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I. INTRODUCTION

The Small Business Reorganization Act (“SBRA”) took effect on February 19, 2020.1 Under the SBRA, subchapter V was created, generating a new avenue for small business debtors to attempt to reorganize their debts and continue their businesses.2 The SBRA does not eliminate the law governing debtors who elect to undergo a traditional Chapter 11 bankruptcy process.3 Instead, subchapter V provides an option to help small business debtors “streamline the bankruptcy process by which [they] reorganize and rehabilitate their financial affairs.”4 Traditional Chapter 11 bankruptcy procedures were often ineffective for small business debtors since the section was designed for larger, more sophisticated corporate debtors.5 Subchapter V empowers small business debtors by removing procedural barriers and lowering some financial hurdles to a reorganization in bankruptcy.6

In subchapter V, the SBRA provides qualifying small business debtors with an alternative to traditional Chapter 11 bankruptcy.7

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3. See Bonapfel, supra note 1, at 576. (“SBRA does not repeal existing provisions that govern small business debtors in chapter 11. Those provisions continue to apply to small business debtors who do not elect to proceed under subchapter V.”). In this Note, the process established by the SBRA will be called “subchapter V”; the other avenue a debtor may choose, which existed prior to the SBRA and continues to exist, will be referred to as a “traditional Chapter 11 bankruptcy.”
5. See Michael Blackmon, Revising the Debt Limit for “Small Business Debtors”: The Legislative Half-Measure of the Small Business Reorganization Act, 14 BROOK. J. CORP. FIN. & COM. L. 339, 344 (2020) (“Traditional Chapter 11 does not ‘work for small and medium-sized businesses because the [code] places unrealistic and artificial deadlines on small and medium-sized businesses’ which prevents them from restructuring.’”).
6. See id. (“Subchapter V provides debtors with ‘a powerful suite of tools to negotiate a deal with its creditors and, if negotiations break down, subchapter V provides a simplified method of confirming a Chapter 11 plan over a creditor’s objection.’”).
7. See 11 U.S.C. § 1187(a) (spelling out the debtor’s duties if he or she elects to use subchapter V).
However, the SBRA does not eliminate traditional Chapter 11 bankruptcy procedures as a potential avenue for a qualifying small business debtor.\textsuperscript{8} Traditional Chapter 11 bankruptcy procedures are still available to a debtor if he or she chooses to forego or is ineligible for the newly minted subchapter V.\textsuperscript{9} Only “small business debtors” as defined by the SBRA may access subchapter V.\textsuperscript{10} The SBRA defines a small business debtor as a person engaged in commercial or business activities with an aggregate noncontingent liquidated secured and unsecured debt of $7.5 million at the date of the petition’s filing.\textsuperscript{11}

The SBRA removed mechanisms deemed by many to be cost-prohibitive administrative expenses and disclosure efforts.\textsuperscript{12} Traditional Chapter 11 reorganizations provide for the appointment of a committee of unsecured creditors at the debtor’s expense, but this provision is not carried over to subchapter V cases.\textsuperscript{13} Unlike traditional Chapter 11 reorganizations, subchapter V does not require the written disclosure statement to be provided by the debtor.\textsuperscript{14} Instead, Subchapter V cases make the “Absolute Priority Rule” inapplicable,\textsuperscript{15} and instead use the “Best Efforts Rule.”\textsuperscript{16} Traditional Chapter 11 reorganization cases take much longer than a subchapter V reorganization should take.\textsuperscript{17} Further,

\begin{itemize}
\item \textsuperscript{8} See Blackmon, supra note 5, at 576 (“SBRA does not repeal existing provisions that govern small business debtors in chapter 11. Those provisions continue to apply to small business debtors who do not elect to proceed under subchapter V.”); 11 U.S.C. § 1181 (establishing certain provisions of traditional Chapter 11 bankruptcy inapplicable in subchapter V bankruptcy proceedings).
\item \textsuperscript{9} See 11 U.S.C. § 1181 (stating which specific provisions of the traditional Chapter 11 bankruptcy process do not apply in subchapter V or apply only conditionally in the subchapter V process yet leaving the traditional Chapter 11 process available to debtors).
\item \textsuperscript{10} See 11 U.S.C. § 1182 (defining which debtors qualify as a small business under the SBRA and therefore who may access subchapter V).
\item \textsuperscript{11} See id.
\item \textsuperscript{12} 11 U.S.C. § 1181 (making both 11 U.S.C. § 1102 and 11 U.S.C. §1125 inapplicable); 11 U.S.C. § 1102 (“[T]he United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.”); 11 U.S.C. § 1125 (requiring a written disclosure statement to be provided to the Court in connection with its filed plan).
\item \textsuperscript{13} 11 U.S.C. § 1181 (setting forth provisions of Chapter 11 bankruptcy which are not applicable in subchapter V).
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} 11 U.S.C. § 1191(c)(2) (establishing the Best Efforts Rule, which requires debtors to put all of his or her projected disposable income to be received in the three to five years toward making payments under the plan following the first payment due under the confirmed plan).
\item \textsuperscript{17} Compare 11 U.S.C. § 1189 (requiring the debtor to file a plan within 90 days of the order for relief in a subchapter V case) with 11 U.S.C. § 1121(e) (requiring a plan to be filed within 300 days of the filing date in a traditional Chapter 11 case).
\end{itemize}
the SBRA grants small business debtors enormous flexibility once their
plan is filed on subchapter V’s expedited basis.\footnote{11 U.S.C. § 1193(a) (allowing debtors to modify their plan at any time before confirmation so long as the plan meets the requirements of § 1122 and § 1123).}

While SBRA is an admirable attempt to give salvageable small businesses a lifeline, it goes too far in protecting debtors.\footnote{See Blackmon, supra note 5, at 345 (“Thus, the SBRA ‘holds the promise of improving the likelihood of reorganization for a viable small business debtor by reducing the time, expense of a proceeding, and eliminating certain legal impediments to confirmation of a Chapter 11 plan.’”).} It allows debtors to hide information regarding their finances since it requires little disclosure.\footnote{See 11 U.S.C. § 1181 (making inapplicable the statutory requirements of filing a disclosure statement and the formation of unsecured creditors’ committees); see also Christopher G. Bradley, The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act, 28 AM. BANKR. INST. L. REV. 251, 274 (2020) (“The problem of disposable income manipulation is exacerbated by the lowered disclosure requirements of subchapter V.”).} Further, it grants debtors too much leniency by neither setting a time limit for plan confirmation nor limiting the modifications a debtor may make to the plan once it is filed.\footnote{See Bradley, supra note 20, at 272 (“The lack of a deadline for confirmation or of limitations on plan modification may present serious concerns for creditors.”).} Though the maze of filing deadlines, barrage of fees and administrative expenses, and destruction of equity rights in the business have long deterred small business owners from choosing to enter Chapter 11, the reforms of the SBRA subchapter V of Chapter 11 bankruptcy have swung the pendulum too far in the other direction, much to the detriment of creditors.\footnote{Small Business Reorganization Act, 11 U.S.C. § 1182 (defining who qualifies as a small business debtor for the purposes of the SBRA).}

While small business interests in reorganization are crucial in the United States economy, the free and easy flow of credit is equally important. This Note examines the substantial debtor-friendly changes made to the Chapter 11 bankruptcy in subchapter V of Chapter 11 for small business debtors, analyzes the actions debtors are likely to take in the reorganization process, and ultimately concludes that the SBRA goes too far in empowering small business debtors to the detriment of creditors’ rights.\footnote{Bradley, supra note 20.}

The Note proceeds in six parts. Part I introduces the SBRA and discusses how it weakens creditors’ recoveries.\footnote{See infra Part I} Part II discusses the informational asymmetry caused by removing statutory tools creditors need to gather information about the debtor’s financial state of affairs, and addresses the inadequacy of counterbalancing measures in the SBRA to ensure adequate information is provided to the small business debtor’s
creditors. Part III discusses problems with the new Best Efforts Rule and the ways in which these problems are exacerbated by the statutorily manufactured problem of asymmetrical information. Part IV discusses potential solutions to the problem posed by the informational asymmetries in the context of determining what a debtor’s “Best Efforts” ought to be under a confirmed plan. Part V discusses the undue leverage granted to debtors by the lack of a required time frame for plan confirmation and the capacity of bankruptcy judges to prevent plan modification as a means of twisting the arms of creditors. Finally, Part VI draws conclusions.

II. KNOWLEDGE IS POWER: HOW THE SBRA WEAKENS CREDITORS’ CAPACITY TO RECEIVE PROPER PAYMENT

Subchapter V creates a mountain of asymmetrical information problems for creditors seeking to recover from a debtor in bankruptcy; it does so by removing crucial investigative mechanisms that were deemed cost-prohibitive administrative expenses and procedural tasks. Though the lack of disclosure statements in subchapter V cases is a boon to debtors seeking to reorganize quickly and cheaply, its absence will soon prove to be a bane to creditors seeking to enforce their rights.

Both the Chapter 11 creditors’ committee and the required disclosure statement served important functions in providing information to creditors during the debtor’s reorganization in a traditional small

25. See infra Part II.
26. See infra Part III.
27. See infra Part IV.
28. See infra Part V.
29. See infra Part VI.
31. See Ethan D. Dunn, Faster, Cost-Effective, and Streamlined Reorganization Under Subchapter V, Mich. B.J. (June 2020) at 35–36 (discussing the ways in which the SBRA removes hurdles, such as mandatory disclosure statements and the appointment of unsecured creditors’ committees, to a small business’ successful reorganization under subchapter V of Chapter 11).
32. See generally, Bradley, supra note 20 (discussing the ways the SBRA will damage creditors).
business Chapter 11 reorganization.\textsuperscript{33} Information regarding the debtor’s financial state of affairs is at a premium when calculating what the payments ought to be under a confirmed plan, for a debtor’s ability to hide financial information can effectively allow him or her to lowball creditors in the confirmed plan.\textsuperscript{34}

Under a traditional small business Chapter 11 reorganization, debtors would be required to file disclosure statements providing creditors “adequate information.”\textsuperscript{35} Adequate information is a high standard; it requires debtors to provide information about a debtor’s books, records, federal tax consequences, and other information that would enable a hypothetical investor to make an informed judgment about the plan.\textsuperscript{36} The debtor must make “full and fair disclosure” during the entire reorganization process beginning from the date the Chapter 11 petition is filed.\textsuperscript{37} Courts have found a disclosure statement inadequate for various reasons, including: failure to enumerate assets and liabilities, failure to provide reasons for the debtor’s financial difficulty, failure to provide creditors with the cash requirement needed by debtors to operate their properties, failing to identify any escrowed funds held on behalf of debtor’s tenants, failing to reveal the status of any pending litigation.


\textsuperscript{34} Bradley, supra note 20, at 274. (“The problem of disposable income manipulation is exacerbated by the lowered disclosure requirements of subchapter V.”).

\textsuperscript{35} See 11 U.S.C. § 1125 (requiring debtors to file disclosure statements providing creditors with “adequate information” about the business).

\textsuperscript{36} 11 U.S.C. § 1125(a) (defining “adequate information” to require the provision of information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.).

\textsuperscript{37} In re Momentum Mfg. Corp., 25 F.3d 1132, 1136 (2d Cir. 1994) (“Of prime importance in the reorganization process is the principle of disclosure. The Code obliges a Debtor to engage in full and fair disclosure, providing to creditors ‘information of a kind, and in sufficient detail, as far as is reasonably practicable . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . . This disclosure requirement does not attach only to the preparation of disclosure statements. ‘Full and fair’ disclosure is required during the entire reorganization process; it begins ‘on day one, with the filing of the Chapter 11 petition.’”) (emphasis added).
against debtors and their assets, and failing to identify tax consequences which might arise as result of the debtor’s reorganization. 38

Subchapter V removes the disclosure statement requirement unless the bankruptcy court orders it. 39 Subchapter V’s most intensive disclosure requirement mandates only that a filed plan include a brief history of the debtor’s business operations, a liquidation analysis, and projections about the debtor’s ability to make payments under the proposed plan of reorganization. 40 The SBRA, however, does not provide for judicial review to determine what the minimum disclosure requirements may be. 41 Put simply, the adequate information standard is a much more exacting standard than subchapter V’s disclosure requirements, and such information is crucial to creditors in the bargaining process. 42

The SBRA’s abolition of creditors’ committees furthers the assault on a creditor’s capacity to collect information about the debtor’s financial affairs. 43 Traditional Chapter 11 allows unsecured creditors to

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38. Hall v. Vance, 887 F.2d 1041, 1043 (10th Cir. 1989) (“The bankruptcy court found that the Statement failed: (1) to enumerate the assets and liabilities, accounts receivable, physical condition and maintenance required for each parcel of real property; (2) to provide the reason for debtors’ financial difficulty; (3) to provide the creditors with the cash requirements needed by the debtors to operate the properties; (4) to identify any escrowed funds held on behalf of the debtors’ tenants; (5) to reveal the status of any pending litigation against the debtors and their assets; and (6) to identify the tax consequences which may arise as a result of the debtors’ reorganization. These failures are clearly contrary to § 1125(a)(1); therefore, we must reject the Halls’ contention that the bankruptcy court’s findings of fact were clearly erroneous.”).


41. Id.; see also Bonapfel, supra note 1, at 599 (“Subchapter V does not require that the plan contain ‘adequate information,’ and it does not provide for judicial review of the required information.”).

42. Compare 11 U.S.C. § 1125(a)(1) (defining “adequate information); see also In re Momentum Mfg. Corp., 25 F.3d at 1136 (interpreting “adequate information” to require full and fair disclosure of information of a kind that would enable hypothetical reasonable investors to make an informed judgment about the proposed plan); Hall, 887 F.2d at 1043 (holding that 11 U.S.C. § 1125(a)(1)’s “adequate information” standard required an extensive list of documentation regarding the debtor’s financial affairs) with 11 U.S.C. § 1190 (requiring plans filed under subchapter V to include a brief history of the debtor’s business operations, a liquidation analysis, and projections regarding the debtor’s ability to make payments under the proposed reorganization plan).

43. 11 U.S.C. § 1181 (making inapplicable § 1102); 11 U.S.C. § 1102 (“Unless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter.”).
appoint a committee of creditors.\textsuperscript{44} These committees of unsecured creditors had an investigative role in traditional small business bankruptcy cases.\textsuperscript{45} They examined the debtor’s acts, conduct, assets, liabilities, financial condition, business operations, and the desirability of continuance of the debtor’s business.\textsuperscript{46} Abolishing the unsecured creditors’ committee—which serves an information-gathering role—is yet another way that the SBRA saddles the capacity of creditors to obtain information about the financial affairs of the small business debtor.\textsuperscript{47}

The SBRA attempts to bridge this gap by appointing a trustee to help “facilitate the development of a consensual plan of reorganization.”\textsuperscript{48} The trustee’s duties are otherwise ill-defined,\textsuperscript{49} and it seems likely that the statute’s vaguely contemplated actions of the subchapter V trustee will be inadequate for the purposes of gathering information for creditors for several reasons.\textsuperscript{50} To begin, the SBRA imposes no duty upon the trustee to investigate the debtor’s affairs absent a court order.\textsuperscript{51} Trustees are likely to see their roles as helping to confirm a feasible plan because the SBRA is explicit in authorizing a trustee to

\textsuperscript{44} 11 U.S.C. § 1102 (“Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.”).

\textsuperscript{45} 11 U.S.C. § 1103 (“A committee appointed under section 1102 of this title may . . .
investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business, and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.”).

\textsuperscript{46} Id.

\textsuperscript{47} 11 U.S.C. § 1101 (making inapplicable 11 U.S.C. § 1125 which allowed classes of unsecured creditors to create a committee of unsecured creditors in the subchapter V process).


\textsuperscript{49} See 11 U.S.C. § 1183 (requiring the trustee to appear at conferences and be heard on several matters but not imposing a general duty to investigate); see also Bonapfel, supra note 1, at 583 (“Although the responsibility of the Subsidiary V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor’s property, business, and financial condition, a sub V trustee, like a chapter 12 trustee, does not have the duty to investigate the financial affairs of the debtor.”).

\textsuperscript{50} See Bonapfel, supra note 1, at 583 (discussing the necessary qualifications and roles suggested by practitioners the trustee might play in subchapter V cases); see also Lawless, supra note 33 (noting the role the trustee might take in differing circumstances).

\textsuperscript{51} See 11 U.S.C. § 1183(b)(2) (requiring the trustee to play an investigative role as defined in § 1106(a)(3) only if the court so orders); 11 U.S.C. § 1106(a)(3) (“A trustee shall . . . investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.”).
help a debtor develop a plan of reorganization and suggesting a goal of confirming a consensual plan. Not only does the trustee owe the creditors no duty, but the trustee’s financial interests could be at odds with unsecured creditors; his or her fees will be paid out of the disposable income plan payments before any unsecured creditors are paid. An active trustee would bill more hours, thereby reducing the amount of money that may otherwise go to unsecured creditors. Thus, a trustee is a poor substitute for the investigative powers of a secured creditors’ committee, as the trustee is unlikely to provide much information regarding the state of the debtor’s financial affairs. As will be discussed in Parts III and V respectively, this lack of information creates asymmetrical information when calculating plan payments under the Best Efforts Rule and attempting to object to improper plan modifications.

III. DEBTORS’ “BEST EFFORTS” TO DIMINISH CREDITORS’ RECOVERIES

The SBRA’s abolition of the Absolute Priority Rule is among its most substantial changes to small business Chapter 11 reorganization. Subchapter V cases make the Absolute Priority Rule inapplicable and instead uses the Best Efforts Rule. Under traditional small business Chapter 11 reorganizations, the Absolute Priority Rule prohibits

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52. See 11 U.S.C. § 1183 (requiring the appointment of a trustee in subchapter V cases and outlining the trustee’s duties); see also Donald L. Swanson, SBRA: Frequently Asked Questions and Some Answers, 39 AM. BANKR. INST. J. 1, 2 (Nov. 2019) (“This provision is unique: in no other place does the Bankruptcy Code (1) authorize a trustee to help a debtor in possession develop a plan of reorganization, or (2) suggest the goal of a ‘consensual plan’ when the absolute-priority rule does not apply.”).

53. Bradley, supra note 20, at 269 (“Second, the trustee’s financial interests may directly conflict with those of the unsecured creditors in particular. The fees of the trustee—which, as mentioned under the new Act may be paid over time as part of the plan—may drain any ‘disposable income’ plan payments that would otherwise go to unsecured creditors.”).

54. Id.

55. Id.


57. Id. (making inapplicable § 1129(a)); 11 U.S.C. § 1129(a) (establishing the Absolute Priority Rule, which dictates that junior creditors may not be paid before members of a dissenting class with claims senior to theirs nor can equity interest holders keep their equity under a plan if all senior claims are not first paid in full).

58. See 11 U.S.C. § 1191(c)(2) (establishing the Best Efforts Rule, which requires debtors to put all of his or her projected disposable income to be received in the three to five years toward making payments under the plan following the first payment due under the confirmed plan). To be clear: the “Best Efforts Rule” is not the same as the “Best Interest Test.” The Best Interest Test, as set forth in 11 U.S.C. § 1129(a)(7), requires all creditors to be paid at least as much in the Chapter 11 proceeding as they would otherwise get in a Chapter 7 proceeding in order to confirm the plan, and it remains in full effect in both traditional and subchapter V bankruptcy proceedings.
absolutely both the paying of any junior creditor and prohibits any equity interest holder from retaining its interest if there were any senior claims that had yet to be fully paid.\textsuperscript{59}

If a small business debtor elects to proceed under subchapter V instead of traditional Chapter 11 bankruptcy procedures, the Absolute Priority Rule will not apply.\textsuperscript{60} Instead, subchapter V cases are governed by the Best Efforts Rule.\textsuperscript{61} The Best Efforts Rule requires all of the projected disposable income of the debtor to be received in a three to five year period after the first payment under the plan is due to be used to make payments to unsecured creditors under the plan.\textsuperscript{62} The repayment period cannot exceed five years.\textsuperscript{63}

Courts apply the Absolute Priority Rule in traditional Chapter 11 reorganizations to bar the debtor from retaining property without payment in full to unsecured creditors.\textsuperscript{64} Application of the Absolute Priority Rule ends many otherwise confirmable Chapter 11 plans, and is even more likely to end a traditional small business reorganization under Chapter 11 because reorganization may be impossible for a small business if the current owners cannot retain their interests.\textsuperscript{65} Smaller businesses are often owned and operated by a single individual with a personal stake in the business’s success.\textsuperscript{66} The Absolute Priority Rule deters small business debtors—particularly those that are solely owned and operated—from filing for Chapter 11 reorganization at all for fear that the debtor would lose its equity interest entirely if it was unable to pay all of the unsecured creditors’ claims.\textsuperscript{67}

\textsuperscript{59} See 11 U.S.C. § 1129(a) (establishing the Absolute Priority Rule, which dictates that junior creditors may not be paid before members of a dissenting class with claims senior to theirs nor can equity interest holders keep their equity under a plan if all senior claims are not first paid in full).

\textsuperscript{60} See 11 U.S.C. § 1181 (making inapplicable § 1129(a) with respect to the unsecured creditors).

\textsuperscript{61} See 11 U.S.C. § 1191(c)(2) (establishing the Best Efforts Rule, which requires debtors to put all of his or her projected disposable income to be received in the three to five years toward making payments under the plan following the first payment due under the confirmed plan).

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Bonapfel, \textit{supra} note 1, at 607 (“In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.”).

\textsuperscript{65} See Dunn, \textit{supra} note 31, at 36 (discussing the unique harm posed to small business cases in traditional Chapter 11 cases by the Absolute Priority Rule).

\textsuperscript{66} Blackmon, \textit{supra} note 5, at 349 (“A common feature of smaller businesses is a ‘unified ownership and management’ structure that emphasizes an owner’s personal stake in seeing the business thrive.”).

\textsuperscript{67} 11 U.S.C. § 1129(b) (barring equity holders from retaining their interests in the business unless all unsecured creditors’ claims are paid off first).
Subchapter V’s Best Efforts Rule is substantially more debtor-friendly. The new Best Efforts Rule requires all of the projected disposable income of the debtor to be received in the three to five-year period after the first payment under the plan goes towards making payments on the plan. Key considerations in the confirmation of a plan under the Best Efforts Rule include: how projected disposable income is determined, how the court decides whether the required period should be longer than three years, and if it is to be longer than three years, how the court determines how much longer the period should be. The debtor need only estimate disposable income for a period of three to five years and pay that amount to creditors in order to retain their equity interest. There is no requirement that anything be paid to unsecured creditors at all.

Whatever problems it has, abolition of the Absolute Priority Rule would frustrate the purposes of subchapter V. In essence, subchapter V allows existing business owners to maintain their control and ownership of the business even if they confirm a plan that does not pay a dime to general unsecured creditors. Despite the controversy over the failure to pay unsecured creditors, abolishing the Absolute Priority Rule was necessary to provide meaningful change for small business debtors because small businesses are commonly owned and operated by one person. The Absolute Priority Rule—if allowed to impact small business debtors under the SBRA—would operate to divorce the most interested party in the small business’ subchapter V reorganization from

68. 11 U.S.C. § 1191(c)(2) (establishing the “Best Efforts Rule”). The “Best Efforts Rule” is not so named by the statute; scholars and judges have named 11 U.S.C. § 1191(c) requiring debtors to allocate their disposable income to plan payments the “Best Efforts Rule.”

69. 11 U.S.C. § 1191(c)(2) (“As of the effective date of the plan the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.”).

70. Bonapfel, supra note 1, at 609 (“Key confirmation issues are: (1) How is projected disposable income determined? (2) How does the court determine whether the required period should be longer than three years?; and (3) If so, how does the court determine how much longer the period must be?”).

71. See 11 U.S.C. § 1191 (discussing the necessary payments of disposable income to unsecured creditors without requiring that any money actually go to said unsecured creditors).

72. Id.

73. See Bonapfel, supra note 1, at 607 (discussing the consequences of replacing the Absolute Priority Rule with the Best Efforts Rule).

74. See 11 U.S.C. § 1191(c)(2) (establishing the Best Efforts Rule in place of the Absolute Priority Rule for the purposes of subchapter V plan confirmation).

75. Blackmon, supra note 5, at 349 (“A common feature of smaller businesses is a ‘unified ownership and management’ structure that emphasizes an owners’ personal stake in seeing the business thrive.”).
his interest in the business. This is necessary for the continuation of the business if reorganization is to occur, in the service of unsecured creditors who are likely to receive a smaller payout anyway. Though the abolition of the Absolute Priority Rule is necessary for the SBRA to function, the Best Efforts Rule goes too far, much to the detriment of creditors.

That the Best Efforts Rule is more desirable than the Absolute Priority Rule in the context of bankruptcy reorganizations of small business debtors says little about its own merits. The Best Efforts Rule requires a plan to provide that all of the projected disposable income of the debtor be applied to make payments under the plan. The statutory definition of disposable income requires the debtor to subtract certain expenses from his projected revenue during the three to five year period during which they are making plan payments. Expenses which are “reasonably necessary to be expended . . . for the payment of expenditures necessary for the continuation, preservation, or operation of the business debtor” fall outside of the statute’s definition of “disposable income.”

Though this rule contemplates the payment of items like payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily occurred when running a business, problems arise when the debtor wishes to establish a reserve or invest income to increase the business’ profitability.

76. See 11 U.S.C. § 1129(a) (forbidding a debtor from retaining an interest in the business unless unsecured creditors are paid in full).

77. Id.

78. See 11 U.S.C. § 1191(c) (establishing the Best Efforts Rule in place of the Absolute Priority Rule for the purposes of subchapter V plan confirmation).

79. See id. (defining a plan to be “fair and equitable with respect to each class of claims or interests” if it “provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.”).

80. See 11 U.S.C. § 1191(c) (setting forth the disposable income requirement of the Best Efforts Rule).

81. See 11 U.S.C. § 1191(d)(1)(B) (defining “disposable income” not to include expenses necessary for the continuation, preservation, or operation of the debtor’s business).

82. See id. (excluding particular expenses necessary for the continuation and operation of the debtor’s business from the definition of “disposable income”).

83. See 11 U.S.C. § 1191(d)(2) (allowing deductions from “disposable income” where the expenditure is reasonably necessary to the operation of the business); see also Bonapfel, supra note 1, at 611 (discussing what expenditures are and are not to be considered “reasonably necessary to be expended” for “maintenance or support” under § 1191).
The permissible expenditures of disposable income are written vaguely and encourage malfeasance by subchapter V debtors.\textsuperscript{84} The statutory language as written will incentivize small business debtors to calculate projected revenues at the lowest possible level while maximizing projected expenses, thereby producing an artificially low disposable income to be paid to unsecured creditors.\textsuperscript{85} This sort of debtor malfeasance is not only encouraged but rewarded: if the projected disposable income is lower than the actual profit, then the statute provides no obligation that the debtor share the additional profits with his creditors or even inform them of his miscalculation.\textsuperscript{86} The language of the statute’s exclusions from the Best Efforts Rule is itself vague and easily manipulated too.\textsuperscript{87} Many expenditures can be argued to be “necessary for the . . . preservation” of the business, and courts are very likely to defer to the trustee—who has statutorily granted discretion to investigate the debtor’s property, business, and financial condition and monitor the debtor’s payments—if the trustee allows a given expenditure.\textsuperscript{88}

Debtors know more about their own finances and prospects than do their creditors.\textsuperscript{89} Debtors have every incentive to minimize estimated revenues and to maximize their projected expenses to decrease their projected disposable income\textsuperscript{90} and there is no requirement that any

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\item \textsuperscript{84} See 11 U.S.C. § 1191(c) (requiring disposable income to be paid to unsecured creditors for a period of three to five years after the payment period has begun); see also § 1191(d) (setting forth expenses which may be excluded).
\item \textsuperscript{85} See 11 U.S.C. § 1191(d) (excluding “expenditures necessary for the continuation, preservation, or operation of the business of the debtor” and “for the maintenance or support of the debtor or a dependent of the debtor” from the definition of disposable income which must be paid to unsecured creditors). However, 11 U.S.C. § 1129(a)(2) still requires that secured creditors either retain their liens or be paid in full in order to confirm the plan.
\item \textsuperscript{86} See id. (setting forth the requirements for disposable income); see also Bradley, supra note 20, at 273 (discussing the incentives for and ways in which debtors may misrepresent their disposable income as per the § 1191(d)).
\item \textsuperscript{87} See 11 U.S.C § 1191(d). (excluding expenditures necessary for the continuation, preservation, or operation of the business of the debtor); see also Bonapfel, supra note 1, at 611 (“[§ 1191(d)(2) contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.”).
\item \textsuperscript{88} See Bonapfel, supra note 1, at 583–84 (listing the statutory powers and duties of the trustee in a subchapter V case); see also Brendan G. Best, Challenging the Sub-V Election, 39 AM. BANKR. INST. J. 28, 47 (Dec. 2020) (discussing courts’ deference to trustees regarding the trustee’s decisions to exercise their discretion in not appointing unsecured creditors’ committees).
\item \textsuperscript{89} Bradley, supra note 20, at 274–75 (“Debtors have superior information about their own finances and their future prospects, and they will be capable of producing the three to five year income projections that best suit their preferences.”).
\item \textsuperscript{90} Id at 274 (“The problem of disposable income manipulation is exacerbated by the lowered disclosure requirements of subchapter V.”).
\end{itemize}
additional profit beyond the projected disposable income be shared with creditors or even disclosed. The lack of a disclosure statement creates an asymmetrical information problem. This issue combines with the debtor’s incentive to minimize estimated revenues and maximize estimated expenses in order to lowball creditors. These actions go undetected because the debtor will never have to disclose the disparity between the reported disposable estimates and actual disposable income.

IV. MITIGATION: TRYING TO CONSTRAIN THE BEST EFFORTS RULE

The potentially flexible definition of “necessary expenditure” under the Best Efforts Rule is problematic by itself, but its harm is compounded by the inability of the creditors to acquire information regarding the debtor’s financial state. The removal of unsecured creditors’ committees, the lack of disclosure statements, the ineffectiveness of the appointed trustee due to the trustee’s ill-defined statutory role in subchapter V cases, the incentive for debtors to mislead creditors on their projected revenues and expenses, and the unclear parameters of what constitutes an “expenditure necessary for the continuation, preservation, or operation of the business debtor” make the Best Efforts Rule rife with opportunities for abuse by crafty debtors.

If courts provide leniency with regard to what expenditures are necessary for the continuation of the business, a legislative solution may be necessary. The first proposed legislative solution would be to better define what constitutes an expenditure necessary to the preservation or the continuation of the business under the Best Efforts Rule.

91. Id. at 259 (“And remarkably, if the debtor’s disposable income proves to be higher than estimated, there is no requirement that the additional profit be shared with creditors.”).
92. Id. at 274 (“The problem of disposable income manipulation is exacerbated by the lowered disclosure requirements of subchapter V.”).
93. See id. at 269 (discussing how the trustee can be used to minimize the worst effects of the Best Efforts Rule on creditors).
95. See 11 U.S.C. § 1183 (defining the role of the subchapter V trustee).
96. See Bradley, supra note 20, at 273 (discussing the incentives for fudging the numbers regarding projected revenues and projected expenses).
98. Bradley, supra note 20, at 272 (arguing that courts are likely to be lenient to newly reorganized subchapter V debtors in the wake of their emergence from subchapter V reorganization).
99. See 11 U.S.C. § 1191(d) (allowing the deduction of expenditures necessary to the continuation of the business from the disposable income payments).
perfect definition is perhaps not possible due to the statute’s purpose,\textsuperscript{100} some boundaries are necessary to help courts balance debtor reorganization and the proper payment of debts to creditors under the Best Effort Rule in order to prevent debtors from exempting frivolities from their disposable income.\textsuperscript{101}

The other potentially useful amendment to the SBRA would be to better define the subchapter V trustee’s role in the case.\textsuperscript{102} Specifically, this could be amended to impose a duty of investigation and disclosure rather than what appears to be a minimal, mediatory role.\textsuperscript{103} This would form a better compromise between the debtor and creditors than simple mediation because it could make up for some of the information deficiency created by the removal of unsecured creditors’ committees and the inapplicability of the required disclosure statement in subchapter V cases.\textsuperscript{104} The major downside to this amendment is that it may harm unsecured creditors in some instances by engaging the subchapter V trustee more, thus driving up expenses to be paid out of the disposable income otherwise available to creditors.\textsuperscript{105} Still, subchapter V cases differ on their facts, and, if there is sufficient capacity for the debtor to produce disposable income, then the expended fees may end up increasing recoveries despite increased trustee fees.\textsuperscript{106} This would make it more difficult for the debtor to game its projected revenue and expense numbers in an attempt to decrease disposable income that must be paid to unsecured creditors.\textsuperscript{107}

\begin{itemize}
  \item \textsuperscript{100} See H.R. Rep. No. 116-171, at 1 (2019) ("H.R. 3311, the ‘Small Business Reorganization Act of 2019,’ would streamline the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs.").
  \item \textsuperscript{101} See 11 U.S.C. § 1191(d) (setting forth the Best Efforts Rule and the disposable income requirements therein).
  \item \textsuperscript{102} See 11 U.S.C. § 1183 (setting forth the duties and powers of the subchapter V trustee).
  \item \textsuperscript{103} See 11 U.S.C. § 1183 (setting forth the duties of the subchapter V trustee); see also Bonapfel, supra note 1, at 583 ("Although the responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor’s property, business, and financial condition, a sub V trustee, like a chapter 12 trustee, does not have the duty to investigate the financial affairs of the debtor.").
  \item \textsuperscript{104} 11 U.S.C. § 1181 (making the provisions allowing the appointment of a committee of unsecured creditors and the requirement that debtors file a disclosure statement inapplicable in subchapter V cases); see also Bonapfel, supra note 1, at 583 ("Although the responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor’s property, business, and financial condition, a sub V trustee, like a chapter 12 trustee, does not have the duty to investigate the financial affairs of the debtor.").
  \item \textsuperscript{105} Bradley, supra note 20, at 269 (discussing the ways in which trustee’s fees may drain any “disposable income” which would otherwise go to unpaid unsecured creditors).
  \item \textsuperscript{106} Id.
  \item \textsuperscript{107} Id.
\end{itemize}
V. THE LACK OF REQUIRED TIME FRAMES TO CONFIRM PROPOSED PLANS

In addition to the disadvantage in bargaining imposed upon creditors by asymmetrical information caused by the removal of procedural obligations, creditors are further harmed in the bargaining process by the SBRA’s required timeline. If a debtor elects to reorganize under traditional Chapter 11 processes, he or she must file a plan within 300 days of the filing date. Only the small business debtor may file a plan in the first 180 days after the date for the order for relief in a traditional Chapter 11 bankruptcy. The debtor must then confirm a plan within forty-five days of filing the plan. This is not so in subchapter V cases.

Subchapter V reorganizations are much swifter than traditional Chapter 11 reorganizations of small businesses. The debtor must file a plan within ninety days of the order for relief. The SBRA requires the small business debtor to hold a status conference within sixty days of the order for relief to “further the expeditious and economical resolution of a case” under subchapter V. The small business debtor must file and serve a report on all parties detailing the efforts the debtor has and will make to attain a consensual plan of reorganization at least fourteen days before that conference. No creditor will ever have an opportunity to file a competing plan in a subchapter V case. The debtor may modify any plan it files at any time so long as the plan has not been confirmed; there is no limitation on the number of modifications the debtor can make.

108. See 11 U.S.C. § 1189 (granting subchapter V debtors the exclusive right and obligation to file a plan within 90 days after the order for relief); 11 U.S.C. § 1191 (discussing the requirements for plan confirmation).
109. 11 U.S.C. § 1121(e) (requiring a plan to be filed within 300 days of the filing date in a traditional Chapter 11 case).
110. See id. (“In a small business case . . . only the debtor may file a plan until after 180 days after the date of the order for relief . . . “).
111. 11 U.S.C. § 1129(e) (setting a 45-day deadline for confirmation once the reorganization plan is filed).
112. 11 U.S.C. § 1189 (requiring the debtor to file a plan within 90 days of the order for relief in a subchapter V case).
113. Id.
114. Id.
115. 11 U.S.C. § 1188(a) (mandating a status conference for small business debtors within 60 days of the entry for the order of relief).
116. 11 U.S.C. § 1188(c) (mandating a report no later than 14 days before the mandatory status conference).
117. 11 U.S.C. § 1189 (granting debtors the exclusive right to file a plan in subchapter V cases).
to the plan before it is confirmed. There is no deadline by which a filed plan must be confirmed.

The SBRA granted debtors great leverage over creditors whose recoveries are reduced by delays in subchapter V reorganization proceedings. As the time spent in the reorganization process drags on, the bankruptcy estate will spend more money and the case will lose value, thereby damaging creditor recoveries. The small business debtor can prolong this process using subchapter V’s procedural tools, for the debtor can act to damage creditor recoveries by extending the time spent in the subchapter V bankruptcy reorganization process by utilizing its capacity to unilaterally amend the filed plan before it is confirmed. Each time the debtor does so the case will be extended, assets will diminish, and there will be no end to this gamesmanship in sight because there is no time frame in which a filed plan must be confirmed under the subchapter V process.

While creditors will be impacted differently by this sort of gamesmanship depending on their security or priority, the extent of the assets present in a given case may still incentivize even well-situated creditors to be leveraged into agreeing to confirmation plans in an endeavor to protect or salvage their own recoveries, which only diminish as the process drags on. Meanwhile, debtors are incentivized to claim that they are working without rest to form a reasonable and confirmable

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118. 11 U.S.C. § 1193 (allowing debtor to modify a plan at any time before confirmation).
119. Bradley, supra note 20, at 272 (arguing the lack of a deadline for confirmation or of limitations on plan modification may present serious concerns for creditors); 11 U.S.C. § 1189 (discussing filing a plan); § 1191 (setting confirmation requirements); 11 U.S.C. § 1193 (allowing debtor to modify an unconfirmed plan at any time).
120. Bradley, supra note 20, at 272 (discussing he ways in which debtors can extend their cases to gain leverage over creditors).
122. 11 U.S.C. § 1189 (granting debtors the exclusive right to file a plan in subchapter V cases); § 1193 (allowing debtor to modify a plan at any time before confirmation).
123. 11 U.S.C. § 1181 (making inapplicable § 1129(e)); 11 U.S.C. § 1129(e) (requiring small business debtors to confirm a filed plan within 45 days).
124. Warren & Westbrook, supra note 107, at 625 (“The professional fees and other expenses associated with a Chapter 11 case diminish the value available to creditors . . . In addition, the time spent in bankruptcy itself leads to the loss in value, comprising an indirect cost.”).
plan, and they need only a bit more information about their financial futures to finish it.\footnote{125}{See Bradley, \textit{supra} note 20, at 272 (arguing that debtors will use § 1193 to modify and extend the time it takes to confirm their cases to gain bargaining leverage over creditors by diminishing creditors’ recoveries).}

The problem of asymmetrical information arises once again in this context. Despite the importance of not allowing disingenuous statements to go unchallenged where the creditor has good reasons to doubt the debtor’s good faith, the creditor is less likely to have the information necessary to articulate such a reason due to the diminished disclosure requirements of the debtor, the lack of an investigating entity, and the subchapter V trustee’s role as a mediator rather than an investigator.\footnote{126}{Id. at 269 (“While subchapter V trustees are not statutorily charged with investigating the debtor’s affairs, most trustees will likely feel uncomfortable ignoring credible complaints, and will undertake to develop at least some view regarding the credibility of debtors’ financial information and projections. A “squeaky wheel” strategy may work for a creditor that can articulate concrete and well-founded objections to the debtor’s proposed course of action.”).}

There are several possible solutions to the leverage posed by the lack of a confirmation deadline in the SBRA.\footnote{127}{See 11 U.S.C. § 1189 (setting forth filing requirements for subchapter V debtors); 11 U.S.C. § 1191 (setting forth the requirements of a confirmable plan); § 1193 (setting forth requirements for modification of a proposed yet unconfirmed plan).} The clearest option would be to amend the statute to set a deadline by which a plan must be confirmed after filing a confirmation plan in accordance with statutory procedures to prevent indefinite diminution of a case’s value.\footnote{128}{See 11 U.S.C. § 1191 (lacking a deadline for plan confirmation).} However, such an amendment may be slow in coming, and the responsibility may rest with judges to protect the value of cases and thereby creditor recoveries by taking more skeptical positions towards the debtor throughout the process to ensure that modifications to unconfirmed filed plans are made in good faith rather than to twist creditors’ arms.\footnote{129}{See Bradley, \textit{supra} note 20, at 272 (“The lack of a deadline for confirmation or of limitations on plan modification may present serious concerns for creditors. Debtors may well develop the practice of filing placeholder plans early in the case and then modifying them over time—perhaps over great lengths of time. In the absence of statutory guidance concerning the permissibility of such behavior, creditors may appeal to the court for relief.”).}

\section*{VI. CONCLUSION}

The SBRA seeks to reduce the time spent in the reorganization process for subchapter V debtors by removing expensive and the time-consuming barriers to the benefits of successful Chapter 11
reorganizations for small businesses. 130 The SBRA removes required disclosure statements and barred the appointment of unsecured creditors’ committees to reduce the costs and complexity of Chapter 11 reorganization for small business debtors. 131 However, the inapplicability of these provisions may harm creditors’ capacity to effectively gather information about the state of the debtor’s financial affairs. 132 An informational asymmetry was created that gives debtors increased leverage in negotiating plan confirmations. The best way to alleviate this informational asymmetry is to impose a duty of investigation on the subchapter V trustee. 133

In the absence of a reformed SBRA granting creditors a greater ability to discover information about debtors’ financial state of affairs, debtors will be incentivized to hide the ball in calculating their disposable income under the Best Efforts Rule. 134 Debtors will undervalue projected income, overvalue expenses, and attempt to argue for deductions from the Best Effort Rule’s disposable income requirement for expenditures reasonably necessary for the continuation of the business. Due to the decreased capacity of creditors to gain information about the debtor’s financial affairs, this will be even more difficult to combat. The best remedy available is for the legislature to set a stricter standard for what sort of expenditures are necessary for the continuation of the business.

Finally, the lack of a deadline for plan confirmation in subchapter V reorganizations grants debtors too much negotiation leverage over creditors because the debtor will be empowered to hold up the case through modifications to the plan so long as it remains unconfirmed. If

130. See Bonapfel, supra note 1, at 574 (“The purpose of SBRA is ‘to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs.’ A sponsor of the legislation stated that it allows small business 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.’”).

131. 11 U.S.C. § 1181 (making inapplicable the provisions of the bankruptcy code requiring debtors seeking to undergo Chapter 11 bankruptcy to file disclosure statements or fund appointed unsecured creditors’ committees).

132. See Bradley, supra note 20 (arguing that some of the SBRA’s reforms damaged creditors’ ability to investigate debtors’ financial situations).

133. See Bonapfel, supra note 1, at 583–84 (discussing how a court may impose investigative duties upon the subchapter V trustee if the judge finds it necessary); see also Bradley, supra note 20, at 269 (“While subchapter V trustees are not statutorily charged with investigating the debtor’s affairs, most trustees will likely feel uncomfortable ignoring credible complaints, and will undertake to develop at least some view regarding the credibility of debtors’ financial information and projections.”).

134. 11 U.S.C. § 1191(c) (setting forth the Best Efforts Rule requiring debtor to dedicate projected disposable income to be received to making payments under the confirmed reorganization plan).
the debtor manages to successfully delay the confirmation of a plan and prolong the reorganization process then the case’s value will decline, and creditor recovery will too. An amendment to the SBRA limiting the debtor’s capacity to amend filed plans would cede an appropriate amount of the leverage back to creditors, but judges can effectuate this same policy by taking a more skeptical view of debtors’ claims when modifications are requested.

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