

# What Comes Next: Handling Contracts, Insurance, Litigation & Insolvency Issues



Charles J. Filardi Jr., Esq.  
Dominic Fulco III, Esq.  
Thomas R. Kasper, Esq.  
Brian O'Donnell, Esq.



Raymond L. Baribeault Jr., Esq.

# Presenters

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**Charles J. Filardi Jr., Esq.**  
Of Counsel, Insolvency & Bankruptcy  
Phone: (860) 240-1076  
Email: [cfilardi@rrlawpc.com](mailto:cfilardi@rrlawpc.com)

**Dominic Fulco III, Esq.**  
Stockholder, Litigation  
Phone: (860) 240-1031  
Email: [dfulco@rrlawpc.com](mailto:dfulco@rrlawpc.com)

**Thomas R. Kasper, Esq.**  
Stockholder, Commercial Real Estate & Business Services  
Phone: (860) 240-1084  
Email: [tkasper@rrlawpc.com](mailto:tkasper@rrlawpc.com)

**Brian O'Donnell, Esq.**  
Stockholder, Litigation  
Phone: (860) 240-1012  
Email: [bodonnell@rrlawpc.com](mailto:bodonnell@rrlawpc.com)



**Raymond L. Baribeault Jr., Esq.**  
Director, Business Law, Real Estate & Bankruptcy  
Phone: (860) 442-4416  
Email: [rbaribeault@sswbgg.com](mailto:rbaribeault@sswbgg.com)

# Overview of Topics

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- Lawsuits Resulting from COVID-19
- Contract Performance: Commercial Lease Considerations
- Lawsuits: Liability & Insurance
- Bankruptcy Code: Chapters 7, 11, 12, and 13
- New Subchapter V: Small Business Reorganization

# Lawsuits

What has come from COVID-19

# Hundreds of Lawsuits

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- Media estimates more than 800 lawsuits filed to date
- Brief survey of the subject matter
  - If you have a grievance, could help you pursue
  - If you are facing a grievance, could help you brace

# Paycheck Protection Program (PPP)

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- Claim banks favored large borrowers
  - Loans supposed to be first-come, first served
  - Claim on behalf of borrowers who didn't get loans
- Several claims by agents who helped borrowers apply
  - Claim they were denied required fees
  - Agents include loan brokers, accountants, attorneys, others
  - Paid from lender's fees

# Education

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- Universities switched to on-line classes
- Allegedly did not refund room and board
- *Paris v. UConn*
  - Suspended in-person classes March 13
  - Online learning options are “subpar”
  - Students “lost the benefit of the education for which they paid, and/or the services for which their fees paid”

# Employment

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- Claimed violations of the WARN Act
  - Large employer failed to give 60-days' notice before layoffs
- Claimed violations of Fair Labor Standards Act
  - Employer allegedly closed in middle of pay period without payment
- Pretext: claim company that had been transferring jobs overseas terminated workers to advance that policy
- Claim in Alaska seeking order over workplace safety



# Travel & Entertainment

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- People paid for air travel
  - Flights were canceled, customers were dissatisfied with vouchers
- Pre-paid student trips
  - Supposed guaranteed refunds
- Planet Fitness allegedly kept charging monthly fees after gyms closed
- Amusement park charged monthly fees

# Debt Relief

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- Banks sued by borrowers seeking to suspend foreclosure actions
- Plaintiffs in one action claim to be victims of predatory lending scheme
  - Seek to stop foreclosure
  - Loan exceeds value of house
  - Seeks to quiet title

# Government

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- *Gottlieb v. Lamont*
  - Plaintiff objects to limits on mail-in voting
  - Plaintiff objects to difficulty of gathering signatures to get on ballot
- In Michigan, challenge to stay-at-home orders
  - Said to violate 1<sup>st</sup>, 2<sup>nd</sup>, 14<sup>th</sup> Amendments
  - Plaintiff was unable to visit a vacation home in the resort town of Charlevoix
- Massachusetts challenge to designation of marijuana stores as non-essential

# Government Cont.

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- Modern Barber & Shave sued Gov. Lamont
  - Claim: Followed his directions to purchase PPE, cleaning supplies
  - Passed inspection
  - Governor allegedly changed reopen date
  - Sought injunction barring government from closing shop
  - Court denied – no proof of irreparable harm
- Courant: barbers can reopen next week

# Privacy

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- Zoom has been sued
  - Claim that Zoom was collecting and sharing user information with Facebook

# Force Majeure

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- “Force Majeure”
  - Excuses performance in the event of unforeseen and uncontrollable events
- Connecticut statutes
  - “Delay in delivery or nondelivery...is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the **nonoccurrence of which was a basic assumption** on which the contract was made or by compliance in good faith with any applicable...**governmental regulation or order....**”

# Force Majeure Cont.

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- Some contract parties will be genuinely unable to perform; others will be avoiding unfavorable contracts
- “Impracticability” means an extreme and unforeseeable hardship due to an unavoidable event
  - Not enough that government order made performance difficult

# Force Majeure Cont.

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- Nonoccurrence must be basic assumption – i.e., event must not be foreseeable
- Pandemics are arguably foreseeable
  - 1918 Spanish flu, 2005 SARS, 2009 swine flu (H1N1)
  - Courts construe force majeure clauses narrowly
  - Might find that contracting parties should have allocated their responsibilities if pandemic
- If foreseeable, courts might expect parties to allocate risk in the contract



# Force Majeure Cont.

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- Statutes require that party unable to fully perform must allocate partial performance among customers
  - Must be fair and reasonable
- Seller must notify buyer “seasonably” of delay or nondelivery

# Force Majeure Cont.

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- In future contracts, consider allocating responsibility in event of pandemic or government-ordered economic restriction

# Contract Performance

## Commercial Lease Considerations

# Overview

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- Contract performance in light of COVID-19
- Do you have to perform?
- What are your options?
- Work something out?
- Sue or be sued?
- Bankruptcy considerations

# Commercial Lease Agreement

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- Why discuss a commercial lease?
  - A classic contract of shared obligations and performance.
- Typical business agreements (whether goods, services, parts manufacturer, construction, etc.)
- Mutual obligations of performance – lease basics
  - Financial obligations
    - Landlords: construction obligations, payment of improvement allowance
    - Tenants: rent obligations
  - Mutual service obligations
    - Landlords: take care of common areas, parking lots, lobbies, etc.
    - Tenants: take care of their spaces and perhaps more

# First Stop – Review the Agreement Terms

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- Review your lease in detail
- Primary issues to consider at the outset:
  - First, identify your failures or pending risks of failure based on the express obligations in your lease (or whatever contract you have concerns about). Ex. rent payment issues, mortgage payment risks for landlords, loan covenant risks, service obligation problems, access limitations, etc.
  - Next, review the notice and default provisions. Are any of the parties to the contract actually in default per the contract terms?
  - What does the default provision provide for exactly?
  - Notice requirements? When should you provide notice? Is it needed?

# Default/Notice Considerations

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- Default provisions typically provide for a period of notice and cure.
- If the other party is in default, or likely to be in default, what should you do?
- Both parties need to fully review and understand the lease provisions re: default and risks that flow from default.
- Are there personal guarantees? Can the Landlord go after the guarantor and avoid dealing with the Tenant.
- Non-defaulting party – strictly follow the lease provisions
- Notice required?
- How is notice delivered? Certified Mail? Overnight? Hand delivery?
- Phone calls/personal visits rarely will satisfy a reasonably well-drafted default provision.
- If you are in default, what should you do?

# A Party is in Default, What Should You Do?

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- So things are not going well and one party is in default, do you want to terminate the lease? Sue them? Work it out? What next?
- Assuming a Tenant default for failure to pay rent (the most typical scenario with the current COVID-19 crisis), and the Landlord has provided appropriate notice and the Tenant still hasn't paid (so hasn't cured the default), but also remains in the space, now what?
- In CT, you must sue to evict a non-performing Tenant. You can't just change the locks and throw their property out on the street or sell it. Court action needed.



# Sue to Force Performance

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- So, someone decides to sue. Let's assume it's the Landlord based on Tenant's failure to pay the rent.
  - Is this the Tenant's fault?
  - What are the causes of action?
  - Who pays?
    - “Loser pays” is a common contract provision re: legal fees.  
**BE CAREFUL HERE.**
  - Can the landlord take the deposit, go after a guarantor?
    - **GUARANTORS BEWARE!**
  - Are there other, less expensive and stressful options?
    - Business interruption insurance?
      - Requires a separate session, but in short, unlikely to provide relief as it's casualty based.
  - Force majeure? So-called “Act of God”?
    - Not my fault, not your fault, so not a default, just bad luck.
    - Also, enough to fill an afternoon talk, but the basics are that this will not likely solve the issue.

# Example of Landlord-Tenant COVID Lawsuit

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- **VENUS OVER MANHATTAN ART LLC v. 980 MADISON OWNER LLC**
  - Tenant failed to pay rent due to governor's order which effectively meant they had to shut down due to the COVID-19 situation.
  - Tenant stopped paying rent and now wants to get out of lease and get their money back. Still in the space but not paying.
  - Landlord defaulted them and called their security deposit of \$365,000.
  - The Tenant tried to cut a deal, but the Landlord refused.
  - What next? Who wins (besides the lawyers!)?
  - Why sue? What went wrong? Why couldn't they work it out?

# What To Do Other Than Sue?

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- So, assuming you want to at least initially stay out of the courtroom, what do you do?
- First, if the default situation (non-payment of rent) has occurred, the Landlord in this case, even if trying to work it out, should be sure that they follow the strict contract requirements for notice of the default.
- Next, before any real detailed solutions are proposed, you should consider entering into a Non-Disclosure Agreement. Why?
- Try and work out a mutually agreeable solution.
- Finally, document your solution.

# Making a Deal

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- Assume it's a failure to pay rent (or substitute your circumstances – a failure to deliver parts, or perform a service, etc.).
- Some options to deal in the leasing context following rent payment failure:
  - Landlord simply forgives the obligations to pay rent for a defined period.
  - Landlord agrees to a rent forbearance for a period, so you don't have to pay, but the rent failure is not forgiven, it's just delayed and recaptured later.
  - What concessions will the Landlord want, if any?
    - More term?
    - Additional security?
    - A new or additional personal guaranty?
    - A Tenant surrendering rights in the lease to extend, purchase, expand, etc.?
    - Quicker rent bumps?
    - Surrender outstanding improvement allowance or other rights of Tenant to secure future financial benefits.
    - Give the Landlord a right to terminate the lease at some later future date?

***Let's Make A Deal...***

# Will the Deal You Make Stick?

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- **BE CAREFUL!**
- Most Landlords have lenders, and most lenders need to be involved in any change to rent or other material terms of the lease. Or whatever deal you strike will be at risk.
- Loan agreements; financial covenants (Landlord's income stream); possible breach by the Landlord, who now has problems with its lender (Nice guys finish last!).
- As a Tenant, did you sign an SNDA? What is an SNDA? Could your deal with the Landlord put you in contract breach with their lender? Maybe...
- Any loan guarantees? Are you personally on the hook?
- Well-meaning efforts could harm both parties if you are not careful.

# Confidentiality Agreement

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- CONSIDER A CONFIDENTIALITY AGREEMENT IF YOU ARE A LANDLORD WHO MODIFIES A TENANT'S LEASE.
- YOU DO NOT HAVE ANY OBLIGATION TO PROVIDE COMPARABLE MODIFICATIONS FOR OTHER TENANTS IN YOUR MULTI-TENANT BUILDINGS.

# Lease Modification

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- Assuming the lender is on board, and both Landlord and Tenant want to modify the lease, then what?
  - Enter into a written lease amendment.
  - Landlord: Secure lender approval of amendment.
  - Tenant: Check with lender to be sure that if taking on an additional financial commitment to the Landlord.

# Prepare for Litigation

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If all else fails, litigation may be unavoidable.



# Concluding Thoughts on Lease/Space Issues

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- Current and future space needs
- Social distancing and how it will impact operations
- Office sharing; less private offices, more collaborative spaces
- Sublease
- Budgeting – Landlord’s increased expenses tied to COVID-19 in most all cases will be passed along to their Tenants and be reflected in an increase in CAM charges.
- ***GOOD LUCK!***

# Open for Business

## Exposure to Potential Lawsuits from COVID-19

# Exposure Liability to Businesses

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- “This is perhaps the largest area of concern for the overall business community. It encompasses multiple types of claims that could be brought against businesses that have been designated as ‘essential’ as well as large swaths of the remaining business community once the economy is reopened. The core component of claims in this category is that a customer/employee/patient/member of the public/etc. was exposed to COVID-19 in a business facility or as the result of a business’ particular action, or failure to act, and then the claimant became sick.”
  - *Source: Memorandum from Suzanne Clark, President, U.S. Chamber of Commerce to Members of the U.S. Chamber of Commerce, dated April 13, 2020 entitled “Implementing a National Return to Work Plan”*

# “Third Party” Lawsuits

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- “Third Party” Lawsuits Stemming from COVID-19 Have Been Filed and Legal Pundits Predict Many More
- Example:
  - Two passengers on the Grand Princess docked off the coast of California due to coronavirus on board filed suit against Princess Cruise Lines claiming that it had actual knowledge that other passengers who had disembarked had coronavirus symptoms but the ship still sailed.

# “Third Party” Lawsuits Cont.

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- Potential Claimants:
  - Customers or other invitees including contractors claiming exposure at a business
  - Patients against hospitals and healthcare workers
  - Residents of nursing home and assisted living facilities (or their legal representatives)
- Types of Claims:
  - Negligence (including failure to adequately safeguard; failure to adequately train)
  - Wrongful death and malpractice

# Does Insurance Provide Protection?

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- Whether an insurance policy will provide coverage will depend upon:
  - Allegations made by a plaintiff or claimant
  - Insurance policy or policies in place
- Since the COVID-19 pandemic is relatively new the issues involved in insurance coverage have not been addressed by the courts.

# Does Insurance Provide Protection? Cont.

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- Many businesses have a commercial general liability policy known as a “CGL” policy
- CGL policy:
  - Known as “third party” coverage
  - Contract between the insured and the insurer to protect against certain claims brought by a person or entity outside of that relationship against the insured (i.e., not a claim by an insured for damage to it or its property)
  - Covers sums that an insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” that is caused by an “occurrence”
    - “Occurrence”
      - “Accident including continuous or repeated exposure to substantially the same general harmful conditions.”

# Potential CGL Policy Issues

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- Insurers may:
  - Challenge coverage
    - Is an injury alleged to be based on an insured's failure to prevent exposure to the coronavirus an "accident"?
  - Claim
    - In light of warning about the need to take precautions to prevent exposure there is no occurrence because the injury was foreseeable



# Potential CGL Policy Issues Cont.

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- Policies may have exclusions for coverage and the language of the policies including endorsements must be reviewed.
- Exclusions:
  - May be used in denying coverage for a COVID-19 related claim
  - May include:
    - “Communicable diseases”
      - Insurance does not apply to “bodily injury or property damage arising out of the actual or alleged transmission of a communicable disease”
    - Fungi, mold and bacteria
    - Virus
    - Pollution
      - Connecticut appears to take a narrow view of the pollution exclusion
      - If the policy in question does not refer to virus and narrow interpretation of pollution is followed by the Connecticut courts with respect to COVID-19 claims, a successful application of the pollution exclusion to restrict coverage would be problematic

# Proactive Steps to Take

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- Secure copies of all of your insurance policies
- Conduct an “insurance audit”
  - Review existing insurance policies, including all endorsements, with your agent or broker
  - Determine what coverages you have and don’t have
- Inquire about coverage for third part claims from COVID-19
- Inquire about the sufficiency of the amount of coverage, taking into account the possibility of multiple claims during a policy period
  - Limits for each occurrence
  - Aggregate (total amount)
- Consult with your attorney after such due diligence

# Proactive Steps to Take Cont.

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- If you become aware of a claim or potential claim:
  - Give immediate notice to your agent and insurers
    - Abide by notice requirements in policy
  - Consult with your attorney
    - Potential claim or claim and coverage issues that arise following notification to your agent and insurers, including denial of coverage

# Waivers or Releases to Limit Liability

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- In order to avoid liability, businesses are presenting customers with documents to sign that waive and release the business from liability related to COVID-19
- Waiver Forms:
  - Acknowledgment of the risk of contracting COVID-19
  - Customer waives, releases and discharges the business from all liability, claims and cause of action arising out of any loss, damage or injury including death related to COVID-19 whether caused by the negligence of the business or otherwise
  - Enforceability:
    - Vary depending upon state law applicable to such documents

# Connecticut Courts' View

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- Connecticut Courts' View of Waivers or Releases of Liability for Future Negligence
  - “As a general rule, Connecticut courts disfavor broad waivers of negligence liability.”
  - 2 part test in determining the validity of advance waivers for negligence:
    - “Whether an ordinary person of reasonable intelligence would understand that, by signing the agreement, he or she was releasing the defendants from liability for future negligence.”
    - Whether the waiver is void as a matter of “public policy”

# Connecticut Courts' View Cont.

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- 6 factors used in assessing whether a waiver violates public policy, “totality of the circumstances”
- A waiver will not be enforced when:
  1. It concerns a business suitable for regulation;
  2. That business is performing a service of great public interest;
  3. The business offers its services to the general public;
  4. The party seeking exculpation has a decisive bargaining advantage;
  5. The release is tantamount to a contract of adhesion; and
  6. The release places the purchaser under the control of the seller and is subject to the risk of the seller’s carelessness

# Connecticut Courts' View Cont.

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- Example of a waiver thrown out by a court:
  - *Munn v. Hotchkiss School*, 933 F. Supp. 2d 343, 345 (D.Conn.2013), aff'd 724 Fed. Appx.25 (2d Cir. 2018).
    - Carla Munn was a student at The Hotchkiss School.
    - She signed up for a school trip to China.
    - Three months before leaving the school sent to her and her parents an agreement that contained a waiver and release of liability.
    - During the China trip, Carla contracted tick born encephalitis, a virus transmitted by an insect bit that causes brain swelling. Carla had significant life changing injuries and her parents sued Hotchkiss claiming negligent supervision of the trip and the failure to adequately warn of the risks of insect borne disease.
    - Hotchkiss attempted to use a waiver and the court found the waiver to be void as a matter of public policy.
    - After a trial a jury awarded the Munns \$41.5 million in damages and the award was upheld after appeals.

# “Nothing Ventured, Nothing Gained”

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- While the Connecticut courts take a strict view of waivers, serious consideration should be given to using a properly drafted waiver of liability as a protective measure.
- You should consult with your attorney to see if an appropriate waiver can be and should be developed for your business.



# Bankruptcy Code

Chapters 7, 11, 12, and 13

# Recent Well-Known Bankruptcies

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- Modell's Sporting Goods
- J.Crew
- Neiman Marcus
- JCPenney

# Bankruptcy

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- Not all bankruptcies result in liquidation
- Can use bankruptcy to turn things around

# Bankruptcy Types

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- Chapter 7 Liquidation
- Individual
- Businesses
- Chapter 7 Trustee
- Investigate Financial Affairs of Debtor

# Chapter 11

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- Individual
- Businesses
- Debtor in Possession (DIP) – with full power
- Disclosure Statement
- Chapter 11 Plan
  - Exclusivity period – 300 days and confirm within 45 days
- Typically No Chapter 11 Trustee
  - But can be appointed for cause
- Creditors' Committee

# Chapter 11 Cont.

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- Failure to Perform Duties
  - Dismissal
  - Conversion
  - Appoint Trustee

# Chapter 12

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- Family Farmers
- Family Fishermen
- Chapter 12 Trustee
- Paid (%)
- DIP
  - Remains in control, however

# Chapter 13

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- Individuals
- Reorganization (3-5 years)
- Means Testing (6 month look back)
- Projected Disposable Monthly Income
- Immediate Payments to Trustee



# Chapter 13 Trustee

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- Paid (%)
- Supervise and monitor case
- Investigate financial affairs of debtor
- Collect and distribute money
- CARES Act
  - Possible extension to existing confirmed plans up to 7 years

# New Subchapter V

## Small Business Reorganization

# Chapter 11, Subchapter V

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- “Small Business Reorganization Act of 2019”
- Signed into law August 23, 2019
- Effective February 19, 2020

# Legislative History

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- Purpose
  - “To streamline the process by which small business debtors reorganize and rehabilitate their financial affairs.”
- Intention
  - Allows 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.”

# Must Affirmatively Elect Treatment

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- Individuals
  - Eliminates Statement of Current Monthly Income (CMI)
- Businesses
- Debtor in Possession (DIP) – with full power
  - Exclusive authority to file plan (within 90 days)
  - Attend status conference (60 days)
  - Report on efforts to obtain consensual plan at least 14 days prior to conference
  - May be removed for cause, including fraud, dishonesty, gross mismanagement
  - May also be re-instated

# Subchapter V Trustee (Limited Power)

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- Supervise and monitor case
- Paid
  - Time and expense basis
    - no limit
    - can retain professionals (non-standing trustee) or % (standing trustee)
- Facilitate development of consensual plan (versus cram down)
- Appear and be heard at status conference (60 days)
- Examine and object to claims “if a purpose would be served”
- Furnish information to parties in interest
  - No duty to investigate the financial affairs of debtor
  - May do so if ordered by court
- Collect and distribute monies under Plan if provided for
- Make a final report

# Debt Limits

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- Non-contingent secured and unsecured debt limit of \$2,725,625
- BUT under the CARES Act due to COVID-19 Congress increased this limit to \$7,500,000 for 1 year

# Chapter 11, Subchapter V

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- Like Chapter 13 allows “Small Business” debtors to reorganize debts over a 3-5 year period
- Documents
  - Most-recent balance sheet
  - Insurance certificate
  - Statement of operations
  - Cash-flow statement
  - Federal and state income tax returns (or affidavit none were prepared)
  - Notices re Domestic Support Orders (DSO)
  - Monthly operating reports
  - DIP accounts



# Chapter 11, Subchapter V Cont.

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- Periodic reporting
- Profitability
- Approximation of cash receipts/disbursements (feasibility)
- Actual vs. projections
- Post-petition tax returns, payments
- Post-petition DSO
- No US Trustee quarterly payments
- US Trustee can inspect business premises, books and records
- No Creditors Committee

# Plan

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- No disclosure statement – unless ordered
- 90 day timeframe – no deadline for confirmation
  - Brief history of business operations
  - Liquidation analysis
  - Projections re: ability to make payments under plan
- Consensual (vote and acceptance)
  - All classes, not necessarily all creditors, approve
- No payments to trustee
- No disposable income requirements
- Get votes to prove it's consensual

# Plan Cont.

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- Trustee's function ends upon confirmation
  - “Substantial Consummation” – commencement of distribution under the plan
  - Motion to modify
  - Debtor fails to perform obligations
- Immediate discharge to debtor
- Need to include in plan that debtor retains equity interest
- Difficult to modify

# Cram Down

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- No requirement that impaired classes must accept
  - Different from Chapter 11
  - i.e., no vote required
  - Notice and opportunity to object is still required
- Must be fair and equitable
  - Using best efforts

# Projected Disposable Income

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- Defined
  - Income received that is not “reasonably necessary to be expended” for
    - Maintenance and support of debtor / dependent
    - DSO
    - Expenditures necessary for continuation, preservation or operation of business

# Projected Disposable Income Cont.

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- 3-5 years (decided by the COURT – new) OR
- Value of property to be distributed must not be less than projected disposable income
- No express requirement that “payments under the plan” from disposable income go to unsecured creditors
- No alternative paying claims in full
- No exclusion for SSDI, VA Disability, Child Support received, charitable contributions

# Plan Provisions

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- Eliminates absolute priority rule (can retain equity interest even if unsecured creditors don't receive payment in full)
  - Payments to trustee
  - Trustee's function end upon plan completion
  - Discharge upon completion of plan
  - Remedies to protect claimants if debtor fails to make payments

# Mortgage Modification Permitted

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- NEW – modification of mortgage only on principal residence
  - Cannot have been used to acquire residence
  - Must have been used for business purposes
    - HELOC
    - RAM
    - Second mortgages
    - Cash-out mortgages
  - Doesn't require that the lender had a business purpose in mind



# Failure of Duties

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- Dismissal
- Conversion
- No option to appoint trustee
- Liquidation of non-exempt assets (as provided in plan)
- Discharge can be as early as 3 years after plan payments
- No felony exception to discharge
- No debtor education certificate (but only if crammed down or not liquidating)

# Post-Petition Property & Earnings

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- Chapter 7
  - Post filing – not included (with exceptions)
- Chapter 11, 13
  - Post filing – included
- Subchapter V
  - Consensual – none
  - Cram Down – included

# Contact Us

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**Charles J. Filardi Jr., Esq.**  
Of Counsel, Insolvency & Bankruptcy  
Phone: (860) 240-1076  
Email: [cfilardi@rrlawpc.com](mailto:cfilardi@rrlawpc.com)

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Director, Business Law, Real Estate & Bankruptcy  
Phone: (860) 442-4416  
Email: [rbaribeault@sswbgg.com](mailto:rbaribeault@sswbgg.com)

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