KREKELER LAW REPORT

JANUARY 2020 **VOL. 6 NO. 1**

NEW TOOL FOR STRUGGLING BUSINESSES

Chapter 11 is supposed to keep businesses operating and keep Americans employed, all while enabling creditors to get the greatest possible recovery. This form of reorganization has worked well for many large businesses, such as Chrysler, General Motors, Owens Corning, Kmart, and a number of airlines. It does not always work, of course, as we have seen with Circuit City and Toys"R"Us.

The Problems

Chapter 11 has also not worked very well for many small businesses. The bureaucratic demands, as well as the extensive and expensive disclosure requirements, are difficult for many small businesses to meet. These requisites add greatly to the expense of reorganization.

Even the law itself makes it often impossible for small business owners to continue. Too often, debtors are unable to eliminate debt while retaining their businesses, due to what is known as the absolute priority rule. The absolute priority rule requires payment in full to a senior class of creditors before any payments can be made to a junior interest. Because ownership is the very lowest of junior interests, all creditors must be paid in full unless they consent to other treatment.

Payment in full is usually impossible. The debtor would not be in Chapter 11 in most instances if he could pay creditors in full.

Chapter 11 also has substantial administrative fees. The filing fee alone is $1,717. The debtor must also pay quarterly fees to the United States Trustee. These fees are tied to the debtor's expenses/disbursements but can be very substantial.

The debtor also has additional Chapter 11 burdens not required in other chapters. There is an initial debtor interview with the United States Trustee. More importantly, a disclosure statement must be prepared, which can sometimes be extremely…

(continue on page 2)

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In This Issue

(cont. from page 1)

lengthy and detailed, and very costly to prepare.

The SBRA

Now Congress has made an effort to fix these problems. The Small Business Restructuring Act of 2019 (SBRA) takes effect February 20, 2020.

SBRA is designed to make small business Chapter 11 cases much more like Chapter 12 or Chapter 13 cases.

Eligibility

Only a "small business debtor" may elect to proceed under the SBRA (also referred to as Subchapter V). A small business debtor may be an individual, partnership, or corporation. In addition, the definition includes the following:

1. The debtor must be engaged in commercial or business activities;
2. The debtor must have no more than $2,725,625 of total debt;
3. At least 50% of that debt must be from the business or commercial activities; and
4. The debtor's principal activity cannot be a single-asset real estate operation.

Subchapter V will only apply if the debtor elects its application. If not, normal Chapter 11 procedures will apply.

The Process

A status conference must be held by the court within 60 days from the date of the case filing. At least 14 days prior to that conference, the debtor must file a report and serve on all parties and interests. The report must detail the efforts made by the debtor, and to be made by the debtor, to get a consensual plan.

The trustee is to appear at and be heard at the status conference.

The debtor must file its plan of reorganization within 90 days from the date of filing. Only the debtor may file a plan.

No disclosure statement is required, eliminating a regular Chapter 11 requirement which often proves costly to debtors.

The debtor's plan is required to include certain disclosures, however, including a brief history of the business operations, a liquidation analysis, and projections demonstrating the ability of the debtor to make the proposed plan payments.

In some circumstances, the plan may modify the rights of a creditor secured only by the personal residence of the debtor. This differs from both Chapter 11 and Chapter 13, and may prove beneficial to some Subchapter V debtors, as many small business debtors operate out of their home.

There typically will be no creditors committee. In a number of cases, this will result in substantial savings. Creditors committees often add substantially to the costs of reorganization.

The Plan

The plan must be filed no later than 90 days after the filing of the case. The court may extend this time, but only for "circumstances for which the debtor should not justly be held accountable."

The plan must contain the following:

- Brief history of the debtor
- Liquidation analysis
- Projections of future performance
- Submission of future earnings to fund the plan

The plan may modify the rights of secured creditors.

The real benefit to debtors comes from being able to have a plan confirmed even without acceptance by creditors. To do so, the plan must not discriminate unfairly and must be fair and equitable.

The fair and equitable standard is changed. Creditors must still receive as much under the plan as they would if the debtor were liquidated in Chapter 7. But Sub V now includes an option for the debtor to contribute all of the debtor's "projected disposable income" to making plan payments for 3 to 5 years.

Projected disposable income is income not reasonably necessary to be expended for maintenance or support of the debtor or a dependent (including any post-petition domestic support obligation), or for the payment of expenditures necessary for the continuation, preservation, or operation of a business. In effect, then, **if the business is not making enough money to pay unsecured creditors, these creditors need not be paid.** This provision is very similar to the present standards under Chapters 12 and 13.

To confirm the plan, the court must find:

1. That the debtor will be able to make all payments under the plan; or

(Continued on page 3)

(cont. from page 2)

2. There is reasonable likelihood that the debtor will be able to make all payments under the plan and the plan contains appropriate remedies to protect creditors if payments are not made as proposed.

The statute states that appropriate remedies include the liquidation of nonexempt assets. If the debtor keeps property which serves as collateral for a creditor, the plan may have to call for the surrender or liquidation of that collateral in the event of the debtor's default.

Because the requirement for appropriate remedies is described simply as "including liquidation," there may be other alternatives. These might be very similar to the various means by which a debtor provides adequate protection to secured creditors.

These new provisions should enable us to keep more Wisconsin businesses in business. The law takes effect February 20, and we already have several clients waiting and ready to file.

Let us know if you have questions on how this new law can help you save your business.

IRS INTEREST RATES REMAIN AT 5%

Interest rates for underpayment of taxes will remain at 5% for the first quarter of 2020, which began January 1, 2020. The IRS rate of interest is determined quarterly, and for taxpayers other than corporations, the rate is determined by adding 3 percentage points to the Federal Short-Term Rate.

While this interest rate is quite low, delinquent taxpayers do not get off quite so easily. The IRS also imposes a monthly penalty of .5% of the unpaid tax for each month the tax remains unpaid (6% per year).

Taxpayers also do not fare as well with the Wisconsin Department of Revenue. The interest rate imposed by statute for Wisconsin taxes is at 12% on nondelinquent taxes and 18% on delinquent taxes.

Some taxes, and the accompanying interest and penalties, can be discharged in bankruptcy. Be sure you know all of your options before entering into an installment agreement or submitting an offer in compromise to either tax authority.

JUDGMENT INTEREST RATE GOES DOWN JANUARY 1

The interest rate applicable to judgments in Wisconsin is 1% plus the prime interest in effect on January 1 and July 1 of each year, as reported in the Federal Reserve Statistical Release H. 15. That rate decreases January 1, 2020 to 5.75%.

If a judgment is entered on or before June 30, the applicable interest rate is the rate in effect on January 1 of that year. If a judgment is entered after June 30, the applicable rate of interest is the rate in effect on July 1 of that year.

Rate in effect January 1-June 30, 2016	4.50%
Rate in effect July 1- December 31, 2016	4.50%
Rate in effect January 1-June 30, 2017	4.75%
Rate in effect July 1-December 31, 2017	5.25%
Rate in effect January 1-June 30, 2018	5.50%
Rate in effect July 1-December 31, 2018	6.00%
Rate in effect January 1-June 30, 2019	6.50%
Rate in effect July 1-December 31, 2019	6.50%
Rate in effect January 1-June 30, 2020	5.75%

The interest rate remains in effect from the date of entry of judgment until the judgment is paid.

FUNERAL BURGLARY

Losing a loved one is hard enough, but the thought of someone taking advantage of you during that difficult time is unthinkable. This is what a former Jefferson County deputy did, which hits a little too close to home for comfort.

From February 2018 until June of 2019, Janelle Gericke executed a plan that would allow her to enter the homes of those who had recently suffered a loss. She

(continue on page 4)

(Cont. from Page 3)

would find the list of surviving family members in the obituaries, along with the time and date of the funeral, and go to their homes to steal their personal belongings.

She was spotted on more than one occasion by a few of the homeowners walking around the perimeter of their houses or even inside of the homes. If questioned, she simply stated that she was attempting to complete a Facebook Market Place transaction and had the wrong address. She was also found in the home of another couple who returned after a relative's visitation service. She then claimed that she was hired to clean the home through a Facebook transaction and was told no one would be home. She was asked to leave and complied.

Through this information, testimony given by potential victims, and discovery of a checkbook taken from an 82-year-old that was connected to an inactive bank account, the Sherriff's Office was able to tie Gericke to the crimes.

The Sheriff's Office uncovered the evidence that led to the investigation and later turned the case over to the Department of Justice's Division of Criminal Investigations. Gericke was terminated in July of 2019 after the investigation began. Jefferson County Sheriff Paul Milbrath and the Jefferson County Sheriff's Office apologized to the people that they serve for the embarrassment and mistrust that this incident may have caused. Gericke was charged with felony burglary and may serve up to 12.5 years in prison.

Speaking Engagements

If you'd like information on any of the topics, David would love to discuss them over coffee and a bagel – his treat. Contact him at jdkrek@ks-lawfirm.com.

Have a question? Idea for a future article?

If you ask for it – we will write it!

E-mail Charlotte Pettit at

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WHERE'S KREKELER?

Attorney Lisa Lietz-Ray gave a presentation entitled "INCOMING!!! – A Creditors' Attorney's Perspective on What to Do in a New Bankruptcy Filing" to the Western District Bar Association. Lisa covered the various issues, steps, and methodologies we use when representing creditors in a bankruptcy case. The presentation drew the attendance of a number of creditor lawyers who do not normally attend these bankruptcy events.

If you would like to discuss these issues or obtain a copy of her materials, please contact us for a free cup of coffee and a bagel.

David Krekeler was asked by the Wisconsin State Bar to write an article on the new Small Business Restructuring Act.

The article was featured in *Inside Track*, a news publication of the state bar, disseminated to thousands of Wisconsin Lawyers.

A summary of the article is on the front page of this newsletter. David will also be presenting a stand-alone webcast specifically addressing the drastic changes to business reorganization.

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