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Mid-Atlantic Bankruptcy Workshop 2021

Subchapter V Recent Case Law Updates and Issues: Navigating the New Small Business Roadmap to Reorganization

Hon. Maria Ellena Chavez-Ruark

U.S. Bankruptcy Court (D. Md.) | Greenbelt

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Hon. Michelle M. Harner

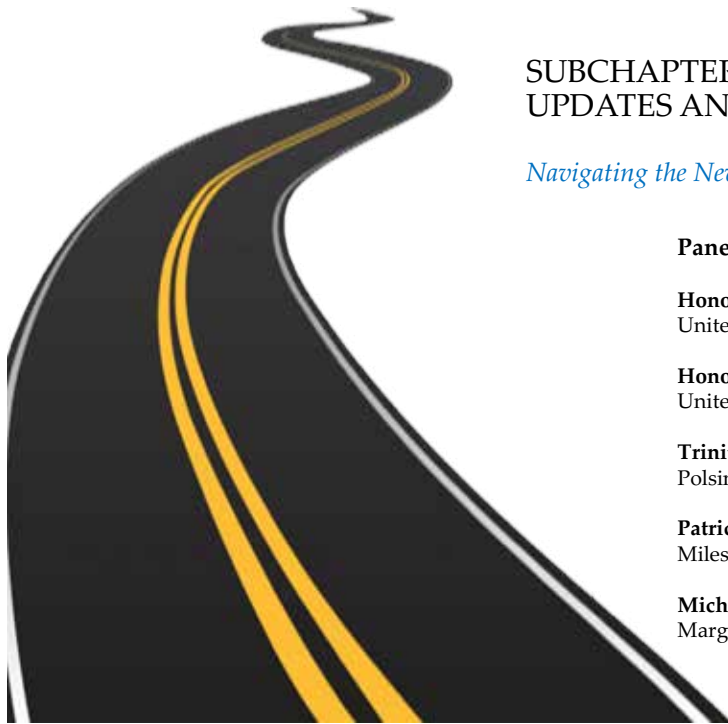
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SUBCHAPTER V RECENT CASE LAW UPDATES AND ISSUES:

Navigating the New Small Business Roadmap to Reorganization

Panelists:

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United States Bankruptcy Court for the District of Maryland

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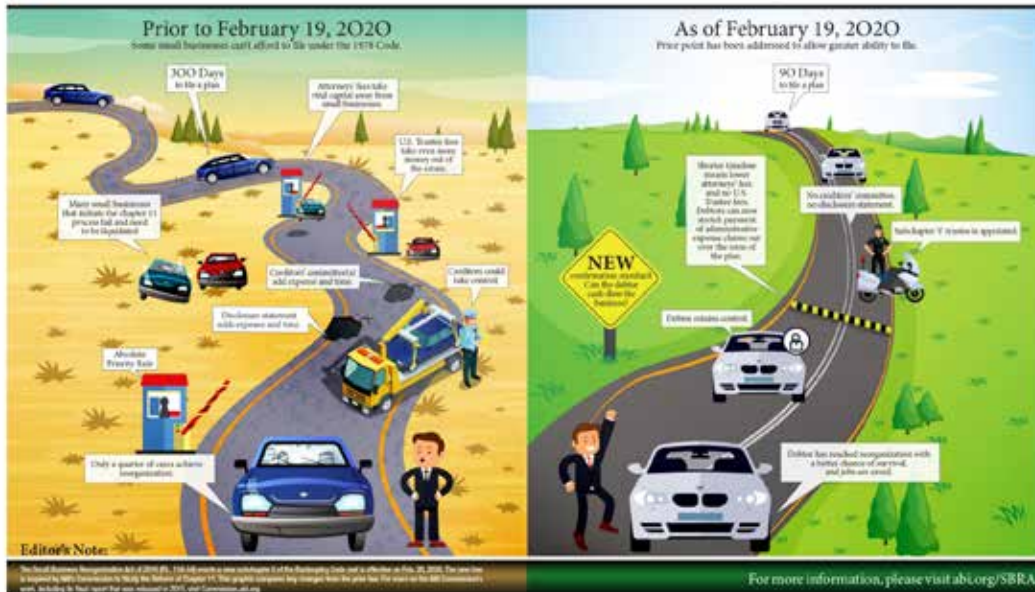
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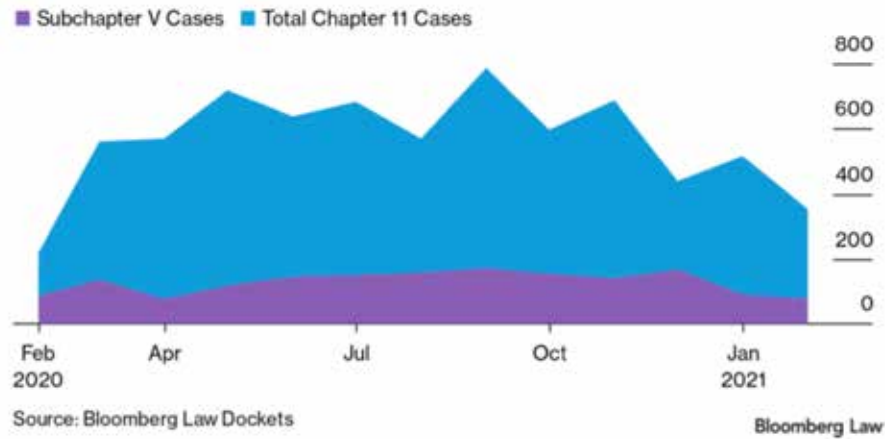
SBRA

Small Business Reorganization Act

A Better Road to Reorganization for Main Street Businesses



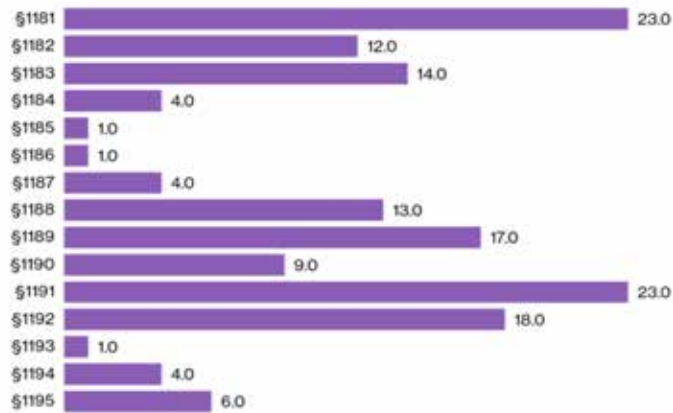
Comparison of Subchapter V Case Filings to Total Chapter 11s



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The Year in Subchapter V Litigation

Number of Opinions Analyzing the Section, February 19, 2020-February 18, 2021, 11 U.S.C. § 1181 et seq.



Source: Bloomberg Law

Bloomberg Law

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Subchapter V Eligibility

11 U.S.C. § 1182. Definition of Debtor

- Debtor must be engaged in commercial or business activities
- Aggregate noncontingent liquidated secured and unsecured debts cannot exceed \$7.5MM
- Is retroactive election permissible?

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Subchapter V Eligibility

Engaged in Commercial or Business Activities

- What does it mean to be “engaged in commercial or business activities”?
- Does Section 1182 require the Debtor to be engaged in actual business operations?

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Subchapter V Eligibility

Debt Requirements

- Increased debt limit under the CARES Act through March 27, 2022.
- Do post-petition rejection damages claims or claims based on undetermined PPP obligations need to be included in debt calculations?
- Should debts be aggregated in jointly administered cases?
- Do the scheduled debts need to be related to current business activities?

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Subchapter V Eligibility

Retroactive Election

- May a debtor retroactively proceed under subchapter V?
- What impact does the 90-day deadline for filing a plan have on a debtor's ability to proceed retroactively?

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Role of the Subchapter V Trustee

- The trustee owes a [fiduciary duty](#) to the bankruptcy estate.
- The Trustee will act as a fiduciary for creditors, [in lieu of an appointed creditors' committee](#).
- Charged with [facilitating](#) the subchapter V debtor's small business reorganization and [monitoring consummation](#) of the plan of reorganization.

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Role of the Subchapter V Trustee

11 U.S.C. § 1183. Trustee

(b) Duties. – The trustee shall –

- (1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;
- (2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;
- (7) facilitate the development of a consensual plan of reorganization.

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Role of the Subchapter V Trustee

- Trustee as mediator/neutral facilitator.
- Trustee's fiduciary duties.

"A Subchapter V trustee is specifically charged with the duty to 'facilitate the development of a consensual plan of reorganization.' 11 U.S.C. § 1183(b)(7). This role should include working not only with the debtor, but with creditors as well, to facilitate negotiation of a consensual plan. A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors."

In re Seven Stars on the Hudson Corp., 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020)

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Role of the Subchapter V Trustee

- What happens after removal of a debtor in possession?

If a debtor in possession is removed pursuant to Section 1185(a), the Subchapter V trustee will take on the additional duties listed in Sections 704(a)(8) and 1106(a)(1), (2), and (6).

Additionally, the Subchapter V Trustee, which is an independent third party, steps into the shoes of the debtor's management and becomes a fiduciary with an obligation of "fairness" to all parties.

U.S. Dep't of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees*, 3-8 (Feb. 2020).

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Discharge Exceptions

11 U.S.C. § 1192

If the plan of the debtor is confirmed under section 1191(b) of this title... the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

(2) of the kind specified in section 523(a) of this title.



11 U.S.C. § 523

A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an **individual** debtor from any debt—... (emphasis added)

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Discharge Exceptions

Does Section 523 Apply to Corporate Subchapter V Debtors?

Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.), 626 B.R. 871, 2021 Bankr. LEXIS 652, 70 Bankr. Ct. Dec. 12, 2021 WL 1096627 (Bankr. D. Md. 2021) (J. Ruark)(dismissing complaint to determine nondischargeability of debt as discharge exceptions contained in Section 523(a) apply only to individual SBRA debtors and not corporations).

Cantell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC), 2021 Bankr. LEXIS 1738, __ B.R. __, 2021 WL 2667735 (Bankr. D. Md. 2021) (J. Harner) (dismissing adversary proceeding, adopting reasoning in Satellite Restaurants).

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Discharge Exceptions

Does Section 523 Apply to Corporate Subchapter V Debtors?

But see Concrete Log Sys. v. Better Than Logs, Inc. (In re Better Than Logs, Inc.),
2021 Bankr. LEXIS 1570, 2021 WL 2405397 (Bankr. D. Montana 2021) (denying
SBRA corporate debtor discharge under 11 USC 523(a)(6)).

Norton on Bankruptcy (July 2021):

...Nevertheless, it appears that the drafters created Subchapter V to mirror Chapter 12, and courts have interpreted identical language in Chapter 12 to include corporations. See 11 U.S.C. § 1228(a)(2) and § 107:19 n. 11.

Also, Code § 1181(c) makes it clear that if a plan is approved by cramdown under Code § 1191(b), the discharge provisions within Code § 1141(d) shall not apply. This means that a corporation will get a discharge even in a liquidation, which is another drastic change for corporations in Chapter 11. Congress provided no explanation of this change either, but the statute is clear in that interpretation. Thus, it appears that Subchapter V was drafted with the intention to apply Code § 523 to corporations.

See 5 Norton Bankr. L. & Prac. 3d § 107:19 (Subchapter V Discharge).

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Plan Confirmation Issues

Plan Procedures

- When will a court grant a debtor's request for an extension of the 90-day period to file a plan?
- Is the failure to timely file the plan fatal to confirmation?

U.S.C. § 1189. Filing of the Plan

Who may file a plan.--Only the debtor may file a plan under this subchapter.

(b) Deadline.--The debtor shall file a plan not later than 90 days after the order for relief under this chapter, 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.

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Plan Confirmation Issues

- An express departure from the residential anti-modification rules found in Chapter 11.
- The term “primarily” is not conducive to a bright-line test.

11 U.S.C. § 1190. Contents of Plan

A plan filed under this subchapter--

...(3) notwithstanding section 1123(b)(5) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was--

- (A) not used primarily to acquire the real property; and
- (B) used primarily in connection with the small business of the debtor.

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Plan Confirmation Issues

Cramdown

- The **absolute priority rule** has been replaced by a **fair and equitable requirement**. Section 1191(b) requires the court to confirm a plan if the plan:
 - Does not discriminate unfairly; and
 - Is fair and equitable.
- What does “fair and equitable” mean?

“Fair and equitable” is defined by § 1191(c), which requires that:

- Debtor’s projected disposable income, during the three to five years term of the plan, is paid to creditors under the plan;
- A reasonable likelihood exists for debtor to make all plan payments; and
- Remedies are provided in the plan to protect creditors, if payments aren’t made.

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Plan Confirmation Issues

Cramdown

Disposable income = the Debtor's future income that is not reasonably necessary for "payment of expenditures necessary for the continuation, preservation or operation" of the debtor's business, or for the maintenance or support of an individual debtor or their dependent.

- Does a debtor need to provide specific information in the plan related to its disposable income?
- What if there is not going to be any projected disposable income?
- Are speculative projections problematic?

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INTRODUCTION

In August 2019, many months before any of us would be aware of the impact, let alone the existence of the COVID-19 pandemic, Congress passed the Small Business Reorganization Act of 2019 (the “SBRA”), in order to address the lack of an affordable, practical tool in the bankruptcy system for small businesses to reorganize efficiently. SBRA became effective in February 2020, and was quickly tested, as more than 1,350 small business Subchapter V cases were filed between February and December 31, 2020.

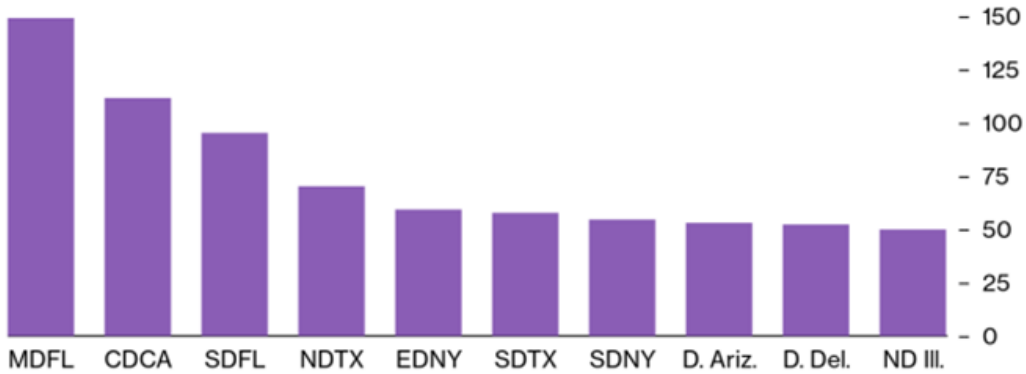
Although the initial debt limit for Subchapter V cases was set at \$2,725,625, that debt limit was increased to \$7,500,000 under the March 27, 2020 Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) to increase the number of small businesses that would qualify for reorganization under the streamlined SBRA process. With the passage of the COVID-19 Bankruptcy Relief Extension Act of 2021, Congress extended the increased debt ceiling of \$7,500,000 through March 27, 2022.

According to Congressman Ben Cline of Virginia, one of the authors of the COVID-19 Bankruptcy Relief Extension Act of 2021, since the enactment of SBRA, “80 percent of small business debtors have chosen to proceed under the provisions of this bill [...].”

By all accounts, it has been a busy first year for Subchapter V, although some commentators suggest that as the effects from the pandemic diminish and temporary amendments expire, Subchapter V filings may slow, giving parties a chance to catch their breath and take stock of lessons learned and strategies gained from the flurry of opinions issues in the last year. There should be little doubt that case law will play a critical and significant role in Subchapter V’s future, as questions regarding eligibility, business operations, and the interplay between debtors and the Subchapter V continue to play out.

Top 10 Most Active Subchapter V Districts

Subchapter V Bankruptcy Cases; February 19, 2020-February 18, 2021

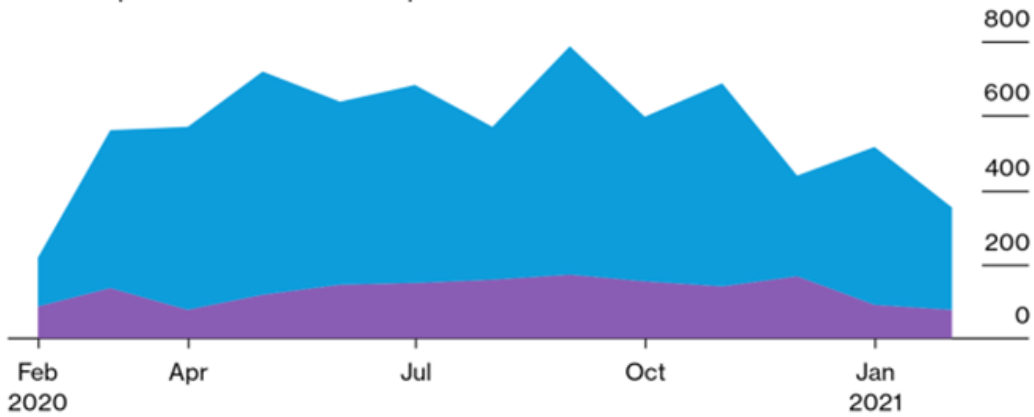


Source: Bloomberg Law Dockets

Bloomberg Law

Comparison of Subchapter V Case Filings to Total Chapter 11s

■ Subchapter V Cases ■ Total Chapter 11 Cases

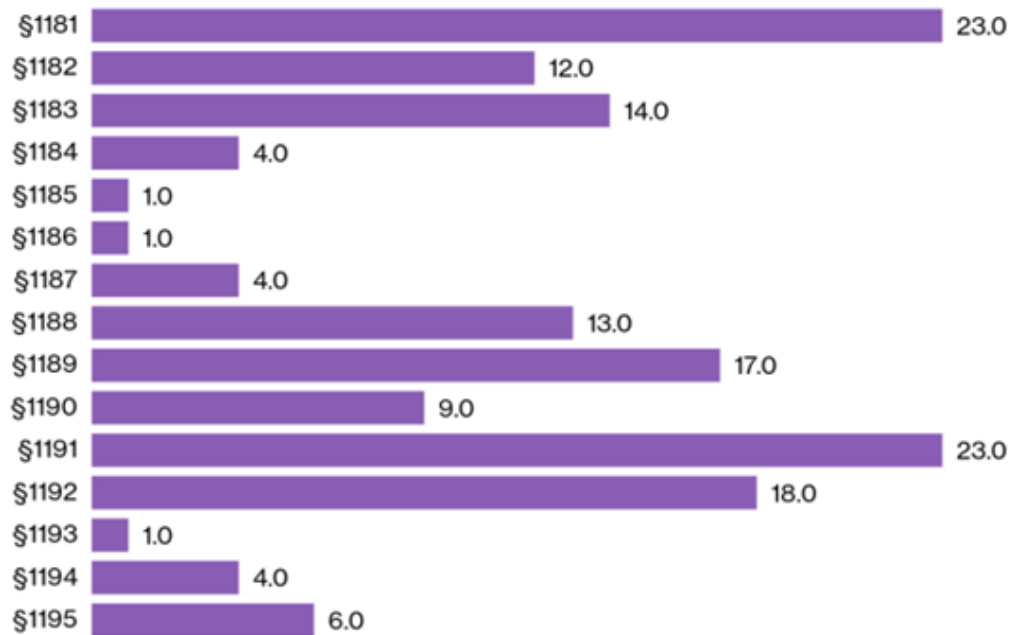


Source: Bloomberg Law Dockets

Bloomberg Law

The Year in Subchapter V Litigation

Number of Opinions Analyzing the Section, February 19, 2020-February 18, 2021, 11 U.S.C. § 1181 et seq.



Source: Bloomberg Law

Bloomberg Law

SUBCHAPTER V ELIGIBILITY

I. APPLICABLE CODE SECTION.

11 U.S.C. § 1182. Definition of Debtor

(1) Debtor. – The term “debtor” –

(A) subject to paragraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

(B) does not include –

(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount great than \$7,500,000 (excluding debt owed to 1 or more affiliates or insiders);

(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

(iii) any debtor that is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).

II. ENGAGED IN COMMERCIAL OR BUSINESS ACTIVITIES

- *In re Ellingsworth Residential Community Association, Inc.*, 619 B.R. 519 (Bankr. M.D. Fla. 2020) (nonprofit association satisfied the requirement that Subchapter V debtors must be engaged in commercial or business activities).
- *In re Thurmon*, No. 20-41400-can11, 2020 WL 7249555 (Bankr. W.D. Mo. Dec. 8, 2020) (debtors were not eligible to proceed under Subchapter V because they ceased operating their businesses and sold their assets before filing the case and, thus, were not “engaged in commercial or business activities”).
- *In re Port Arthur Steam Energy, L.P.*, No. 21-60034, 2021 WL 2777993 (Bankr. S.D. Tex. July 1, 2021) (debtor was eligible even though not engaged in historical

business operations because the debtor was still currently engaged in business or commercial activities).

- *In re Offer Space, LLC*, No. 20-27480, 2021 WL 1582625 (Bankr. D. Utah Apr. 22, 2021) (rejecting the argument that section 1182 requires the debtor to be engaged in business operations and finding debtor was eligible because business activities does not mean business operations and the debtor was engaged in business activities including, without limitation, (1) having active bank accounts; (2) having accounts receivable; (3) analyzing and exploring counterclaims in a lawsuit; (4) managing the Stock; and (5) winding down its business and taking reasonable steps to pay its creditors and realize value for its assets).
- *In re Blue*, No. 21-80059, 2021 WL 1964085 (Bankr. M.D.N.C. May 7, 2021) (agreeing with *Offer Space* and finding that section 1182 does not require an operating business).
- *In re Ikalowych*, No. BR 20-17547, 2021 WL 1433241 (Bankr. D. Colo. Apr. 15, 2021) (“engaged in commercial or business activities” is broadly defined to include any private sector actions related to buying, selling, financing or using goods, property or services for the purpose of earning income, including by establishing, managing, or operating incorporated or unincorporated entity to do so).

III. DEBT REQUIREMENTS

- *In re Wright*, No. 20-01035-HB, 2020 WL 2193240, at *3 (Bankr. D.S.C. April 27, 2020) (debtor who was not currently engaged in business operations qualified as “small business debtor” where 56% of its debt amounted to residual business debt).
- *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020) (neither post-petition rejection damages claims nor claims based on the undetermined obligation to repay PPP (Paycheck Protection Program) funds should be included in debt calculation for purposes of determining eligibility because the claims were contingent and unliquidated on the petition date).
- *In re 305 Petroleum, Inc.*, 622 B.R. 209 (Bankr. N.D. Miss. 2020) (debts of jointly administered Subchapter V cases had to be aggregated with debts of affiliate single asset real estate debtor for eligibility purposes and, thus, the cases could not proceed under Subchapter V).
- *In re Peak Serum, Inc.*, 623 B.R. 609 (Bankr. D. Co. 2020) (debt threshold amount of \$2,725,625 applied because jointly administered cases were filed prior to SBRA’s effective date and, thus, the debtors were not eligible to proceed under Subchapter V when debts were aggregated, and individual debtor case could be

dismissed and refiled under Subchapter V because cause to appoint trustee did not exist as to that case).

- *In re Blue*, No. 21-80059, 2021 WL 1964085 (Bankr. M.D.N.C. May 7, 2021) (finding the Bankruptcy Code does not require a subchapter V debtor's scheduled business debts to be related to current business activities and determining that the debtor satisfied the 50% business debt requirement under section 1182(1)(A), which involved a finding that the debtor's obligations arising out of an original home mortgage were not commercial in nature but debts incurred renovating the home to be used as a rental property in the future were).

IV. RETROACTIVE SUBCHAPTER V ELECTION

- *In re Progressive Solutions, Inc.*, 615 B.R. 894 (Bankr. C.D. Cal. 2020) (small business designated Chapter 11 debtor could retroactively proceed under Subchapter V after the case had been pending approximately 15 months).
- *In re Glass Contractors, Inc.*, No. 20-40185 (Bankr. E.D. Tex. February 25, 2020) (small business designated Chapter 11 debtor could retroactively proceed under Subchapter V after the case had been pending approximately one month).
- *In re Moore Props. of Person Cty., LLC*, No. 20-80081, 2020 WL 995544, at *7 (Bankr. M.D.N.C. February 28, 2020) (small business designated Chapter 11 debtor could retroactively proceed under Subchapter V when it was not a small business debtor as defined by the Bankruptcy Code when the case was originally filed and the case had been pending just over one week).
- *In re Double H Transp. LLC*, No. 19-31830-HCM, 2020 WL 2549850 (Bankr. W.D. Tex. March 5, 2020) (Chapter 11 debtor could *not* retroactively proceed under Subchapter V when the case had been pending more than three months).
- *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020) (small business designated Chapter 11 debtor could retroactively proceed under Subchapter V when the case had been pending 48 days).
- *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 debtor in converted case could retroactively proceed under Subchapter V when the converted case had been pending approximately two months).
- *In re Ventura*, No. 8-18-77193-REG, 2020 WL 1867898 (Bankr. E.D.N.Y. April 10, 2020) (Chapter 11 debtor could retroactively proceed under Subchapter V even though creditor's plan of reorganization was scheduled for hearing on confirmation and case had been pending approximately 15 months).

- *In re Bonert*, No. 2:19-bk-20836-ER, 2020 WL 3635869, at *5 (Bankr. C.D. Cal. June 3, 2020) (Chapter 11 debtor could retroactively proceed under Subchapter V when case had been pending approximately five months).
- *In re Trepetin*, No. 20-11718-MMH, 2020 WL 383315 (Bankr. D. Md. July 7, 2020) (Chapter 7 debtor could retroactively proceed under Subchapter V when case had been pending just over one week).
- *In re Blanchard*, No. 19-12440, 2020 WL 4032411 (Bankr. E.D. La. July 16, 2020) (After U.S. Trustee filed motion to dismiss or convert case that had been pending approximately one month, Chapter 11 debtor could retroactively proceed under Subchapter V, and debtor did not need to be currently engaged in business operations to constitute a “small business debtor”).
- *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020) (retroactive Subchapter V election is not permissible if debtor cannot comply with 90-day deadline for filing plan).
- *In re Easter*, 623 B.R. 294, 296 (N.D. Miss. 2020) (small business designated Chapter 11 debtor could retroactively proceed under Subchapter V when the case had been pending 10 months and debtor was unable to confirm a plan).
- *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020) (debtor could *not* retroactively proceed under Subchapter V because the 90-day plan deadline had passed and the facts and circumstances, including misrepresentations by the debtor, did not warrant modification of the deadline).
- *In re Greater Blessed Assurance Apostolic Temple, Inc.*, No. 6:20-bk-00148-KSJ, 2020 WL 8458164 (Bankr. M.D. Fla. Dec. 17, 2020) (debtor could *not* elect to retroactively proceed under Subchapter V when it filed its petition after SBRA’s effective date and only made the Subchapter V election once it realized it could not confirm a plan).

V. OTHER ELIGIBILITY ISSUES

- *In re Serendipity Labs, Inc.*, 620 B.R. 679 (Bankr. N.D. Ga. 2020) (debtor was not eligible under Section 1182 to proceed under Subchapter V because more than 20% of its voting stock was held by entity with publicly traded stock and, thus, qualified as an “issuer”).
- *In re ENKOGSI, LLC*, 626 B.R. 860 (Bankr. M.D. Fla. 2021) (finding hotel owner and operator was *eligible* to proceed under Subchapter V and rejecting argument that the debtor was a single asset real estate debtor).

ROLE OF THE SUBCHAPTER V TRUSTEE¹

I. APPLICABLE CODE SECTIONS.

11 U.S.C. § 1183. Trustee

(b) Duties. – The trustee shall –

- (1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;**
- (2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;**
- (3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns –
 - (A) the value of property subject to a lien;
 - (B) confirmation of a plan filed under this subchapter;
 - (C) modification of the plan after confirmation; or
 - (D) the sale of property of the estate;
- (4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;
- (5) if the debtor ceases to be a debtor in possession, perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor;
- (6) if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title; and
- (7) facilitate the development of a consensual plan of reorganization.**

¹ Special thanks to Addison Chappell, law clerk to the Honorable Maria Ellena Chavez-Ruark for his work in assembling materials for this section.

11 U.S.C. § 704. Duties of Trustee

(a) The trustee shall –

- (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
- (2) be accountable for all property received;**
- (3) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title;
- (4) investigate the financial affairs of the debtor;
- (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;**
- (6) if advisable, oppose the discharge of the debtor;**
- (7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;**
- (8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;
- (9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;**
- (10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);
- (11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and
- (12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that –

- (A) is in the vicinity of the health care business that is closing;
- (B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and
- (C) maintains a reasonable quality of care.

11 U.S.C. § 1106. Duties of Trustee and Examiner

(a) A trustee shall –

- (1) perform the duties of the trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a);
- (2) if the debtor has not done so, file the list, schedule, and statement required under section 521(a)(1) of this title;
- (3) except to the extent that the court orders otherwise, 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;**
- (4) as soon as practicable –**
 - (A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and**
 - (B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;**
- (5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;
- (6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information;

(7) after confirmation of a plan, file such reports as are necessary or as the court orders; and

(8) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c).

Section 1183 does not incorporate Section 1102(b)(3):

- (3) A committee appointed under subsection (a) shall –
 - (A) provide access to information for creditors who –
 - (i) hold claims of the kind represented by that committee; and
 - (ii) are not appointed to the committee;
 - (B) solicit and receive comments from the creditors described in subparagraph (A); and
 - (C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).

II. THE SCOPE OF THE SUBCHAPTER V TRUSTEE’S DUTIES UNDER THE CODE.

Subchapter V contemplates a unique relationship between the Subchapter V trustee and the debtor in possession —similar to balance sought in chapter 12 cases.

The Subchapter V trustee owes a fiduciary duty to the bankruptcy estate in addition to the duties mandated by the bankruptcy code. The Subchapter V trustee “will act as a fiduciary for creditors, in lieu of an appointed creditors’ committee.” *In re Ventura*, 615 B.R. 1, 13 (Bankr. E.D.N.Y. 2020). Additionally, “[t]he subchapter V trustee is ... charged with facilitating the subchapter V debtor’s small business reorganization and monitoring the subchapter V debtor’s consummation of its plan of reorganization.” *Id.*

1. Section 1183(b)(1). The Trustee shall:
 - a. Be accountable for all property received. 11 U.S.C. § 704(a)(2).
 - b. Examine proofs of claim and object to the allowance of any improper claim. Applicable only if some purpose would be served. 11 U.S.C. § 704(a)(5).
 - c. Oppose the discharge of a debtor if necessary. 11 U.S.C. § 704(a)(6).
 - d. Upon request by a party in interest, furnish information concerning the estate and the estate’s administration unless the court orders otherwise. 11 U.S.C. § 704(a)(7).
 - e. Make a final report and file a final account of the administration of the estate with the United States trustee and the court. 11 U.S.C. § 704(a)(9).

2. Section 1183(b)(2). Upon the request of a party in interest, the Subchapter V Trustee or the U.S. Trustee, and upon a finding of cause, the court may order the Subchapter V Trustee to undertake the additional duties to:

- a. 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 except to the extent the court orders otherwise. 11 U.S.C. § 1106(a)(3).
- b. As soon as practical, file a statement of any investigation conducted pursuant to the above paragraph. The statement must include any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or any cause of action available to the estate. 11 U.S.C. § 1106(a)(4)(A). The Subchapter V trustee must also submit any copy of this statement to any creditors' committee or equity security holders committee, to any indenture trustee, and to any other entity the court designates. 11 U.S.C. § 1106(a)(4)(B).
- c. After confirmation of the plan, file reports that are necessary or as the court orders. 11 U.S.C. § 1106(a)(7).

3. Section 1183(b)(3). The Trustee shall appear and be heard at the status conference under Section 1188 and any hearing that concerns the value of property subject to a lien, confirmation of a plan filed under Subchapter V, modification of the plan after confirmation, or sale of property of the estate.

4. Section 1183(b)(4). The Trustee shall ensure that the debtor commences making timely payments required by a plan confirmed under Subchapter V.

5. Section 1183(b)(5). If the debtor ceases to be a debtor in possession, perform the following duties specified in Section 704(a) and Section 1106(a), including operating the business of the debtor:

- a. If the debtor's business is authorized to be operated, file with the court, the United States trustee, and any government unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information the United States trustee or the court requires. 11 U.S.C. § 704(a)(8).
- b. Perform certain duties specified in Section 704(a), including (i) be accountable for all property received ((a)(2)); (ii) examine proofs of claim and object to any claim that is improper ((a)(5)); (iii) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest ((a)(7)); (iv) if the

business of the debtor is authorized to be operated, file with the court, the United States trustee, and any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires ((a)(8)); (v) make a final report and file a final account of the administration of the estate with the court and the United States trustee ((a)(9)); (vi) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c) ((a)(10)); (vii) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as an administrator under ERISA of an employee benefit plan, continue to perform the obligations required of the administrator ((a)(11)); and (viii) if the debtor is a health care business that is in the process of being closed, use all reasonable and best efforts to transfer patients to an appropriate health care business ((a)(12)). 11 U.S.C. § 1106(a)(1).

- c. If the debtor has not already done so, file the list, schedule, and statement required under Section 521(a)(1). 11 U.S.C. § 1106(a)(2).
- d. For any year for which the debtor has not filed a tax return as required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information. 11 U.S.C. § 1106(a)(6).

6. Section 1183(b)(6). If there is a claim for a domestic support obligation with respect to the debtor, provide the applicable notice to the holder of the claim and the appropriate state child support enforcement agency, as set forth in Section 704(c).

7. Section 1183(b)(7). Facilitate the development of a consensual plan of reorganization.

III. FURTHER GUIDANCE ON THE TRUSTEE'S DUTIES AND ROLE.

The U.S. Department of Justice, Executive Office for United States Trustees, issues separate handbooks for trustees serving under chapters 7, 11, 12 and 13 of the Bankruptcy Code, which sets forth additional guidance and requirements for each category of bankruptcy trustee. The Subchapter V trustee is required to follow specific banking and accounting practices to protect any money of the estate in the trustee's possession, in accordance with Section 345 of the Code. U.S. Dep't of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees*, 1-7 (Feb. 2020). The Subchapter V trustee must obtain and maintain an appropriate trustee bond for each case it administers as required by Section 322 of the Code, maintain and preserve adequate records for each of the cases it administers, and meet with and actively engage with creditors and the committee of creditors (if applicable). *Id.*

A Subchapter V trustee is specifically charged with the duty to “facilitate the development of a consensual plan of reorganization.” 11 U.S.C. § 1183(b)(7). This role should include working not only with the debtor, but with creditors as well, to facilitate negotiation of a consensual plan. A substantial part of the Subchapter V trustee’s pre-confirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors.

In re Seven Stars on the Hudson Corp., 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020) (emphasis in original).

1. Trustee as mediator/ neutral facilitator.

A Subchapter V trustee is expected to be proactive in the plan process and must communicate with both the debtor in possession and creditors. Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019*, 18 (Nov. 2020). At least one practitioner has compared the role to that of a financial wizard who works with all parties on cash flows, interest rates, plan requirements, and all the numbers comprising a plan. *Id.* at 17-18. Arguably, the most important role the Subchapter V trustee must play is that of a mediator. *Id.* See, also *In re Penland Heating and Air Conditioning, Inc.*, 2020 WL 3124585 (Bankr. E.D.N.C. June 11, 2020) (discussing Subchapter V trustee’s duties to facilitate a debtor’s reorganization and monitor the debtor’s consummation of the plan).

2. Fiduciary duties.

Neither the Code nor the U.S. Dep’t of Justice Handbook provides that that the Subchapter V trustee owes a duty to creditors and at least one commentator has opined no such duty exists. Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AM. BANKR. INST. L. REV., 269 (2020). This commentator believes that the Subchapter V trustee’s role is to help facilitate confirmation of a feasible plan and that a trustee may consider objecting creditors to be obstacles to achieving that goal. *Id.* The commentator further states that the trustee’s primary focus should be on assisting the debtor and being responsive to the United States trustee and the court, but he also recognizes that a creditor may be able to use the Subchapter V trustee to investigate the debtor in possession if the debtor is abusing assets or hiding information. *Id.*

IV. THE ROLE AND DUTIES OF THE TRUSTEE AFTER REMOVAL OF A DIP.

If a debtor in possession is removed pursuant to Section 1185(a), the Subchapter V trustee will take on the additional duties listed in Sections 704(a)(8) and 1106(a)(1), (2), and (6). Additionally, the Subchapter V Trustee, which is an independent third party, steps into the shoes of the debtor’s management and becomes a fiduciary with an obligation of “fairness” to all parties. U.S. Dep’t of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees*, 3-8 (Feb. 2020).

Notwithstanding the removal of a debtor in possession, a Subchapter V trustee is not empowered to file a plan on behalf of the debtor’s estate. See U.S. Dep’t of Justice, *Handbook for*

Small Business Chapter 11 Subchapter V Trustees, 3-4 (Feb. 2020); 11 U.S.C. § 1189(a) (“Only the debtor may file a plan under this subchapter.”); *In re Online King LLC*, Case No. 1-20-42591-las, 2021 WL 1536415 at *4 (Bankr. E.D.N.Y. Jan 19, 2021) (“Under § 1189(a), only the debtor may file a plan in a subchapter V case; neither the subchapter V trustee nor creditors are permitted to do so”).

Thus, it is unclear how a case would proceed if a removed DIP refuses to file a plan, or files a plan that the Subchapter V trustee does not support. Some guidance is provided by *In re Jacobson Hotels, Inc.*, Case No. 20-33957 (Bankr. S.D. Tex. 2020), a case in which the court removed the debtor in possession after a plan had been filed, but before confirmation. There, the trustee moved to delay confirmation of the plan and filed a motion to sell assets of the estate pursuant to Section 363. The court granted both motions, and after the sale, the trustee sought authority to pay claims from the sale proceeds and dismiss the case. The court granted the trustee’s motion and dismissed the case after liquidation of the estate assets and distribution of the sale proceeds.

DISCHARGE EXCEPTIONS

I. APPLICABLE CODE SECTIONS.

11 U.S.C. § 1192

If the plan of the debtor is confirmed under section 1191(b) of this title... the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

...

(2) of the kind specified in section 523(a) of this title.

11 U.S.C. § 523

- (a) A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an **individual** debtor from any debt—... (emphasis added)

II. APPLICATION OF THE SECTION 523(A) DISCHARGE EXCEPTION: DOES IT APPLY TO CORPORATE SUBCHAPTER V DEBTORS?

- *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)*, 626 B.R. 871, 2021 Bankr. LEXIS 652, 70 Bankr. Ct. Dec. 12, 2021 WL 1096627 (Bankr. D. Md. 2021) (J. Ruark)(dismissing complaint to determine nondischargeability of debt as discharge exceptions contained in Section 523(a) apply only to individual SBRA debtors and not corporations).
 - i. Plaintiffs filed adversary against Subchapter V Debtor, Satellite Restaurants, for a denial of discharge under § 523(a)(2)(A) (for obtaining money by “false pretenses”) and under § 523(a)(6) (for “willful and malicious injury”). Plaintiffs focused on the phrase “debt of the kind specified in § 523(a)” to conclude that § 1192 expanded the § 523(a) non-dischargeability provisions to Subchapter V individuals and corporations. Conversely, the Debtor moved to dismiss alleging that under the plain language of § 523(a), the non-dischargeability provisions only apply to individuals.
 - ii. The Bankruptcy Court agreed with the Debtor and dismissed Complaint.
 - Case of first impression
 - Statutory Construction: (i) The language of Section 523(a) clearly and unambiguously applies only to individual debtors, and (ii) the §

1192 reference to § 523(a) showed that Congress intended to continue the individual-only application in SBRA.

- Pre-SBRA Application of Section 523(a): it was well-settled law pre-SBRA that Section 523(a) does not apply to a corporate debtor.
 - Legislative History of Section 1192: nothing in the legislative history of Section 1192 suggested that Congress intended to make Section 523(a) discharge exceptions applicable to corporate debtors. As proof, the House Report did not discuss any expansion “which would have been a dramatic change in existing Chapter 11 law”.
 - Secondary source interpretation: The Court adopted Judge Bonapfel’s assessment that Section 1192’s reference to Section 523(a) had no operative effect. The Court rejected four other publications, including Nortons, for failure to examine the plain meaning.
- *Cantell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 2021 Bankr. LEXIS 1738, __ B.R. __, 2021 WL 2667735 (Bankr. D. Md. 2021) (J. Harner) (dismissing adversary proceeding, adopting reasoning in *Satellite Restaurants*)
 - i. Plaintiff filed adversary against SBRA corporate Debtor for a denial of discharge under Sections 523(a)(2)(A) and 523(a)(6). Plaintiff’s position relied upon:
 - The Official Form 309F2 “the Notice of Chapter 11 Bankruptcy Case for Corporations or Partnerships under Subchapter V” and Form 425A3 “the Official Plan of Reorganization for Small

Business Under Chapter 11”, both of which have sections for § 523(a).

- The Internal Revenue Manual states that Section 523(a) applies to Subchapter V corporations.
- Section 1192 does not differentiate between an individual and a non-individual debtor. Moreover, even though Section 523(a) has limiting language, Section 1192 does not.
- Compared Section 1192 to Section 1228(b). Both are included in the qualifying language of §523(a). However, courts have applied §523(a) to individual and corporate chapter 12 filers.

ii. Rationale

- Statutory Construction: Adding Section 1192 to the qualifying language of Section 523(a) is proof that the section applies only to individuals.
- Legislative history: Congress rejected application of §523 to corporations. The only express limitation to discharge took congress 8 years to incorporate.
- The Need for Consistency in the Scope of the Corporate Debtor Discharge
 - a. Large and small corporations are capable of the same behavior. Therefore, [i]t seems incongruent that Congress would penalize a smaller entity for bad behavior but not a large one.
 - b. Expanding Section 523(a) would create arbitrary results. Section 523(a) would apply to Section 1192 nonconsensual plans but not to Section 1191 consensual plans.

III. CONTRARY POSITIONS

- *Concrete Log Sys. v. Better Than Logs, Inc. (In re Better Than Logs, Inc.)*, 2021 Bankr. LEXIS 1570, 2021 WL 2405397 (Bankr. D. Montana 2021) (denying SBRA corporate debtor discharge under 11 USC 523(a)(6)).
 - i. Plaintiff filed adversary against Subchapter V corporate debtor, Better Than Logs, Inc. under Section 523(a)(6) (willful and malicious injury).

Court grants summary judgment in favor of plaintiff, denying corporate Debtor a discharge under Section 523(a)(6)

ii. Rationale

- The Bankruptcy Court does not mention or address the question of whether a claim under § 523(a) applies only to individual debtors.
- Corporate debtor failed to raise the argument that the section does not apply.
- Norton on Bankruptcy (July 2021):

The first court to address this issue following its enactment has interpreted Code §§ 1192 to only apply to individuals. In re Satellite Restaurants Inc., 2021 WL 1096627 (Bankr. D. Md. 2021).

Code § 1192 states that when a debtor seeks approval of a cramdown plan under Code § 1191(b), “the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) ... except any debt— ... (2) of a kind specified in section 523(a) of this title.” The Court interpreted “of a kind” to be limited to individuals in the same manner that Code § 523 is limited to individuals.

Given the lack of legislative history explaining the intent of Congress regarding this drastic change in the application Code § 523, this statutory interpretation is consistent with the courts’ interpretation of the 2005 Amendments to Code § 1129(b)(2)(B) that sought to limit the application of the absolute priority rule in individual cases. See § 106:8 n. 3. Nevertheless, it appears that the drafters created Subchapter V to mirror Chapter 12, and courts have interpreted identical language in Chapter 12 to include corporations. See 11 U.S.C. § 1228(a)(2) and § 107:19 n. 11.

Also, Code § 1181(c) makes it clear that if a plan is approved by cramdown under Code § 1191(b), the discharge provisions within Code § 1141(d) shall not apply. This means that a corporation will get a discharge even in a liquidation, which is another drastic change for corporations in Chapter 11. Congress provided no explanation of this change either, but the statute is clear in that interpretation. Thus, it appears that Subchapter V was drafted with the intention to apply Code § 523 to corporations.

See 5 Norton Bankr. L. & Prac. 3d § 107:19 (Subchapter V Discharge).

PLAN CONFIRMATION ISSUES

I. APPLICABLE CODE SECTIONS.

11 U.S.C. § 1189. Filing of the Plan

- (a) Who may file a plan.--Only the debtor may file a plan under this subchapter.
- (b) Deadline.--The debtor shall file a plan not later than 90 days after the order for relief under this chapter, 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.

11 U.S.C. § 1190. Contents of Plan

A plan filed under this subchapter--

(1) shall include--

(A) a brief history of the business operations of the debtor;

(B) a liquidation analysis; and

(C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization;

(2) shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; and

(3) notwithstanding section 1123(b)(5) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was--

(A) not used primarily to acquire the real property; and

(B) used primarily in connection with the small business of the debtor.

11 U.S.C. § 1191. Confirmation of Plan

- (a) Terms.--The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.
- (b) Exception.--Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does

not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

- (c) Rule of construction.--For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:
 - (1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.
 - (2) As of the effective date of the plan--
 - (A) 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; or
 - (B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.
 - (3)
 - (A)(i) The debtor will be able to make all payments under the plan; or
 - (ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and
 - (B) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.
- (d) Disposable income.--For purposes of this section, the term “disposable income” means the income that is received by the debtor and that is not reasonably necessary to be expended--
 - (1) for--
 - (A) the maintenance or support of the debtor or a dependent of the debtor; or
 - (B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or
 - (2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.
- (e) Special rule.--Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.

II. PLAN PROCEDURES

- *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. 2020) (debtor sought extension of the 90-day plan filing deadline based on exception where extension is attributable to circumstances for which the debtor should not justly be held accountable).
 - i. Court considered “whether the need for an extension is attributable to circumstances for which [d]ebtor is not fairly responsible or, to borrow from COLLIER, whether [d]ebtor can clearly demonstrate that the inability to file a plan of reorganization was due to circumstances beyond his control.”
 - ii. Stating that it was a fact-driven inquiry, the Court considered
 - (1) whether the circumstances raised by the debtor were within his control,
 - (2) whether the debtor has made progress in drafting a plan,
 - (3) whether the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances, and
 - (4) whether any party-in-interest has moved to dismiss or convert the debtor’s case or otherwise objected to a deadline extension in any way.
 - iii. The Court concluded that the need for an extension was based on circumstances for which the debtor should not be held accountable, and specifically focused on the following factors: (i) the uncertainty related to certain proofs of claim that had not yet been filed, (ii) the unexpected death of the debtor’s sibling, (iii) the fact that the debtor made substantial progress toward the drafting of a plan, and (iv) the fact that no party-in-interest had filed a motion to dismiss or convert the case or otherwise opposed the debtor’s motion requesting additional time.
- *In re Online King LLC*, 2021 WL 1536415 (Bankr. E.D.N.Y. Jan. 19, 2021) (notwithstanding that no party-in-interest opposed debtor’s untimely request to extend the 90-day deadline to file plan, debtor failed to satisfy the stringent burden of demonstrating it was entitled to extension).
- *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020) (noting that conversion of case from chapter 7 does not change the date of order for relief for purposes of Sections 1188 and 1189; and finding that standard to extend plan filing deadline in Section 1221 should be same standard applied to 1189).
- *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 343-44 (Bankr. S.D. Fla. Aug. 7, 2020) (failure to meet statutory deadline to file plan under 1189(b) is fatal to plan confirmation, and decision to amend petition was within debtor’s control).
- *But see In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. Mar. 19, 2021) (comparing the filing deadline under 1189 with the requirements of 1121(e) and

finding the deadlines “are not so unforgiving in a subchapter v case, and the distinctions among 11 U.S.C. §§ 1112(b)(2), 1121(e), 1181(a) and 1189(b) indicate Congress’ intent not to have a late filed plan doom a subchapter v case).

- *In re Wetter*, 620 B.R. 243, 253 (Bankr. W.D. Va. 2020) (determining that *Seven Stars* sets “too rigid” of a test, and concluding that *Trepetin* “charts a better path”).

III. CRAM DOWN

- *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020) (analyzing five factors to determine whether usage of loan proceeds permitted debtor to cram down lender’s claim secured by debtor’s primary residence).
 - i. The Court reasoned that Section 1190(3) is an express departure from the residential mortgage anti-modification rules found in Chapter 11, and that the term “primarily” is not conducive to a bright-line test.
 - ii. The Court set forth the following factors in determining whether loan proceeds were “primarily” to acquire residential real estate or “primarily” in connection with debtor’s small business:
 1. Were the mortgage proceeds used primarily to further the debtor’s business interests?
 2. Is the property an integral part of the debtor’s business?
 3. The degree to which the specific property is necessary to run the business.
 4. Do customers need to enter the property to utilize the business?
 5. Does the business utilize employees and other businesses in the area to run its operations?
- *In re Pearl Resources LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020) (providing an in-depth analysis of the plan confirmation requirements under subchapter V).
 - i. Section 1191(b) eliminates the cramdown requirements of Section 1129BB) as well as the requirements of 1129(a)(8), (10) and (15).
 - ii. The absolute priority rule has been replaced by a fair and equitable requirement. Section 1191(b) requires the court to confirm a plan if the plan
 - Does not discriminate unfairly; and
 - Is fair and equitable.
 - iii. These two standards are both also found in 1129(b), and the standard is the same for unfair discrimination; however, the “fair and equitable” standard is modified for purposes of subchapter V cases by subsections (c) and (d)

of 1191. Under § 1191(c), “fair and equitable” imposes (i) a projected disposable income requirement, and (ii) a feasibility finding with remedies for default.

- iv. The result is that a debtor in a subchapter V case can retain its ownership interests under a plan, if debtor distributes all its projected disposable income to creditors over the three to five years term of the plan.
 - v. Creditors objected to the plan, arguing that:
 - the Plan provided no specifics on disposable income amounts or availability;
 - there was a possibility there would not be any disposable income;
 - the financial projections offered were speculative and dependent upon non-existent financing; and
 - the plan was not feasible;
 - ii. The Bankruptcy Court found that the plan had satisfied the “fair and equitable test” because it proposed to pay all projected disposable income, defined as the debtor’s income beyond what’s reasonably necessary to live and keep the business going, to creditors, and because the plan provided appropriate remedies if payments were not made.
- *In re Body Transit, Inc.*, 619 B.R. 816 (Bankr. E.D. Pa. 2020) (court took the overarching policy behind subchapter V into account when concluding that the secured creditor’s interest in property was of “inconsequential value” so as to deny the creditor the right to a Section 1111(b) election).
 - *But see In re VP Williams Trans, LLC*, 2020 WL 5806507 (disagreeing with *Body Transit*’s consideration of subchapter V policy in the application of the “inconsequential value” determination for purposes of 1111(b)).

Faculty

Hon. Maria Ellena Chavez-Ruark is a U.S. Bankruptcy Judge for the District of Maryland in Baltimore, appointed in 2020. Prior to joining the bench, she was a partner in the Bankruptcy and Restructuring practice group at Saul Ewing Arnstein & Lehr LLP in Baltimore, where she represented debtors, creditors' committees, secured creditors, unsecured creditors, landlords, lessors, purchasers of assets and trustees in complex insolvency proceedings, including chapter 11 bankruptcy cases, receiverships and assignments for the benefit of creditors. She also represented parties in workouts, restructurings and complex commercial litigation, including fraudulent transfer, deepening insolvency, breach of fiduciary duty and preferential transfer litigation. Judge Ruark was admitted to practice in the State of Maryland and the District of Columbia and represented clients in state and federal courts throughout the U.S. She is a past president of the Maryland Bankruptcy Bar Association, a member of ABI, the Immediate Past President of the Chesapeake Chapter of the Turnaround Management Association, a former member of the global executive board for the Turnaround Management Association, and the Immediate Past President of the *Pro Bono* Resource Center of Maryland. She is also a frequent speaker and author on various bankruptcy subjects. Judge Ruark was named to the *Lawdragon* 500 Leading U.S. Bankruptcy & Restructuring Lawyers in 2020. She was also named one of "America's Leading Lawyers for Bankruptcy/Restructuring" by *Chambers USA* from 2015-20, named in *The Best Lawyers in America* for Bankruptcy and Creditor-Debtor Rights Law from 2013-20, and selected for inclusion in *Maryland Super Lawyers* from 2010-20. In addition, in 2009, 2011 and 2020, she was named one of Maryland's Top 100 Women in Business by *The Daily Record*, an annual award that recognizes leadership roles and outstanding professional, civic and mentoring achievements of professional women who reside and work in Maryland and who are making an impact on the state. Also in 2010, Judge Ruark was named one of the *Pro Bono* Resource Center of Maryland's "pro bono stars" for her exemplary service and commitment to providing *pro bono* legal representation to Maryland's underrepresented citizens. In 2006, she earned the first annual Educator of the Year Award by Maryland Volunteer Lawyers Service for her *pro bono* service in the State of Maryland. Judge Ruark served on her firm's *Pro Bono* Committee and Diversity and Inclusion Committee for many years, chaired the firm's Minority Attorney Resource Group in 2019 and 2020, and has mentored law students and young lawyers throughout her 26-year career. She received both her B.A. in accounting and her M.B.A. from Salisbury University and her J.D. from the University of Baltimore School of Law.

Trinitee G. Green is an associate in Polsinelli's Chicago and Houston offices, and focuses her practice on complex bankruptcy matters. Her restructuring experience includes the representation of debtors, creditors, committees, post-confirmation trustees and bankruptcy trustees in bankruptcy cases and adversary proceedings throughout the U.S. Since the enactment of the Small Business Reorganization Act of 2019 (SBRA), she has represented debtors and lenders in subchapter V cases. Ms. Green has experience representing lenders and special servicers in the enforcement and foreclosure of commercial mortgage loans. She has experience prosecuting and defending avoidance actions, as well as pursuing D&O claims. Ms. Green received her B.B.A. *summa cum laude* in 2004 from the University of Louisiana Monroe and her J.D. *cum laude* in 2012 from Southern Methodist University.

Hon. Michelle M. Harner is a U.S. Bankruptcy Judge for the District of Maryland in Baltimore, appointed in 2017. Prior to her appointment to the bench, she was the Francis King Carey Professor of Law and the Director of the Business Law Program at the University of Maryland Francis King Carey School of Law, where she taught courses in bankruptcy and creditors' rights, business associations, business planning, corporate finance and the legal profession. Judge Harner lectured frequently during her academic career on various topics involving corporate governance, financially distressed entities, risk management and related legal issues. Her academic scholarship is widely published, with her publications appearing in, among others, the *Vanderbilt Law Review*, *Notre Dame Law Review*, *Washington University Law Review*, *Minnesota Law Review*, *Indiana Law Journal*, *Fordham Law Review* (reprinted in *Corporate Practice Commentator*), *Washington & Lee Law Review*, *William & Mary Law Review*, *University of Illinois Law Review*, *Arizona Law Review* (reprinted in *Corporate Practice Commentator*) and *Florida Law Review*. Judge Harner has served as the Associate Reporter to the Advisory Committee on the Federal Rules of Bankruptcy Procedure, the Reporter to the ABI Commission to Study the Reform of Chapter 11, and most recently chaired the Dodd-Frank Study Working Group for the Administrative Office of the U.S. Courts. She also served as the Robert M. Zinman ABI Resident Scholar for the fall of 2015. Judge Harner is an elected conferee of the National Bankruptcy Conference, an elected Fellow of the American College of Bankruptcy, and an elected member of the American Law Institute. She previously was in private practice in the business restructuring, insolvency, bankruptcy and related transactional fields, most recently as a partner at the Chicago office of the international law firm Jones Day. Judge Harner received her B.A. *cum laude* from Boston College in 1992 and her J.D. *summa cum laude* from The Ohio State University College of Law in 1995.

Patricia B. Jefferson is a principal at Miles & Stockbridge P.C. in Baltimore in its Creditors' Rights and Bankruptcy group. She represents diverse clients (lenders, commercial lessors, committees, trustees and other creditors) in all aspects of bankruptcy cases, including cash-collateral use, debtor-in-possession financing, dischargeability litigation, claims objections, executory contract and lease disputes, asset sales, automatic stay litigation and avoidance actions. Ms. Jefferson also represents and advises secured lenders in formulating and executing workout strategies outside of bankruptcy cases, as well as secured and unsecured creditors in commercial collections matters. In addition, she advises clients regarding distressed real estate and commercial foreclosures. Ms. Jefferson is a regular speaker at legal education seminars sponsored by the Bankruptcy Bar Association for the District of Maryland. She received her J.D. with honors from the University of Maryland School of Law, where she was elected to the Order of Barristers and served as an associate editor of *The Business Lawyer* and as vice-president of the Moot Court Board.

Michelle V. Lee is an associate in the Bankruptcy Department at Margolis Edelstein in Philadelphia. She is admitted to practice law in Pennsylvania and New Jersey. Ms. Lee has been a presenter at PBI's 19th, 21st and 22nd Annual Bankruptcy Institutes and the Eastern District of Pennsylvania Bankruptcy Conference's 27th and 31st Annual Forums. She is a member of the NBA Women's Lawyer Division, National Association of Consumer Bankruptcy Attorneys and the Eastern District of Pennsylvania Bankruptcy Conference, and she is a board member of the People's Emergency Center. Ms. Lee received her Bachelor's degree in international relations and Japanese studies from the University of Pennsylvania. An accomplished double-bassist, she performed with the University's orchestra and toured China performing Beijing opera. She received her J.D. from Georgetown University, where she was selected to join its Criminal Justice Clinic, advocating for impoverished

clients before the District of Columbia Superior Court and the U.S. Parole Commission. Additionally, she was one of just seven law students chosen for a competitive in-house counsel internship with Sodexo Inc., a Fortune 500 Company. Following law school, Ms. Lee clerked for Hon. Frederica Massiah-Jackson, President Judge Emeritus, in the Philadelphia County Court of Common Pleas.