

Legislative Update

BY ROBERT J. KEACH AND ADAM PRESCOTT

President Biden Signs Bankruptcy Threshold Adjustment and Technical Corrections Act into Law



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Editor's Note: For more information about the legislation, be sure to check ABI's SBRA Resources page (abi.org/SBRA) for information on a webinar featuring Mr. Keach and members of ABI's Legislative Committee discussing the provisions of the new law.

The Bankruptcy Threshold Adjustment and Technical Corrections Act (BTATCA)¹ reached the finish line on June 21, 2022, when President Joe Biden signed it into law after several months of it working its way through Congress. Among other changes, the BTATCA provides greater access for struggling small businesses, individuals and families looking to achieve a financial fresh start, including by restoring the debt-eligibility ceiling to \$7.5 million for individuals and small businesses electing to file for bankruptcy under subchapter V of chapter 11, after the prior increase to \$7.5 million had sunset in March 2022.

The BTATCA also raises the debt limit for individual chapter 13 filings to \$2.75 million and removes the distinction between secured and unsecured debt for that calculation. Although the BTATCA was originally drafted to make these eligibility thresholds permanent, the final version provides that the increases will sunset two years after enactment, on June 21, 2024. This article provides a review of the legislative history leading to the BTATCA's enactment and highlights some of the provisions that practitioners should be aware of going forward.

The Winding Road to Enactment

As a direct result of the work of the ABI Commission to Study the Reform of Chapter 11,² the Small Business Reorganization Act of 2019 (SBRA)³ became effective on Feb. 19, 2020, just before the onset of the COVID-19 pandemic and its resulting economic challenges. While the ABI Commission originally recommended a debt-eligibility limit of \$10 million to debtors looking to elect subchapter V, as a result of necessary compro-

mises to ensure passage, the SBRA initially set the eligibility limit at \$2,725,625.

In response to the economic distress related to the pandemic, the "Coronavirus Aid, Relief, and Economic Security (CARES) Act"⁴ was enacted on March 27, 2020, to temporarily increase the debt-eligibility limit from \$2,725,625 to \$7.5 million for individuals and small businesses electing to file under subchapter V. Congress extended the \$7.5 million debt limit last year with the enactment of the COVID-19 Bankruptcy Relief Extension Act of 2021,⁵ but the higher debt threshold was due to return to \$2,725,625 on March 27, 2022, unless Congress intervened.

Sen. Charles Grassley (R-Iowa) introduced the bipartisan S.3823 on March 14, 2022, aiming to make the subchapter V debt limit permanent at \$7.5 million and index it to inflation, increase the chapter 13 debt limit to \$2.75 million and remove the distinction between secured and unsecured debt in that calculation, make certain technical amendments to the SBRA, and make technical amendments to the Bankruptcy Administration Improvement Act. Senate Judiciary Chair Richard Durbin (D-Ill.) and Sens. Sheldon Whitehouse (D-R.I.) and John Cornyn (R-Texas) co-sponsored the legislation. The chapter 13 debt limit increase was consistent with the recommendations of the ABI Commission on Consumer Bankruptcy.⁶

Due to competing priorities and procedural issues, however, the Senate failed to address S.3823 prior to the March 27, 2022, sunset of the \$7.5 million subchapter V eligibility debt limit. The debt ceiling then reverted back on March 28, 2022, to the original ceiling of \$2,725,625.

Undeterred, Sen. Grassley introduced a legislative substitute for S.3823 that retained many of the same provisions as the original bill, but with two key tweaks. First, it covered any chapter 11 case eligible under the reinstated subchapter V debt limit that was pending or filed after the March 27, 2022, sunset. Second, the debt-eligibility limits for both subchapter V and chapter 13 would sunset after two years rather than become permanent. The legisla-

¹ Public Law No. 117-151.

² "Proposed Recommendations: Small and Medium-Sized Enterprise (SME) Cases," Final Report of the ABI Comm'n to Study the Reform of Chapter 11 (December 2014), p. 275, available at commission.abi.org/report (unless otherwise specified, all links in this article were last visited on July 1, 2022).

³ Public Law No. 116-54.

⁴ Public Law No. 116-136.

⁵ Public Law No. 117-5.

⁶ "Chapter 13 Debt Limits," Final Report of the ABI Comm'n on Consumer Bankruptcy (April 2019), p. 146, available at consumercommission.abi.org.

tive substitute for S.3823 passed the Senate via unanimous consent on April 7, 2022, passed the House of Representatives (392-21) on June 7, 2022, and was signed into law by President Biden on June 21, 2022.

Analysis of Key Provisions

The BTATCA contains several statutory modifications, some of which are technical adjustments unlikely to have a significant impact on day-to-day bankruptcy practice, while others will immediately affect the ongoing reorganization efforts of small businesses and individuals.

\$7.5 Million Debt Ceiling Increase for Subchapter V and Retroactive Relief

The BTATCA amends § 1182(1)(A) of the Bankruptcy Code to provide that an eligible subchapter V debtor (including its affiliates) must have “aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$7,500,000.”⁷ It implements the increased debt ceiling retroactively by providing that the amendment applies to any case that was commenced on or after March 27, 2020, and was pending on the date of the BTATCA’s enactment.⁸

Since the SBRA was enacted, case law has developed regarding eligibility for subchapter V debtors, including what it means for a debtor to be “engaged in commercial or business activities” under § 1182(1)(A). One eligibility issue that arose early under the SBRA was whether a debtor could “convert” to a subchapter V case from a pending “regular” chapter 11 case. A number of SBRA decisions addressed this issue, with most courts,⁹ but not all,¹⁰ taking a permissive view of a debtor’s right to amend its petition to elect to continue its chapter 11 case under subchapter V, particularly where the debtor made the amendment promptly after the SBRA was enacted and the SBRA deadlines could still be met (or required only modest adjustments).

The BTATCA presents a similar retroactive opt-in feature for debtors that filed chapter 11 cases between March 28 and June 21, 2022, and would have been eligible for subchapter V under the prior \$7.5 million debt ceiling. However, as long as these debtors act promptly to opt into subchapter V, they are unlikely to meet stiff resistance in making the election. With the BTATCA, Congress clearly and expressly

intended for it to make the eligibility ceiling increase retroactive for debtors that missed out on subchapter V during the gap period while waiting on Congress to act, and § 1189(b) also authorizes courts to extend the 90-day deadline to file a plan in subchapter V “if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable” — with the BTATCA clearly constituting one such circumstance.¹¹

Chapter 13 Debt Ceiling Increase Provides Another Option for Business Owners

Although the SBRA’s focus is often on small *business* debtors, individuals also may opt into subchapter V if they otherwise meet the eligibility criteria. However, the BTATCA provides another option for some individuals seeking a fresh start by raising the debt limit for individual chapter 13 filings to \$2.75 million and removing the distinction between secured and unsecured debt for that calculation.¹² Individuals who are eligible for both chapter 13 and subchapter V will have a decision to make about which type of case best suits their situation, and it will be interesting to see whether statistics reflect a preference between the two moving forward.

Clarity Regarding “Issuer” Affiliates

The SBRA precludes publicly traded companies from proceeding under subchapter V by excluding from eligibility “any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934.”¹³ The CARES Act amended the SBRA to also exclude “any debtor that is an affiliate of an issuer,” which is broadly defined in the Securities Exchange Act as “any person who issues or proposes to issue any security.” Relying on this language, the U.S. Bankruptcy Court for the Central District of California recently concluded that the SBRA bars debtors if they or an affiliate are an “issuer,” regardless of whether the debtor or its affiliate is a public company.¹⁴ The BTATCA fixes this overly broad exclusion of entities from the SBRA by amending § 1182(1)(B)(iii) to exclude only debtors with an affiliate that is subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act.

Technical Change to Subchapter V Cramdown

The BTATCA also amends § 1191(c)(3), which provides part of the modified standard for confirming cramdown plans in subchapter V. It limits the requirement that “the plan provides appropriate remedies, which may include the liquidation of nonexempt assets,” only to situations in which the debtor is relying on § 1191(c)(3)(B) for cramdown. Such provision requires that “there is a reasonable likelihood that the debtor will be able to make all payments under the plan.”¹⁵ This change should not have a large effect on cramdown confirmation in subchapter V, because § 1191(c) provides a nonexhaustive list of factors for determining whether

⁷ Public Law No. 117-151.

⁸ *Id.*

⁹ See, e.g., *In re Progressive Solutions Inc.*, 615 B.R. 894 (Bankr. C.D. Cal. 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V after case was pending approximately 15 months); *In re Glass Contractors Inc.*, No. 20-40185 (Bankr. E.D. Tex. Feb. 25, 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V after case was pending approximately one month); *In re Moore Props. of Person Cty. LLC*, No. 20-80081, 2020 WL 995544, at *7 (Bankr. M.D.N.C. Feb. 28, 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V when it was not a small business debtor as defined by Bankruptcy Code when case was originally filed and case had been pending just over one week); *In re Body Transit Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V when case was pending 48 days); *In re Bonert*, No. 2:19-bk-20836-ER, 2020 WL 3635869, at *5 (Bankr. C.D. Cal. June 3, 2020) (chapter 11 debtor could retroactively proceed under subchapter V when case was pending approximately five months).

¹⁰ See, e.g., *In re Double H Transp. LLC*, No. 19-31830-HCM, 2020 WL 2549850 (Bankr. W.D. Tex. March 5, 2020) (chapter 11 debtor could not retroactively proceed under subchapter V when the case had been pending more than three months); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020) (retroactive subchapter V election is not permissible if debtor cannot comply with 90-day deadline for filing plan); *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020) (debtor could not retroactively proceed under subchapter V because 90-day plan deadline had passed and facts and circumstances, including misrepresentations by the debtor, did not warrant modification of deadline).

¹¹ 11 U.S.C. § 1189(b).

¹² Public Law No. 117-151.

¹³ 11 U.S.C. § 1182(1)(A).

¹⁴ *In re Phenomenon Mktg. & Ent. LLC*, No. 2:22-BK-10132-ER, 2022 WL 1262001, at *4 (Bankr. C.D. Cal. April 28, 2022).

¹⁵ 11 U.S.C. § 1191(c)(3)(B).

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a plan is “fair and equitable,” and bankruptcy courts may consider the adequate remedies issues beyond situations arising under § 1191(c)(3)(B).

Conclusion

Since taking effect in February 2020, more than 3,500 debtors have elected to file under subchapter V of

chapter 11. In addition to technical changes, the BTATCA further expands access to subchapter V, particularly through the increased debt ceiling. Although the modified eligibility threshold is still, for now, temporary, the BTATCA will provide at least two more years of expanded excess for individuals and small businesses seeking an opportunity to take advantage of the SBRA’s benefits and achieve their fresh start. **abi**

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