

TYPES NOT MAPPED YET May 17, 2024 | TTR not mapped yet | David A. Warfield

Subchapter V Practice in the Eighth Circuit: The First Four Years

The new Subchapter V of Chapter 11 became effective on February 19, 2020. Designed to streamline reorganizations for small businesses, the new Subchapter V has proven very popular. The Final Report of the American Bankruptcy Institute ABI Task Force (the “ABI Task Force”) identified 6,410 Subchapter V cases filed nationwide between Subchapter V enactment in February 2020 and December 31, 2023. Subchapter V filings comprised about one-quarter of.

Subchapter V filings have exploded so far in 2024. In the first four months of 2024, 880 Subchapter V cases were filed nationwide, an increase of 45.7% over the same period in 2023. The Subchapter V filings in the first four months of 2024 are 12.3% higher than any other four-month period. While the looming expiration of the temporary increase in the debt limit for Subchapter V (more about that below) may have contributed to the recent surge in filings, it is clear that Subchapter V has become the primary legal vehicle for small business bankruptcy restructurings.

In August 2021, Thompson Coburn published an analysis of all Subchapter V cases filed to that point in the 8th Circuit. Given the passage of time and Subchapter V’s increasing significance for small business reorganizations, Thompson Coburn has updated its analysis of 8th Circuit Subchapter V filings. Unless otherwise indicated, this article analyzes Subchapter V cases filed between February 19, 2020 and December 31, 2023.

FILINGS, DEBT LEVELS, AND TYPES OF CASES

Number of Filings

From reviewing various public records, including the ABI Task Force report, information from the federal judiciary, and PACER filings, Thompson Coburn identified 207 Subchapter V filings in the 8th Circuit between February 19, 2020, and December 31, 2023. This number includes affiliates that filed Subchapter V cases that are being jointly administered. For purposes of the data analysis, Thompson Coburn included all affiliated debtors, even if they were part of a jointly administered Subchapter V case.¹

Using 2020 Official U.S. Census results, approximately 1.93 Subchapter V cases were filed per 100,000 people nationwide through December 31, 2023. However, the filing rate in the 8th Circuit was much lower, only 0.95 cases per 100,000 residents.

Jurisdiction*	Subchapter V Filings	Subchapter V Filings/100,000 residents
Arkansas	41	1.36
Iowa	19	0.6
Minnesota	39	0.68
Missouri	62	1.01

Nebraska	33	1.68
North Dakota	7	0.9
South Dakota	6	0.68
Total 8 th Circuit filings	207	0.95
Total Nationwide	6,410	1.93

*Districts within the same state were added together.

The 8th Circuit filing data shows a substantial filing rate disparity among the states in the 8th Circuit. Subchapter V filing rates in Arkansas and Nebraska are substantially above the 8th Circuit as a whole, but no 8th Circuit state comes close to matching the nationwide filing rate. However, 8th Circuit filings in the first four months of 2024 increased an astounding 275% over Subchapter V filings in the first four months of 2023.

Despite the lower Subchapter V filing rates, a higher ratio of 8th Circuit Chapter 11 filers choose Subchapter V than in the rest of the country. Subchapter V filings in the 8th Circuit from February 19, 2020, through April 30, 2024, comprise 44.4% of all Chapter 11 cases filed in the circuit during that period. Nationwide, Subchapter V cases over a similar period comprised only about 25% of all Chapter 11s. Some of this variance is undoubtedly due to large, multi-debtor Chapter 11 cases filed outside of the 8th Circuit.

Increased Debt Limit

As originally drafted, Subchapter V was available to debtors with \$2,725,625 or less in total non-insider debt. However, six weeks after Subchapter V was enacted, and in response to the COVID-19 crisis, Congress temporarily increased the Subchapter V non-insider debt limit to \$7,500,000. As a result, the \$7,500,000 debt limit has been in place for all but the first six weeks after Subchapter V's effective date and for a brief period in 2022 with the temporary increase lapsed before it could be renewed.

The increased debt limit is due to lapse again on June 21, 2024, and Congress is now weighing whether to extend or make permanent the \$7,500,000 debt cap. The 8th Circuit data shows the average total debt for Subchapter V debtors in the 8th Circuit is \$1,971,399, which is comfortably under the original debt limit. However, 41 out of the 207 Subchapter V debtors in the 8th Circuit reported more than \$2,725,625 in total non-insider liabilities. So almost 20% of all Subchapter V debtors in the 8th Circuit would have been ineligible to file for relief under Subchapter V without the temporary debt cap increase. The ABI Task Force reports that 26.2% of all Subchapter V filings nationwide through December 31, 2023, were by debtors with liabilities in excess of the original \$2,725,625 debt limit.

Filings by Individuals

Individuals with primarily business debts are eligible to file Subchapter V so long as they meet the applicable debt limit. Nationwide, about 20.7% of all Subchapter V cases were filed by individuals. In the 8th Circuit, the percentage of individual Subchapter V debtors is almost the same: Out of the 207 Subchapter V cases in the 8th Circuit, 44 were filed by individuals, for a percentage of 21.3%.

CASE OUTCOMES

Plan Filings and Confirmation Rates

In the 8th Circuit, 141 of the 207 Subchapter V debtors eventually filed a plan. Of the 141 filed plans, 97 of them had been confirmed as of May 1, 2024. Approximately 15 cases were still in progress as of May 1, 2024. Excluding the cases in progress, 46.9% of all 8th Circuit Subchapter V cases resulted in a confirmed plan.

The breakdown by District is as follows:

District	Cases Filed	Plans Confirmed	Confirmation Rate
Arkansas Eastern	17	9	52.9%
Arkansas Western	24	6	25%
Iowa Northern	10	5	50%

Iowa, Southern	9	3	33.3%
Missouri Eastern	28	13	46.4%
Missouri Western	34	19	55.9%
Minnesota	39	18	46.2%
Nebraska	33	16	48.5%
North Dakota	7	5	71.4%
South Dakota	6	3	50%

Individual Subchapter V debtors in the 8th Circuit have confirmed plans in their cases at a higher rate than the national average. Thirty-five of the 44 individual Subchapter V debtors filed a plan, and 24 of those 35 plans were confirmed. Therefore, 68.6% of all individual Subchapter V debtors who filed a plan were able confirm it.

Time Needed to File and Confirm a Plan

Section 1189(b) says that the debtor shall file a plan not later than 90 days after the petition date, “except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.” Of the 141 cases where the debtor filed a plan, the average number of days between the petition date and the date of the filing of the first plan was 118 days. Of the 141 cases where a plan was filed, the first plan was filed within 90 days of the petition date on 65 occasions, or 46.1% of the time.

Thompson Coburn also examined how long it takes to confirm a Subchapter V plan. In the 8th Circuit, the average number of days between the petition date and the date the plan was confirmed is 258 days.

The breakdown per District is as follows:

District	% of plans filed in 90 days or less	No. of days to file plan	No. of days to confirm plan
Arkansas Eastern	33.30%	137	297
Arkansas Western	35.70%	117	314
Iowa Northern	60%	118	199
Iowa, Southern	25%	124	242
Missouri Eastern	28.60%	125	253
Missouri Western	50%	114	322
Minnesota	50%	117	223
Nebraska	63.60%	104	259
North Dakota	0	107	134
South Dakota	60%	97	204

Consensual Plans

In the 8th Circuit, 73 of the 97 confirmed Subchapter V plans, or 75.2% were confirmed as consensual plans under Section 1191(a) of the Bankruptcy Code. The remaining 24 confirmed plans, or 24.8% were non-consensual plans confirmed under Section 1191(b) of the Bankruptcy Code. The ABI Task Force reported that 69% of all confirmed plans nationwide were consensual and 31% were non-consensual. Accordingly, confirmed 8th Circuit confirmed plans were slightly more likely to be confirmed consensually than in the nation as a whole.

The breakdown by districts in the 8th Circuit is below:

District	no. of non-consensual plans confirmed	% of confirmed plans that are non-consensual
Arkansas Eastern	0	0%
Arkansas Western	0	0%
Iowa Northern	0	0%
Iowa, Southern	0	0%
Missouri Eastern	5	38.5%
Missouri Western	7	36.8%
Minnesota	3	16.7%
Nebraska	7	43.8%
North Dakota	2	40%
South Dakota	0	0%

Dismissals and Conversions

Not all Subchapter V cases succeed. Excluding the 15 cases still in progress, 88 of the remaining 192 cases, or 45.8%, were dismissed or converted to Chapter 7. About two-thirds of these cases were converted or dismissed before the debtor could file a plan. However, 29 of the debtors in the dismissed or converted cases were able to file at least one plan but were unable to confirm a plan.

District	No. of dismissed or converted cases	% of dismissed or converted cases (excluding cases in progress)
Arkansas Eastern	7	43.80%
Arkansas Western	14	58.30%
Iowa Northern	3	37.50%
Iowa, Southern	6	66.70%
Missouri Eastern	7	35%
Missouri Western	13	41.90%
Minnesota	19	51.40%
Nebraska	15	45.50%
North Dakota	2	28.60%
South Dakota	2	40%

Conclusion

Subchapter V has improved the ability of small businesses in the 8th Circuit to reorganize. Anecdotal evidence suggests that some businesses that would have been unable to use the Bankruptcy Code before Subchapter V's enactment have successfully reorganized under Subchapter V. Bankruptcy courts in the 8th Circuit have routinely permitted Subchapter V debtors to extend the 90-day period to file a plan, but 75% of Subchapter V debtors have filed plans within 120 days after the petition date.

The data suggests that many Subchapter V debtors encounter some delay between filing their plans and obtaining confirmation. But given the relatively high confirmation rates, this delay suggests that Subchapter V debtors and their creditors have generally worked collaboratively toward a consensual confirmation. And in those cases where a consensual confirmation is not possible, 8th Circuit courts, like other courts throughout the country, have not hesitated to confirm non-consensual plans.

Subchapter V is not a panacea. Nearly one-half of all Subchapter V cases are ultimately dismissed or converted. However, while it is difficult to quantify, it appears that a high percentage of the cases that ultimately fail are doomed from the start and are dismissed because the debtor is unable to file schedules or is represented pro se. Finally, the 8th Circuit data supports the recommendation in the ABI Task Force report that Congress act promptly to extend the \$7,500,000 debt limit for Subchapter V eligibility.

[1] *As the ABI Task Force acknowledged in its report, there is no single comprehensive database collecting all relevant information about Subchapter V cases.*



authorsTest

david

David A. Warfield