

Subchapter V bankruptcy filings for multi property real estate - by Thomas Kearns



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I have long been a proponent of using bankruptcy laws to workout distressed real estate. Bankruptcy courts are much faster than New York State courts are at ordering properties sold and the statutory system is more effective in resolving all open claims. Bankruptcy filings get a bad reputation when a borrower files a bankruptcy petition the morning of a state court ordered foreclosure sale after an often multi-month state court foreclosure process. But lenders should be less resistant to bankruptcy filings where borrowers have a path to resolution.

The 2019 passage of Subchapter V of the Bankruptcy Code creates a new streamlined path that deserves attention from property owners and lenders involving workouts where more than one property is owned and liabilities don't exceed \$7.5 million. Subchapter V, specifical-

ly designed for small business debtors, simplifies the bankruptcy process, reducing costs and time. Importantly, Subchapter V is not available for single asset real estate debtors.

Subchapter V allows small business owners, including those owning multiple real estate properties, to qualify for a simplified bankruptcy process. The core intent of Subchapter V is to allow for a more efficient reorganization process, enabling small businesses to negotiate with creditors, restructure debts, and continue operations with reduced disruption. One way Subchapter V expedites the bankruptcy process is by removing the need for creditors committee, enabling swifter resolution of disputes and reducing costs.

Unlike traditional bankruptcy proceedings, which may result in the forced sale or liquidation of assets, Subchapter V prioritizes the retention of ownership and control. This allows owners to maintain operational autonomy and strategic direction throughout the restructuring process.

It also eliminates the absolute priority rule thereby making confirmation of a reorganization plan much easier to achieve. Unlike in a regular Chapter 11

case, in a Subchapter V case, the debtor may confirm a plan that allows equity to retain its ownership even if there does not exist an impaired consenting class of creditors who also support the plan (which is required in a "cram down" plan).

Said differently, in a Subchapter V case, all classes of creditors can reject the plan and it can still be confirmed, and equity can still retain its equity, so long as the debtors plan generally provides for either the distribution of "projected disposable income" over three to five years, or the value of the property distributed under the plan will equal or exceed the amount of projected disposable income.

Subchapter V does involve the appointment of a bankruptcy trustee, however. The involvement of a bankruptcy trustee, although less intrusive than a creditors committee under a Chapter 11 filing, merits increased attention.

Since single asset debtors are not permitted to use Subchapter V, it's important to determine whether the business involved qualifies. Two recent court decisions help. In *Re Evergreen Site Holdings, Inc.*, an Ohio Bankruptcy Court held that a business that owned two parcels

including a portion on which it operated a zipline park was not a single asset debtor even though its primary asset was land rented to mobile homeowners.

In *re Nuovo Ciao-Di, LLC*, a 2023 Southern District Bankruptcy Court decision, recently held that a debtor which owned two separate but adjacent condominium units was not precluded from filing a Subchapter V petition event though transferred under the same deed and owned by the same debtor in part because the units were separate tax parcels and because the units were not operated as part of a common scheme. As the reader can see, the determination as to whether a particular debtor would be disqualified from a filing requires analysis of the facts and the case law.

In conclusion, the use of Subchapter V small business bankruptcy filing holds potential for real estate ventures with multiple property holdings facing financial distress. As we navigate the complexities of the current real estate market, entrepreneurs should not overlook the bankruptcy tools at their disposal.

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