (36); home services (36); leisure and entertainment (30); manufacturing (23); energy production and services (21); health and fitness (19); hotels and motels (18); taxi and limousine services (15); farms and ranches (14); auto/truck sales and services (14); financial services, including insurance (12); and nonprofit businesses, including churches (10).

Comparison with Prior Years

Subchapter V is not mandatory for small business debtors. Since Feb. 19, 2020, there have been 1,260 small busi-

ness cases filed, including 260 cases in which the debtor did not choose to use subchapter V. Exhibit 3 shows the number of small business cases filed this year and during the same period for the previous five years.

Exhibit 3: Small Business Cases Filed (Feb. 19 to Oct. 9, 2015-2020)

Year	Total Filed
2015	1,103
2016	1,032
2017	967
2018	880
2019	920
2020	1,260

Exhibit 2: Chapter 11 Cases Filed (Feb. 19 to Oct. 9, 2020)

	Chapter 11 Cases Filed	Subchapter V Cases	Percent Subchapter V		Chapter 11 Cases Filed	Subchapter V Cases	Percent Subchapter V
National	5,051	1,000	19.8%	National	5,051	1,000	19.8%
Alabama	48	13	27.1%	Nebraska	6	5	83.3%
Alaska	3	2	66.7%	Nevada	67	13	19.4%
Arizona	62	34	54.8%	New Hampshire	4	2	50.0%
Arkansas	19	8	42.1%	New Jersey	103	24	23.3%
California	335	99	29.6%	New Mexico	12	8	66.7%
Colorado	52	25	48.1%	New York	706	51	7.2%
Connecticut	5	3	60.0%	North Carolina	68	32	47.1%
Delaware	1,114	8	0.7%	North Dakota	2	2	100.0%
Florida	327	127	38.8%	Ohio	51	12	23.5%
Georgia	86	35	40.7%	Oklahoma	11	5	45.5%
Hawaii	3	1	33.3%	Oregon	13	6	46.2%
Idaho	15	11	73.3%	Pennsylvania	73	21	28.8%
Illinois	77	42	54.5%	Rhode Island	0	0	N/A
Indiana	20	10	50.0%	South Carolina	13	5	38.5%
Iowa	6	5	83.3%	South Dakota	3	1	33.3%
Kansas	13	6	46.2%	Tennessee	68	37	54.4%
Kentucky	32	18	56.3%	Texas	1,046	126	12.0%
Louisiana	34	23	67.6%	Utah	11	8	72.7%
Maine	13	12	92.3%	Vermont	3	3	100.0%
Maryland	42	16	38.1%	Virginia	157	13	8.3%
Massachusetts	31	11	35.5%	Washington	34	17	50.0%
Michigan	57	15	26.3%	West Virginia	17	9	52.9%
Minnesota	15	9	60.0%	Wisconsin	17	12	70.6%
Mississippi	42	20	47.6%	Wyoming	11	3	27.3%
Missouri	67	15	22.4%	Puerto Rico	21	9	42.9%
Montana	4	2	50.0%	Washington, D.C.	12	6	50.0%

Total small business filings have been higher since the SBRA took effect on Feb. 19, 2020, compared to previous years. However, this might be a result of the higher debt ceiling for small business eligibility, which went into effect on March 27, 2020, so the jury is still out on whether the SBRA has led to additional filings by small businesses.

Conclusion

It took less than eight months for the first 1,000 subchapter V cases to be filed. Subchapter V seems to have gained wide acceptance as nearly 80 percent of small business debt-

ors have elected to use it, and nearly every bankruptcy court has already received cases. More than 1,000 bankruptcy professionals have already had a role in these cases, serving either as debtors' attorney, subchapter V trustee or the bankruptcy judge assigned to the case. A broad range of businesses have used subchapter V, including many in industries that have been particularly harmed by the COVID-19 pandemic. It is too early to determine whether subchapter V has met its goal of providing small business debtors a more streamlined path for restructuring their debt, but all in all, it seems to be off to a pretty good start. **abi**