AMERICAN BANKRUPTCY INSTITUTE

2021 Alexander L. Paskay Memorial Virtual Bankruptcy Seminar

Subchapter V and Virtual Court: A Tale of Two Frontiers

Pre-Trial

Hon. Jeffery W. Cavender, Moderator
U.S. Bankruptcy Court (N.D. Ga.) | Atlanta

Vincent F. Alexander
Lewis Brisbois Bisgaard & Smith LLP | Fort Lauderdale

Jordi Guso
Berger Singerman LLP | Miami

The Witness (Pre-Trial and Mock Trial)

Amy Denton Harris
Stichter, Riedel, Blain & Postler, PA | Tampa

Mock Trial

Hon. Michael G. Williamson, Moderator
U.S. Bankruptcy Court (M.D. Fla.) | Tampa

Chad P. Pugatch
Lorium PLLC | Fort Lauderdale

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The Experts

Hon. Erik P. Kimball, Moderator
U.S. Bankruptcy Court (S.D. Fla.) | West Palm Beach

Denise D. Dell-Powell
Dean Mead | Orlando

Karim Guirguis
American Bankruptcy Institute | Alexandria, Va.

Scott A. Underwood
Underwood Murray PA | Tampa

2021

K-9 WALKING SERVICES, LLC SUBCHAPTER V

PRE-TRIAL & TRIAL

K-9 PET WALKING & PET CARE

- Locations in Tampa, St. Petersburg, and Orlando
- Owned by Mr. & Mrs. Linton
- Commercial contracts –care and feeding of "professional" dogs
  - local police and military
- Residential contracts- dog walking

PRE-PANDEMIC ORGANIZATIONAL STRUCTURE

- 25 Employees- independent contractors
- 50 Dog Tenders- independent contractors
- 13 Commercial Contracts- generate 70% of revenue- written contracts which cannot be cancelled at will
- Owners Mr. & Mrs. Lindon each receive $100,000 W2 wages & K-1 profit distribution
- Three Leases –each with different landlord

K-9 ASSETS AND LIABILITIES

- $1.5 million term loan [3-year maturity date]- personally guaranteed & secured by Mr. & Mrs. Linton's home- valued at $1.750 million
- $500,000 line of credit [payable on demand with no repayment schedule]
- Seventh Bank has blanket lien against K-9's hard assets & contracts
- Hard Assets: office equipment and commercial contracts valued on K-9's schedules $50,000 or less

COVID PANDEMIC EFFECTS

- Stopped operations for 6 months
- Lost 5 regular employees- independent contractors
- Lost 35 dog tenders- independent contractors
- $1.5 million revenue loss 2019 v. 2020
- Received a $150,000 payroll protection loan [pending application for waiver of repayment]
- Residential contracts almost entirely gone

PRESENT STATE OF K9'S BUSINESS

- Reopened after being closed for 6 months
- Commercial contracts slowly resuming
  - term contracts that may not be cancelled at will
- Residential contracts have not returned
- Revenue for December 2020 15% higher than October and November

K-9 SUBCHAPTER V CHAPTER 11 CASE

- January 2021- defaulted on their line of credit payment
- January 2021- defaulted on fixed loan with Seventh Bank [Mr. & Mrs. Home valued $1, 750,000]
- Unsuccessful attempt to work with the bank
- Filed- January 15, 2021
- Owes $2.3 million with fees and interest including:
  - $55,000 unsecured Federal Withholding Tax
  - $450,000 unsecured claims to pet supply companies
- 3 leases all 2 months in arrears subject to prepetition forbearance agreements
- Unliquidated claim pending for death of 3 professional dogs- died in K-9's care
  - Plaintiff Dragnet- former commercial client

K-9'S SUBCHAPTER V CHAPTER 11 PLAN

- 6-years- pay all taxes from the petition date
- 7-years- extend payments to the bank
- 5- years- re-pay unsecured creditors net operating income
- Assume the 3 leases (arrearage claims dealt with in prepetition forbearance agreements)
- Injunction protection from personal liability for Littons provided payments are made
- **Objecting to the plan**- Seventh Bank, Dragnet (unsecured claim), and other unsecured creditors.

The Florida Bar Recommended Best Practices Guide For Remote Court Proceedings
(Updated 02-25-2021)

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The Florida Bar Recommended Best Practices Guide For Remote Court Proceedings
(Updated 02-25-2021)

The following Recommended Best Practices are designed to provide a guide to all participants, based on currently available technology, to maximize the effectiveness of remote proceedings. They are not intended to relax or supplant the Florida Statutes, the Florida rules of court, local rules of court, administrative orders, individual judges' instructions, the Rules Regulating the Florida Bar (including, without limitation, the Rules of Professional Conduct), or any other substantive or procedural law (collectively, the "Applicable Law, Rules, and Procedures"). All Applicable Law, Rules, and Procedures are intended to prevail, unless expressly stated otherwise.

1. Remote Procedures Applicable to All Proceedings

1.1. Participants must dress and otherwise present professionally, as if they are physically appearing in a courtroom, deposition or mediation, as the circumstances indicate. Participants should notify their court reporter or other technical assistants to follow the same requirements. Participants should conduct remote proceedings in a quiet location where they are free from distractions, with as little ambient noise as possible, and with lighting that allows all participants to clearly see each other. Participants must not operate a motor vehicle while participating in a remote proceeding and should otherwise ensure that their participation does not create a public safety issue.

1.2. Participants in video conferencing proceedings must use a device that allows them to have access to a camera, a speaker, and a microphone. This includes having the necessary device to be able to view any shared documents on the screen of the device, when applicable. Participants must have an adequate Internet connection. A wired Internet connection is preferable over a wireless connection. Participants should ensure that they have working audio and video, know how to mute and unmute, share screens, and are generally familiar with these Best Practices. If any participant does not have access to a device that allows for video conferencing, that participant may attend a remote proceeding by telephone or as otherwise determined by the court.

1.3. Prior to the proceeding, participants should familiarize themselves with the requirements and other operational aspects of the virtual platform being used. If possible, participants should display their full name (and not just a first name, nickname, or phone number) and any party they represent, if applicable.

1.4. At the commencement of a remote proceeding, all participants should identify themselves to the other participants and should also identify any other person present with them, even if that person is off-camera. If another person enters the room with a

participant during the proceeding, that participant should notify the other participants and identify the person at that time.

1.5. When not speaking or preparing to make timely objections during the proceedings, the parties, lawyers, their clients, and non-testifying witnesses should mute themselves.

1.6. For all court proceedings, the court should provide the link to the virtual platform that is being used. No participant should create either a visual or audio recording of a court proceeding without permission of the court. Except as otherwise provided herein, if a participant desires an official record of the proceeding, the participant should hire a court reporter to appear unless the official record is otherwise preserved as authorized by the court.

1.7. Requests for continuances based solely on a participant's preference to wait until the court event can be conducted in person are disfavored, and will be considered only under extraordinary circumstances. Parties and counsel should make any such requests as early as practicable.

1.8. The court should provide for a breakout room if a lawyer needs to confer with his or her client during the proceeding, or in the event the participants need to discuss a matter off the record.

1.9. All notices of remote proceedings must (i) indicate that the proceeding will occur by video conferencing; (ii) include, if available, the video conferencing details, including links and login information; (iii) state that no party or counsel should appear in person at the proceeding; and (iv) provide instructions for participation by telephone if a self-represented party does not have access to the video conferencing platform that is being used. For security purposes, unique links and login information are preferred.

1.10. Judges may begin all court proceedings with an explanation of the video conferencing procedures, including the process the court will use to designate participants to speak.

1.11. Absent an order of court, upon discovering that a participant has lost audio or video connection, the court, mediator, or the participant conducting the deposition, as the case may be, should immediately stop the proceeding until all participants have a live audio and video connection.

1.12. Participants should act in good faith to assist other participants who are unintentionally experiencing technical issues, including but not limited to failing to activate

or deactivate the mute function or inadvertently sharing material that is confidential or privileged or otherwise inappropriate for sharing. Participants who observe such instances should alert the court, mediator, or the unaware participant, as appropriate under the circumstances.

2. Remote Procedures Applicable to All Non-Evidentiary Hearings

2.1. Participants should always check the court's procedures and any local orders, but in the absence of anything to the contrary, should email copies of any materials the participant intends to present to the court during the hearing to the court and opposing parties no later than 48 hours in advance of the hearing.

2.2. A court may allow a participant to share case law, documents, photos, or other materials via the screen-sharing mechanism on the video conferencing platform even if not previously submitted. In addition, any participant sharing previously undisclosed authority or evidence should also contemporaneously provide a copy to all participants by email or other electronic means.

3. Remote Procedures Applicable to Evidentiary Hearings

Note: These procedures apply only to the electronic use and admission of documentary, photographic, audiovisual and other evidence reasonably able to be provided and shared electronically.

PREHEARING EVIDENTIARY PROCEDURES

3.1 PREHEARING CONFERENCE

3.1.1. The court may, *sua sponte* or at the request of any party, schedule a prehearing conference in advance of any evidentiary hearings.

3.1.2. At the prehearing conference, the court may advise all parties of the procedures for the hearing. By way of example, the court's procedures may address the handling of sequestration of witnesses, document sharing, and the use of physical evidence.

3.2 DOCUMENT PROCEDURES

3.2.1. At least 7 calendar days in advance of an evidentiary hearing, the parties must exchange exhibit lists that specifically identify by Bates number potential exhibits to be used at the hearing. Within 5 calendar days in advance of the evidentiary hearing, the parties must meet and confer by telephone or video conference to stipulate to as much as practicable regarding authenticity and admissibility and to agree on the format and manner in which evidence will be presented at the hearing.

3.2.2. During the "meet and confer" after the exchange of exhibit lists, the parties shall prepare jointly an index of all exhibits that will be used at the hearing. The movant shall be primarily responsible for preparing this index and for providing the final copy of the index to the court and clerk's office. This index shall also specifically identify what objections exist, if any, to each exhibit and which party is making the objection. The parties shall check the judge's preferences and procedures, as well as any local rules, for the form of the index. A sample index is included as **Appendix A.** The parties shall exchange copies of any proposed exhibits that have not previously been exchanged no later than this meeting, except for exhibits solely to be used for impeachment. All documents shall be pre-marked for identification, and shall be Bates stamped for ease of identification during remote testimony.

3.2.3. At least 2 calendar days before an evidentiary hearing, the parties shall file all evidence sought to be introduced pursuant to instructions provided by the court. The parties shall comply with the judge's preferences and procedures, as well as any local rules, regarding the form for marking exhibits and the means of submitting the exhibits to the court or clerk in advance of the hearing. The parties should seek to file all exhibits jointly, but in the absence of a joint filing, must file unilaterally at least 2 calendar days in advance.

3.2.4. In settings where the court must review a document that is not being admitted as evidence (for example, showing a driver's license to verify identity) the parties need not file the document in advance but may display the document by the camera for the court's review during the hearing.

3.2.5. Document uploading procedures:

A. Once all documents have been indexed and identified, attorneys must contact the judge's judicial assistant to determine the procedure that will be used for providing copies of the documents to the court, either electronically or otherwise.

B. Documents that are uploaded or provided to the court in an electronic format should be named as follows: #___ Ex. [brief description of document]. For example, #1 Ex. contract between John Smith and Susan Jones 09.12.73.

C. Oversized documents and physical evidence, such as an original of a document, that are not capable of being provided electronically to the court and participants will be addressed by the court on a case-by-case basis. Participants should include a description of such evidence on the exhibit index and shall advise the court of the issue in advance of the hearing.

3.3 WITNESS PROCEDURES

3.3.1. At least 10 business days in advance of an evidentiary hearing, the parties shall exchange witness lists that include the witnesses' names and, if known, email addresses and telephone numbers. The parties shall also identify any witness for whom an interpreter or an accommodation under the Americans with Disabilities Act will be required, and include the names of all interpreters on the witness list. Witness lists shall also be filed with the Court without the witnesses' email addresses or phone numbers at least 10 business days in advance of an evidentiary hearing.

3.3.2. Participants should ensure that witnesses who will lay the predicate for evidence have a copy of the evidence. This can be accomplished either by sharing the document virtually in real time or providing the evidence to the witnesses ahead of time, provided that if the document is provided ahead of time, it must be identical to, and bear the same Bates numbers as the document that is shared virtually during the hearing.

3.3.3. If a witness does not have the technology necessary to participate in the remote hearing, the participant calling that witness should take reasonable measures to assist the witness to participate. The court should address how the witness may participate in the hearing on a case-by-case basis.

3.3.4. Participants should explain to witnesses that, if the rule of sequestration is invoked, the witness will not be able to observe any part of the proceeding outside of his or her testimony, and will either be placed into a virtual waiting room or virtual breakout room or will be "on call" until it is the witness's turn to testify. If the witness will not be placed in a virtual waiting room or virtual breakout room, the participant should advise the witness to be prepared to immediately participate in the proceeding upon receiving a notification from the participant who is calling the witness.

3.3.5. Participants should ensure their witnesses are aware of the witness testimony protocol discussed and agreed to by counsel or ordered by the court

3.3.6. The witness shall have the appropriate form of identification available to allow for the virtual swearing in of the witness.

Appendix A

Exhibit	**Admissibility Status**
Example- Plaintiff's Exhibit 1- Contract	Stipulated into evidence
Example- Plaintiff's Exhibit 2- Medical Records	Objection by Defendant 1 on the basis of relevancy.

4. Remote Deposition Procedures

The following procedures supplement all Applicable Law, Rules, and Procedures, which shall be followed at all times. This includes, but is not limited to, the prohibition on speaking objections and on contact, including virtual contact, with a witness during the course of a deposition.

4.1. The court reporter may administer the oath or affirmation to the deponent remotely in accordance with the Applicable Law, Rules, and Procedures.

4.2. Participants appearing on the record shall state their appearances clearly for the record, and shall not disable their cameras during the deposition unless there is a break or unless they are necessarily appearing by telephone.

4.3. The deponent shall comply with any request by a participant to show the environment where the deposition is taking place by using the camera on the device being used by the deponent for the deposition.

4.4. The deponent shall not use any virtual background at any time during the deposition.

4.5. All deposition participants shall appear remotely unless the witness requests that the witness's counsel be present in the same physical location as the witness. The witness shall provide written notice to the participants no less than 5 business days prior to the deposition of the witness's intent to have his or her counsel present in the same physical location during the deposition. Upon such notice, any participant may attend the deposition in person or remotely. If the witness and the witness's counsel are in the same room, that witness and counsel must use two video cameras on two different devices and mute one of those devices to allow only one microphone to be used at a time. One video camera shall show the witness and one video camera shall show the witness's counsel.

4.6. In the event that the witness produces documents for the deposition in advance of the deposition, the party calling the witness should produce such

documents to the participants promptly. If documents are produced at the time of the deposition said documents shall be made available to all parties.

4.7. The deposition notice for any remote deposition shall identify the virtual video conference platform. The notice shall also contain a general description of how deposition participants may access the remote deposition.

4.8. The host of the remote deposition will only admit participants entitled to be present under all Applicable Law, Rules, and Procedures. Whenever possible, the host shall secure the deposition with a password or a second method of authentication.

4.9. Remote depositions taken in accordance with these Best Practices may be used at a trial or hearing to the same extent that an in-person deposition may be used at a trial or hearing, and the parties may not object to the use of the video recordings of the remote depositions on the basis that the depositions were taken remotely or through an electronic, Internet-based service.

4.10. The parties will use reasonable efforts to minimize technical disruptions. Notwithstanding the foregoing, in the event that the participants, court reporter, or videographer experience a technical malfunction that disrupts his or her audio or video during the deposition, the affected participant must raise any objection, contemporaneously on the record or as soon thereafter as reasonably possible, as to the portion of the deposition during which the affected participant's participation was impaired. If additional time is needed to complete the deposition due to technical difficulties, the participants must agree to make the deponent whose deposition was interrupted available later that day, if possible, and if not, on another day to conclude the deposition.

4.11. While testifying in the deposition no witness shall engage in any private communication, including but not limited to text messages, electronic mail, or the chat feature in the video conferencing system, while on the record, whether or not a question is pending. Nothing in this paragraph prohibits counsel for the deponent from conferring with the deponent during a break in the deposition, in a "breakout room" or otherwise, nor does it prohibit counsel from communicating with each other by any means during the deposition, or otherwise prevent

counsel for the deponent from conferring with the deponent as permitted by the applicable rules of court.

4.12. The deponent must not turn off his or her microphone while on the record. While on the record, each deponent shall close all documents, emails, browsers, programs and applications on his or her computer or other device, other than the virtual video conference platform. While on the record, the deponent should turn off all electronic devices capable of communication and Internet access other than the ones being used to connect to the remote deposition.

4.13. Any video record shall be made in accordance with all Applicable Law, Rules, and Procedures.

4.14. During breaks in the deposition, the participants may use the breakout room feature provided by the virtual video conference platform, which simulates a live breakout room through video conference.The breakout rooms shall be established and controlled by the host. A conversation in a breakout room shall not be recorded, transcribed, or observed by anyone not specifically authorized by the participants in the specific breakout room.

4.15. Exhibits used during the deposition need not be presented to the deponent and participants in hard copy and may instead be presented electronically. No participant may object to the admissibility of any material on the grounds that the material was presented in electronic form.

4.16. Participants may introduce exhibits electronically during the deposition through the virtual video conference platform's document-sharing technology, by using the screen-sharing technology within the video conferencing platform and by sending the exhibit to the deponent and all participants via email or other electronic means. In the event that the videographer or exhibit technician is charged with introducing exhibits through the virtual video conference platform's document-sharing or screen-sharing technology within the video conferencing platform, such person is prohibited from sharing any exhibit with anyone else unless and until the deposing participant asks that the exhibit be published to the witness and other participants.

5. Remote Mediation Procedures

5.1. All confidentiality protections that apply to mediation shall also apply to any mediation conducted virtually.

5.2. All appearance requirements that apply to mediation shall also apply to any mediation done virtually.

5.3. In order to make sure all parties, counsel, representatives, and other participants are in compliance, all video cameras shall be turned on and all participants, regardless of their location, shall be visible at all times while conferring with the mediator, unless excused by the mediator or by agreement of all of the parties.

5.4. No one, regardless of location, shall record any portion of the mediation or download or save any contents of any chat function of the conferencing platform.

5.5. The mediator should be the host of the virtual mediation and should:

A. Disable the recording functions, if any, in the conferencing platform;

B. Enable a sufficient number of confidential, break-out rooms for participants to caucus;

C. Maintain control of who is admitted to participate in the conference by manual admission (if the platform is equipped with that function);

D. Provide an alternate method of communicating with the mediator, such as by telephone, email, or text, so that a participant who has lost connection to the conference may be re-admitted or continue to participate.

5.6. Anyone who circulates or receives a connection link for a remote mediation conference should safeguard the link, refrain from sharing the link with non-participants, and refrain from posting the link publicly (such as on social media outlets).

ZOOM Appearances
"Preferences and Tips"
March 2021

Upon surveying the court staff, judges included, here are some suggestions and requests to make the Zoom hearings go smoother and to avoid notations in transcripts, such as (line cut out) or (line garbled). This is such a shame when an attorney is making an important argument on behalf of the client and this happens 50 times in a transcript.

To address that most critical problem, if anyone is having trouble hearing a person on Zoom, please ask for a one-minute pause in the proceedings so that the person can exit the Zoom hearing and then link back in anew. It generally fixes the problem.

Another big problem that people do not realize, which causes audible problems, is a fan going in a person's office, a ceiling fan or a small fan. Please be sure any fan is turned off while on a Zoom call.

Have good equipment. Your computer may have insufficient bandwidth or you're too far from the router. Also, a high-quality noise-cancelling microphone headset is helpful to avoid any ambient noise interfering with your speech. Please speak distinctly and directly into the microphone. I recently bought a set of headphones for about 59 bucks from Nuance Corporation online.

A person should test the camera on their laptop or computer for its positioning prior to the Zoom event. Sometimes a laptop will need to be elevated or the screen pushed forward or backward to ensure your face is being shown fully instead of just your nose, something that drives a particular judge crazy.

Try to keep your computer located in a spot where you have an orderly, non-distracting background. A disorganized background is not a good idea and could be a problem to someone trying to watch and understand you. When you watch folks be interviewed via Zoom on TV, you'll notice the nice backgrounds, tons of bookshelves, and they stay very still for good coverage of their face. A lot of rocking back and forth is distracting to the judges. Seeing someone's lips move really helps to better understand what they're saying. Wear proper attire.

It's a good idea to keep your door shut during a Zoom hearing, especially if you are at home, to avoid the sound of a dog barking or baby crying. If it's a neighbor's dog that is outside, there's not much you can do about that, unfortunately. So, be sure to stay MUTED until it's your time to talk. Attorneys have become much better at remembering to unmute before speaking. No worries, the Judge will remind you if he/she sees your lips moving with no sound.

If your case has not been called yet when you enter the Zoom hearing and another case is going on, be sure to keep your video in the "off" mode. I've noticed that the courtroom deputies have stopped saying "All rise" in the beginning of a hearing, so there's no more need to stand up in your office when court begins. That was sort of a funny predicament for attorneys in the beginning of our new world of Zoom.

When time permits, some courtroom deputies do an audio check 15 minutes prior to a hearing. So, you may want to tune in to see if she's looking for you to make sure all is well with your sound system.

Announce yourself before speaking unless the Judge has called you by name. Please be mindful when there's several voices involved, the person transcribing the proceeding may not know who's talking, especially later on in the hearing when folks forget to identify themselves in the heat of battle, so to speak.

Be patient with yourself and others, swallow or take a one-second breath before speaking to avoid cross-talk which totally obliterates what anyone is saying. In a regular hearing over a year ago, we could isolate the channels and capture all words when folks were talking over one another but not anymore. The reason therefor is the Judge is on Channel 1 and everyone else on a Zoom hearing is on Channel 2.

Try to avoid the noise created by the shuffling of papers and clicking of typing. Get a silent keyboard if someone is going to be in the room with you typing a lot of notes. Another good reason to mute yourself.

However, this brings me to another point and something that makes the record a lot better, in my opinion insofar as major trials. It seems to go smoother if counsel for each side can be present in the courtroom with maybe just their experts testifying live and everyone else via video.

If there are a lot of participants appearing via Zoom, I suppose that having techs operate the screen share of exhibits is the only way to handle that situation. But if there are few players, it seems so much faster for everyone to have access to the exhibits to be viewed by individual witnesses. It seems like it would be easy to make electronic file folders with the respective exhibits that folks could pull up. The Zoom witness could be instructed to print them out before testifying. This would be in lieu of a throw-away binder oftentimes used in court in the past.

In trials, please have a script of your questions ready for easy reference. Oftentimes when there is an objection and colloquy takes place, the witness usually needs the question restated. Unfortunately, there is no witness or playback of audio available, so having that last question right in front of you will be helpful and speed things along.

Also, in trials when witnesses receive subpoenaes to testify, they get scared and hire counsel, sometimes the same counsel. The attorney feels like they need to be in his office waiting to be called to testify. Recently, the witnesses weren't called as anticipated and waited a couple days to be asked to testify. So, it might be wise for the attorney to just have the witness stay in their office or home until ready to testify via Zoom. Food for thought.

The witnesses need to be advised that they can't have any other papers in front of them but for the relevant exhibits that may have been provided. Their testimony should be considered to be as formal as if they were testifying live in the courtroom.

Try to have as many exhibits stipulated to before trial, of course, and this will save everyone a ton of time and make the Zoom trial go faster. The few exhibits with objections can just be addressed during testimony that includes that exhibit or exhibits.

As an aside, we have several female federal bankruptcy judges. I wish attorneys and witnesses would more often say, "Yes, Your Honor" instead of "Yes, ma'am."

My daughter was recently involved in a complicated mediation. Beforehand, she sent the Mediator (older guy) an outline of the personal injury case with several people injured in a car accident. When the mediation began, the Mediator asked my daughter to begin the Zoom mediation by outlining the case for everyone.

So, here's what she did. She forced herself to speak slowly and distinctly (easy to do here in Charleston, South Carolina) and first went through each screen of the Zoom mediation by identifying who each person was, i.e., the insurance rep, etc. The mediation went forward and was successful, thank goodness.

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13
Prepared by the Chambers of Mary Jo Heston
December 2019

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1] No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (excludes person whose primary activity is business of owning or operating real property). § 101(51D). Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over $2,725,625. § 101(51D).	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less. § 101(51D); § 104. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended § 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below $10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below $10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B).	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e).

[1] Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	No unsecured creditors committee (or committee is sufficiently inactive). Status as a "small business debtor" hinges, at least in part, upon whether a creditor's committee is appointed, and on how much that creditor's committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor's committee thereby extinguishing debtor's small business status. The UST appoints any such committee. *Id.* Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.		Family farmer must be engaged in a farming operation, including "farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." § 101(21).	
Filing Fees	$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is $325 for disbursements up to $15,000. Code does not define "disbursements."	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first $450,000 paid under the plan, and 3% of any payments in excess of $450,000. 28 U.S.C. § 586(e)(1)(B).	No UST fees.

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).		28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
			that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13 trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual,	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11 cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset	A disinterested trustee is appointed in every ch. 13 case. § 1302. A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
		the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for "cause."	
Trustee Fees	No rule.	Trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1).	Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).
Estate Property	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor	Section 1186 augments § 541 and parallels § 1115 in ch. 11.	Section 1207 augments § 541 and parallels § 1115 in ch. 11.	Section 1306 augments § 541, and parallels § 1115 in ch. 11.

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306.			
Estate Property Post-confirmation	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	No separate rule.	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).
Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b).	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property. § 1325(a)(5)(B)(iii)(II).

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order. § 1123(b)(3)(B).	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.
Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d). Small Business Debtors: Debtors have 180 days to	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).			
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes. Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f).	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.
Status Conference	None required.	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended	None required.	None required.

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
		for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).		
Plan Content	Plans *must*: 1) designate classes of claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123. Plans m*ay*: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and,	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2) provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2). Plans *may*: 1) 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 granting the security was i) not used primarily to acquire real property; and (ii) used	Mirrors those of ch. 13. Ch. 12 plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222. Under § 1222(b)(1)-(12), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property.	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322. Under § 1322(b)(1)-(11), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan.

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	primarily in connection with the small business of the debtor. § 1190(3).	Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	Cannot modify consensual liens on a principal residence.
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1128. Section 1232 was signed into law on October 26, 2017. Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly.	

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
			Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants.	
Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b).	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b).	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors.	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors.

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. *In re Rogers*, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements as their larger ch. 11 counterparts.	A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income. Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a).	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).		in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch. 12 based on the motion date, not the petition date). There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the conversion. § 1307(f).
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation,	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not they have completed all payments. § 1228.	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523. Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1).	confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020)	Ch. 12	Ch. 13
	An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.			influence. § 1328.

A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

Revised and Updated July 2020

Paul W. Bonapfel
U.S. Bankruptcy Judge, N.D. Ga.

Earlier versions of this paper were originally distributed in February 2020 and May 2020. For the reader who has read one of those, these are the material revisions:

May 2020 revisions

Sections III(A) and (B) – discussion of changes in the debt limit for a subchapter V debtor under the CARES Act

Part VI – additional discussion of how bankruptcy courts are implementing procedures for subchapter V cases

Section VII(B) – expanded discussion of exception in §1190(3) to general prohibition of modification of residential mortgage

Part XIII – discussion of case law on retroactive application of subchapter V and its availability in pre-enactment case

July 2020 revisions

Addition of Appendices C (Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13) and D (Key Events in the Timeline of Subchapter V Cases)

Inclusion of additional sources and discussion in text accompanying footnotes 45, 52, `47, 152, and 347-48 and in footnotes 5-6, 9, 11, 17, 33, 45, 48, 56, 61, 83, 88, 111, 146-47, 142, 165, 173, 182, 262, 347-49, 352

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A Guide to the Small Business Reorganization Act of 2019

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I. Introduction

The Small Business Reorganization Act of 2019 (the "SBRA"),[1] signed by the President on August 23, 2019, enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and made conforming amendments to several sections of the Bankruptcy Code and statutes dealing with appointment and compensation of trustees in title 28.[2] SBRA also revised the definitions of "small business case" and "small business debtor" in § 101(51C) and § 101(51D), respectively.[3] It took effect on February 19, 2020, 180 days after its enactment.

Under § 101(51D), as amended, a debtor could not qualify as a small business debtor if its debts (with some exceptions) exceeded $ 2,725,625. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"),[4] enacted and effective March 27, 2020, amended

[1] Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.).

[2] Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code. Sections of the Bankruptcy Code added by the SBRA are referred to as "New § ___" in the text of this paper.

Section 3 of SBRA also enacts changes relating to prosecution of preference actions under 11 U.S.C. § 547 and to venue for certain proceedings brought by a trustee. These amendments apply in all bankruptcy cases.

SBRA § 3(a) amends § 547(b) to require that a trustee seeking to avoid a preferential transfer must exercise "reasonable due diligence in the circumstances of the case" and must take into account a party's "known or reasonably knowable" affirmative defenses under § 547(c). SBRA § 3(a).

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than $ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was $ 13,650.

[3] SBRA § 4(1)(A)-(B).

[4] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

the SBRA to increase the debt limit to $ 7.5 million for purposes of subchapter V for one year and made certain technical corrections.

Appendix A is a chart that lists sections of the Bankruptcy Code that SBRA affected and summarizes the changes, as affected by the CARES Act.

The purpose of SBRA is "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs."[5] 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."[6] Courts have taken the legislative purpose of SBRA into account in their application of the new law.[7]

It is likely that SBRA will have a significant impact. A preliminary estimate is that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would qualify as a small business debtor and that about 25 percent of individuals in chapter 11 cases would qualify as a small business.[8] The economic circumstances arising from the

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[5] H.R. REP. NO. 116-171, at 1 (2019), *available at* https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf.

For a summary of small business reorganizations under the Bankruptcy Code, see Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 BANKRUPTCY LAW LETTER, no. 10, Oct. 2019, at 1-4.

[6] H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc,* 2020 WL 975464, at *1-3 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. 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, 344-45 (2020).

[7] *In re* Ventura, 615 B.R. 1 , 6, 12-13 (Bankr. E.D.N.Y. 2020); *In re* Progressive Solutions, Inc, 2020 WL 975464, at *1-3 (Bankr. C.D. Cal. 2020).

[8] Brubaker, *supra* note 5, at 5-6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?,* CREDIT SLIPS (Sept. 14, 2019), http://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html. Professor Brubaker points out that the percentage may ultimately be higher because pre-SBRA law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under pre-SBRA law because of its obstacles might now do so.

Covid-19 pandemic and the temporary increase of the debt limit under the CARES Act can only increase the number of small business cases.[9]

New subchapter V applies in cases in which a qualifying debtor elects its application. In the absence of an election, the existing provisions of chapter 11 that govern a small business debtor apply with one change. SBRA amends § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in any case of a small business debtor unless the court orders otherwise.[10]

Subchapter V resembles chapter 12 in some aspects.[11] It provides for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee has oversight and monitoring duties and the right to be heard on certain matters. In some cases, the trustee may make disbursements to creditors.

But subchapter V differs from chapter 12 in significant ways. For example, whereas chapter 12 confirmation standards (§ 1225) are similar to those in chapter 13 (§ 1325), subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a). Unlike chapter 12, subchapter V does not provide for a codebtor stay.

Enactment of SBRA required revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") had authority to make changes in the Official Forms prior to the effective date of the SBRA. Changes to the Bankruptcy Rules,

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[9] For a discussion of strategies for creditors in view of the enactment of subchapter V, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 Am. Bankr. Inst. L. Rev. __ (forthcoming 2020).

[10] SBRA, § 4(a)(11), 133 Stat. at 1086.

[11] As the court observed in *In re Trepetin,* 2020 WL 3833015, at *5 n. 14 (Bankr. D. Md. 2020):

> Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

however, take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require.

To take account of the new law, the Rules Committee made changes to the Official Forms and promulgated interim rules (the "Interim Rules") that amend the Federal Rules of Bankruptcy Procedure.[12] The changes to the Official Forms became effective as of the effective date of SBRA. The Rules Committee has recommended that each judicial district adopt the Interim Rules as local rules or by general order. Enactment of the CARES Act required technical revisions in Interim Rule 1020 in and the Official Forms for voluntary petitions.[13] Appendix B summarizes the changes that the Interim Rules make.

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. The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee proposes to call cases

[12] On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure ("Interim Rules") to address provisions of SBRA for adoption in each judicial district by local rule or general order and new Official Forms. The proposed Interim Rules and Official Forms reflected changes in response to comments received. ADVISORY COMMITTEE ON BANKRUPTCY RULES, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption, and approved the new Official Forms. The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

The Interim Rules are located on the *Current Rules of Practice & Procedure* page of the U.S. Courts public website (USCOURTS.GOV). The new Official Forms are posted on the *Forms* page of the website, under the *Bankruptcy Forms* table.

[13] On April 6, 2020, the Advisory Committee on Bankruptcy Rules proposed one-year technical amendments to Interim Rule 1020 to take account of the revised definition of "debtor" under the CARES Act, which Sections III(A) and (B) discuss. The Advisory Committee also proposed conforming technical changes to official forms, including Official Forms 101 and 202, which are the forms for the filing of a voluntary petition by an individual and a non-individual, respectively.

On April 20, 2020, the Committee on Rules of Practice and Procedure approved the amendments and recommended their local adoption. It also approved the one-year technical change to the Official Forms.

under the existing provisions "small business cases" and to call cases of electing debtors "cases under subchapter V of chapter 11."

This terminology is technically accurate. Under the SBRA amendments, a "small business debtor" is not necessarily a debtor in a "small business case." Rather, a "small business case" is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case.

The distinction is important for at least one reason. Section 362(n) makes the automatic stay inapplicable in certain circumstances when the debtor in the current case is or was a debtor in a pending or previous small business *case*. Because a subchapter V debtor is not in a small business *case,* § 362(n) will not apply in a later case of the subchapter V debtor.

Bankruptcy judges and lawyers will inevitably adopt shorthand expressions to distinguish the three types of cases that are now possible under chapter 11: a non-small business case; a subchapter V case for a small business debtor who elects it; and a non-subchapter V small business case – a "small business case" – for one who does not. This paper refers to a non-small business case as a "standard" chapter 11 case; to the case of an electing small business debtor as a "sub V case;" and to the case of a non-electing small business debtor as a "non-sub V case." And, of course, debtors are either "standard," "sub V" or "non-sub V."

II. Overview of Subchapter V

For electing small business debtors, subchapter V: (1) modifies confirmation requirements; (2) provides for the participation of a trustee (the "sub V trustee") while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) changes several administrative and procedural rules; and (4) alters the rules for the debtor's discharge and

the definition of property of the estate with regard to property an individual debtor acquires postpetition and postpetition earnings (which has implications for operation of the automatic stay of § 362(a)). Only the sub V debtor may file a plan or a modification of it.

This Part provides an overview of these provisions. Later Parts discuss these and other provisions in more detail. Appendix C is a chart that compares provisions of subchapter V with those that govern non-sub V chapter 11, chapter 12, and chapter 13 cases.

A. Changes in Confirmation Requirements

The court may confirm a plan even if all classes reject it. Moreover, the "fair and equitable" requirement for "cramdown" confirmation does not include the absolute priority rule. Instead, the plan must comply with a new projected disposable income requirement (applicable in cases of entities as well as those of individuals). The cramdown requirements for a secured claim are unchanged. (Part VIII).

A plan may modify a claim secured only by a security interest in the debtor's principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor. Such modification is not permitted in standard or non-sub V chapter 11 cases or in chapter12 or 13 cases. (Section VII(B)).

B. Subchapter V Trustee and the Debtor in Possession

Subchapter V provides for the debtor to remain in possession of assets and operate the business with the rights and powers of a trustee, unless the court removes the debtor as debtor in possession. (Part V).

The United States Trustee appoints the sub V trustee. The role of the sub V trustee is to oversee and monitor the case, to appear and be heard on specified matters, to facilitate a

consensual plan, and to make distributions under a nonconsensual plan confirmed under the cramdown provisions. (Part IV).

C. Case Administration and Procedures

Subchapter V modifies the usual procedures in chapter 11 cases in several respects. Appendix D summarizes the key events in a subchapter V case and the timeline for them.

No committee of unsecured creditors. A committee of unsecured creditors is not appointed unless the court orders otherwise. (SBRA also makes this the rule in a non-sub V case.) (Section VI(A)).

Required status conference and report from debtor. The court must hold a status conference within 60 days of the filing "to further the expeditious and economical resolution" of the case. Not later than 14 days before the status conference, the debtor must file a report that details the efforts the debtor has undertaken and will undertake to achieve a consensual plan of reorganization. (Section VI(C)).

Time for filing of plan. The debtor must file a plan within 90 days of the date of entry of the order for relief, unless the court extends the time based on circumstances for which the debtor should not justly be held accountable. The existing requirements in a small business case that a plan be filed within 300 days of the filing date (§ 1121(e)) and that confirmation occur within 45 days of the filing of the plan (§ 1129(e)) do not apply in a sub V case. (Section VI(D)).

No disclosure statement. Section 1125, which states the requirements for a disclosure statement in connection with a plan and regulates the solicitation of acceptances of a plan, does not apply in a sub V case, unless the court orders otherwise. Although no disclosure statement is required, the plan must include: (1) a brief history of the business operations of the debtor; (2) a

liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan. (Sections VI(B), VII(B)).

No U.S. Trustee fees. A sub V debtor does not pay U.S. Trustee fees. (Section VI(E)).

D. Discharge and Property of the Estate

1. Discharge – consensual plan

If the court confirms a consensual plan, a sub V debtor (including an individual debtor) receives a discharge under § 1141(d)(1)(A) upon confirmation. The provision in § 1141(d)(5) for delay of discharge in individual cases until completion of payments does not apply in a sub V case. In the case of an individual, the § 1141(d)(1)(A) discharge does not discharge debts excepted under § 523(a).[14] One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

2. Discharge – cramdown plan

If the court confirms a cramdown plan, § 1141(d) does not apply, and confirmation does not result in a discharge. Instead, new § 1192 provides for a discharge, which does not occur until the debtor completes plan payments for a period of at least three years or such longer time not to exceed five years as the court fixes. (Section X(B)).

Under new § 1192, the discharge in a cramdown case discharges the debtor from all debts specified in § 1141(d)(1)(A) and all other debts allowed under § 503 (administrative expenses), with the exception of: (1) debts on which the last payment is due after the first three years of the plan or such other time not exceeding five years as the court fixes; and (2) debts excepted under § 523(a). (Section X(B)). Under § 362(c)(2), the automatic stay remains in effect after

[14] § 1141(d)(2).

confirmation of a cramdown plan until the case is closed or dismissed, or the debtor receives a discharge.

3. Property of the estate

Section 1115 provides that, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. Section 1115 does not apply in a subchapter V case.[15] If the court confirms a plan under the cramdown provisions of new § 1191(b), however, property of the estate includes (in cases of both individuals and entities) postpetition assets and earnings.[16] (Part XI(B)).

III. Debtor's Election of Subchapter V and Revised Definition of "Small Business Debtor"

A. Debtor's Election of Subchapter V

The provisions of subchapter V apply in cases in which a small business debtor elects them.[17] If a small business debtor does not make the election, the current provisions of Chapter 11 governing small business cases apply.

The operative statutory provision is new § 103(i). As amended by the CARES Act, it provides:

> Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of title 11 shall apply.[18]

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[15] New § 1181(a).
[16] New § 1186(a).
[17] One commentator has suggested that a creditor may want to attempt to limit the availability of subchapter V by including in the credit agreement a commitment from the debtor not to make the election or to waive it, noting that such a contractual provision may not be enforceable. Bradley, *supra* note 9, manuscript at 11-12. Professor Bradley suggests alternatively that a creditor could require a "springing" (sometimes referred to as a "bad boy") guarantee from a debtor's insider that would arise if the debtor elected subchapter V. *Id.*
[18] SBRA inserted new subsection (i) in § 103 and renumbered existing subsections (i) through (k) as (j) through (*l*). SBRA § 4(a)(2). Before enactment of the CARES Act, new § 103(*i*) provided:

SBRA added new § 1182, which defined "debtor" in subsection (1) as meaning a "small business debtor,"[19] a term defined in § 101(51D). As the next Section discusses, SBRA also revised the § 101(51D) definition of "small business debtor." The CARES Act amended § 1182(1) so that its definition of "debtor" is the same as the definition of "small business debtor" in revised §101(51D), with a technical correction that it also made,[20] except that the amount of the debt limit is increased to $ 7.5 million.[21] The debt limit in revised § 101(51D) is unchanged.

The CARES Act amendment to new § 1182(1) is effective for only one year after enactment of the statute on March 27, 2020.[22] At that time, the CARES Act provides for the amendment of § 1182(1) to return to its original language, so that "debtor" will mean "a small business debtor."

The effect of all these provisions is that, for one year after the enactment of the CARES Act, new (and amended) § 1182(1) states the definition of a debtor eligible to be a sub V debtor. After that, new § 101(51D) will state the definition. The only difference in the language of the two statutes is the higher debt limit in the temporary CARES Act version of § 1182(1). (Because the CARES Act does not change the definition of "small business debtor," a debtor with debts in excess of the § 101(51D) limit but below $ 7.5 million that does not elect subchapter V cannot be a small business debtor.)

Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of title 11 shall apply.

[19] SBRA § 2(a).

[20] The technical correction involves the exclusion of public companies. See text accompanying note 39 *infra*.

[21] CARES Act § 1113(a)(1).

[22] CARES Act § 113(a)(5).

The statute does not state when or how the debtor makes the election. Bankruptcy Rule 1020(a) requires a debtor to state in the petition whether it is a small business debtor.[23] In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order for relief. The case proceeds in accordance with the debtor's statement unless and until the court enters an order finding that the statement is incorrect.

Interim Rule 1020(a) as originally promulgated added the requirement that the debtor state in the petition whether the debtor elects application of subchapter V and provided that the case proceed in accordance with the election unless the court determined that it is incorrect. In an involuntary case, the Interim Rule required the debtor to state whether it is a small business debtor and to make the election within 14 days after the order for relief.[24] In response to the CARES Act amendment of new § 1182(1), the revised Interim Rule provides in both instances for the debtor to state whether the debtor is a small business debtor or a debtor as defined in § 1182(1) and, if the latter, whether the debtor elects application of subchapter V.

Revisions to the Official Forms for voluntary chapter 11 cases require the debtor to state whether it is a small business debtor or a § 1182(1) debtor and whether it does or does not make the election.[25] Revised Official Forms also provide for creditors to receive notice of the debtor's statement of its status and the election that it makes.[26]

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[23] FED. R. BANK. P. 1020(a).
[24] INTERIM RULE 1020.
[25] OFFICIAL FORM B101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); OFFICIAL FORM B102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).
[26] OFFICIAL FORM B309E2 is the form for individuals or joint debtors under subchapter V, and OFFICIAL FORM B309F2 is the form for corporations or partnerships under subchapter V. Existing OFFICIAL FORMS B309E (individuals or joint debtors) and B309F (corporations or partnerships) are renumbered as B309E1 and B309F1. Both new forms contain the same information as the existing notices but provide additional information applicable in subchapter V cases.

The new forms require inclusion of the trustee and the trustee's phone number and email address. The new notices state that the debtor will generally remain in possession of property and may continue to operate the business and advise that, in some cases, debts will not be discharged until all or a substantial portion of payments under the plan are made.

Parties in interest may object to a debtor's election to proceed as a small business debtor. Bankruptcy Rule 1020(b) requires an objection to a debtor's statement as to whether it is a small business debtor within 30 days after the later of the conclusion of the § 341(a) meeting or amendment of the statement. Interim Rule 1020(b) makes the same requirement applicable to the statement regarding the election.

Bankruptcy Rule 1009(a) gives a debtor the right to amend a voluntary petition, list, schedule, or statement "as a matter of course at any time before the case is closed." A question is whether a debtor may amend the small business designation or the subchapter V election that the voluntary petition includes. Current Bankruptcy Rule 1020 does not address whether a debtor can amend the small business designation, and Interim Rule 1020 likewise does not address the issue of whether a delayed election should be allowed and, if so, under what circumstances.[27] Part XIII discusses the cases that have considered whether a debtor in a case pending before enactment of SBRA may amend the petition to elect application of Subchapter V.

One problem with permitting a debtor to change the election is that deadlines for conducting a status conference[28] and for filing a plan[29] run from the date of the order for relief. The Advisory Committee in its Report observed, "Should a court exercise authority to allow a delayed election, it is likely that one of the court's prime considerations in ruling on a request to make a delayed election would be the time restriction imposed by subchapter V. . . ."[30]

[27] The Advisory Committee Note to Interim Rule 1020 states, "The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions."
[28] *See infra* Section VI(C).
[29] *See infra* Section VI(D).
[30] REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES, *supra* note 12, at 3.

B. Revised Definitions of "Small Business Debtor" and "Small Business Case"

Under pre-SBRA law, paragraph (A) of § 101(51D) defined a "small business debtor" as a person (1) engaged in commercial or business activities, (2) excluding a debtor whose principal activity is the business of owning or operating real property, (3) that has aggregate noncontingent liquidated secured and unsecured debts[31] as of the date of the filing of the petition or the date of the order for relief in an amount not more than $ 2,725,625,[32] (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor. Paragraph (B) of former § 101(51D) excluded any member of a group of affiliated debtors that has aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

As the previous Section discusses, SBRA amended the § 101(51D) definition of "small business debtor," and the CARES Act made amendments that temporarily increase the debt limit for a sub V debtor to $ 7.5 million and make a technical correction to the exclusion of certain public companies from the definition.

The CARES Act effects the debt limit change through an amendment to new § 1182(1) that lasts only one year. The language of revised § 1182(1) is identical to the language of § 101(51D), with the technical correction that the CARES Act also makes. Specifically, subparagraphs (A) and (B) of new § 1182(1) are exactly the same as subparagraphs (A) and (B) of § 101(51D), as amended by both SBRA and the CARES Act. For convenience, this paper

[31] § 101(51D)(A). Debts owed to one or more affiliates or insiders are excluded from the debt limit. *Id.*
[32] The amount is revised every three years. § 104. The current amount became effective to cases filed on or after April 1, 2019.

discusses these provisions by reference to § 101(51D) because it continues to apply to a small business debtor that does not elect subchapter V.

SBRA did not change the requirement in § 101(51D) that the debtor be engaged in "commercial or business activities"[33] or the aggregate debt limit, but it modified each of the other requirements.[34] First, revised subparagraph (A) of § 101(51D) requires that 50 percent or more of the debt must arise from the commercial or business activities of the debtor.[35]

Second, amended § 101(51D)(A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real estate.[36]

Third, the requirement that no committee exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in the case of a small business debtor unless the court orders otherwise.)

Finally, SBRA added two additional types of debtors to those that subparagraph (B) excludes from being a small business debtor. One exclusion (in (B)(ii), as amended) was for a corporate debtor subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act of 1934.[37] The second (in (B)(iii), as amended) was for a corporate debtor subject

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[33] In *In re Wright,* 2020 WL 2193240 (Bankr. D. S.C., April 27, 2020), the court held that nothing in the definition limits it to a debtor currently engaged in business and ruled that an individual who had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. *Accord, In re* Bonert*,* 2020 WL 3635869, at *5 (Bankr. C.D. Cal. 2020); *see In re* Blanchard, Case No. 12440, Doc. No. 137 (Bankr. E.D. La., July 16, 2020).

[34] SBRA § 4(a)(1).

[35] For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor's income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B).

[36] Section 101(51B) defines "single asset real estate" as "real property constituting a single property of project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto." § 101(51B).

[37] § 101(51D)(B)(ii).

to the reporting requirements of those sections that is an affiliate of a debtor.[38] The CARES Act made a technical correction[39] to eliminate the second provision and to insert a new (B)(iii) to exclude "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))."[40]

SBRA amended the definition of "small business case" in § 101(51C) to exclude a subchapter V debtor. Thus, a "small business case" is a case in which a small business debtor has *not* elected application of subchapter V. In other words, the case of a sub V debtor is *not* a "small business case," even though a sub V debtor necessarily is a "small business debtor." And as a result of the CARES Act amendments increasing the debt limits, a debtor may be a subchapter V debtor under § 1182(1) (until its expiration) but not a "small business debtor."

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases.[41] The trustee is a standing trustee, if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. SBRA § 4(b) amends 28 U.S.C. § 586 to make its provisions for the appointment of standing chapter 12

[38] SBRA § 4(a)(1)(B)(i)(III), amending § 101(51D)(B)(iii).
[39] For a discussion of the issues relating to this provision, *see* Brubaker, *supra* note 5, at 7. Because the issues are of limited or no interest to most practitioners and judges, they are beyond the scope of this paper. The author will address the issues if they arise and readers must do likewise.
[40] CARES Act § 1113(a)(4)(A).
[41] § 1183(a). SBRA § 4(a)(3) amends § 322(a) to provide for a sub V trustee to qualify by filing a bond in the same manner as other trustees.

and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.[42]

The United States Trustee Program has selected a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.[43] The appointment of a sub V trustee in each case instead of a standing trustee appears to be contrary to the expectations of proponents of the SBRA. In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated, "There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee."[44]

B. Role and Duties of the Subchapter V Trustee

The role of the sub V trustee is similar to that of the trustee in a chapter 12 or 13 case. But as later text discusses, a sub V trustee has the specific duty to "facilitate the development of a consensual plan of reorganization." New § 1183(b)(7). Sub V trustees may, therefore, confront issues that are quite different from those that trustees in other cases deal with.[45]

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[42] New § 1181(a). Section 1104, which governs the appointment of a trustee in a non-sub V case, does not apply in sub V cases. In a sub V case, the U.S. Trustee's appointment of the trustee is not subject to the court's approval as it is under § 1104(d).

[43] *See* Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP's Implementation of the HAVEN Act and the SBRA,* 38 AMER. BANKR. INST. J. 12 (Oct. 2019).

[44] *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), *available at* https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

[45] The United States Trustee Program has promulgated its expectations with regard to the duties of the sub V trustee and the trustee's role in the case. U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), *available at* https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials [hereinafter SUBCHAPTER V TRUSTEE HANDBOOK]. For a discussion of the sub V trustee's duties and role in the case, and strategic considerations for creditors, see Bradley, *supra* note 9, manuscript at 8-9, 14-17.

New § 1183 enumerates the trustee's duties. Section 1106, which specifies the duties of the trustee in a standard chapter 11 case, does not apply in sub V cases.[46] New § 1183, however, makes many of its provisions applicable in some circumstances. As in chapter 12 and 13 cases, the debtor remains in possession of assets and operates the business. If the court removes the debtor as debtor in possession under new § 1185(a), the trustee operates the business of the debtor.[47]

1. Trustee's duties to supervise and monitor the case and to facilitate confirmation of a consensual plan

In general, the role of the trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan.[48] This role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

First, the sub V trustee has the duty to "facilitate the development of a consensual plan of reorganization."[49] No other trustee has this duty, although a chapter 13 trustee has the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan."[50] One practitioner has suggested that the sub V trustee should be a "financial wizard" who can work with all parties on cash flows, interest rates, payment requirements, and "all the numbers puzzles

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[46] New § 1181(a).
[47] New § 1183(b)(5).
[48] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 1-1, provides an overview of the sub V trustee's duties:

> In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor's payments under the confirmed plan of reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor's bankruptcy estate for the benefit of creditors.

The Handbook notes, "The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case." *Id.* at 2-2. For a summary of the U.S. Trustee Program's views of the sub V trustee's duties, see *id.* at 1-5 to 1-7.
[49] New § 1183(b)(7).
[50] § 1302(b)(4).

that comprise a plan," and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.[51] The United States Trustee Program expects sub V trustees to be proactive in the plan process.[52]

Second, the trustee must appear and be heard at the status conference that new § 1188(a) requires.[53] Although § 105(d) (which does not apply in a sub V case under new § 1181(a)) provides for a status conference in any case on the court's own motion or on the request of a party in interest, it does not require one. Thus, a status conference is not required in any other type of case. Section VI(C) discusses the status conference.

Finally, the trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.[54]

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. Section 704(a)(4) imposes such a

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[51] Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers,* 38 AMER. BANKR. INST. J. 8 (Nov. 2019). *See also* Bradley, *supra* note 9, at manuscript 8-9 ("Trustees seem likely to play the role of mediator.").

[52] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-9, states:

> As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor's counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

When the plan is filed, the Handbook advises the sub V trustee to "review the plan and communicate any concerns to the debtor about the plan prior to the confirmation hearing." *Id.*

[53] New § 1183(b)(3). *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-8 ("The trustee should review the debtor's report carefully. . ." and "should be prepared to discuss the debtor's report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.").

[54] New § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all of these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a standard chapter 11 or a non-sub V case has a broad duty of investigation under § 1106(a)(3), unless the court orders otherwise.

The court may impose the investigative duties that § 1106(a)(3) specifies on the sub V trustee. Under new § 1183(b)(2), the court (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) may order that the sub V trustee perform certain duties of a chapter 11 trustee under § 1106(a). The specified duties are: (1) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3)); (2) to file a statement of the investigation, 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 to transmit a copy or summary of it to entities that the court directs (§ 1106(a)(4)[55]); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).[56] The same procedures apply to a chapter 12 trustee's duty to investigate under § 1202(b)(2).

[55] Section 1106(a)(4)(B) directs a chapter 11 trustee to transmit the copy or summary to any creditors' committee, equity security holders' committee, and indenture trustee. Committees do not exist in a small business case unless the court orders otherwise under § 1102(a)(3) as amended, and a small business debtor is unlikely to have an indenture trustee as a creditor.

[56] New § 1183(b)(2). In *In re AJEM Hospitality, LLC*, 2020 WL 3125276 (M.D.N.C. 2020), the court on motion of the bankruptcy administrator, and with the consent of the debtor and sub V trustee, authorized the trustee to conduct an investigation limited to the investigation of potential intercompany claims. The court noted, "The language of [§ 1106(a)(3)] specifically allows the Court to limit the scope of an investigation 'to the extent that the court orders . . . .'" *Id*. at *2.

2. Other duties of the trustee

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),[57] a sub V trustee under new § 1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine proofs of claim and object to allowance of any claim that is improper, if a purpose would be served (§ 704(a)(5)); (3) to oppose the discharge of the debtor, if advisable (§ 704(a)(6)); (4) to furnish information concerning the estate and the estate's administration that a party in interest requests, unless the court orders otherwise (§ 704(a)(7)); and (5) to make a final report and to file it (§ 704(a)(9)).[58] Under new § 1183(b)(4), the sub V trustee also has the same duty as chapter 12 and 13 trustees to ensure that the debtor commences timely payments under a confirmed plan (§§ 1202(b)(4), 1302(b)(5)).[59]

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees.[60] The U.S. Trustee Program has developed procedures for reporting by sub V trustees to enable U.S. Trustees to evaluate and monitor their performance.[61]

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[57] Chapter 12 (§ 1202(b)(1)) and chapter 13 (§ 1302(b)(1)) trustees also have the duty of a chapter 7 trustee under § 704(a)(3) to ensure that the debtor performs the debtor's intentions under § 521(a)(2)(B) to surrender, redeem, or reaffirm debts secured by property of the estate. The imposition of this duty in chapter 12 and 13 cases is curious in that § 521(b)(2)(B) applies only in chapter 7 cases. SBRA does not impose this anomalous duty on the sub V trustee.

[58] New § 1183(b)(1).

[59] New § 1183(b)(4).

[60] 28 U.S.C. § 586(a)(3). SBRA § 4(b)(1)(A) amended 28 U.S.C. § 586(a)(3) to include sub V cases within the types of cases that the U.S. Trustee supervises.

[61] SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, ch. 8. *See also* U.S. DEP'T OF JUSTICE, 3 UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL: CHAPTER 11 CASE ADMINISTRATION (Feb. 2020) §§ 3-17.16, 3-17.16.1, 3.17.1.2, 3.17.16.3, 3.17.16.5, 3.17.16.6, *available at* https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra,* directs sub V trustees to consult with the U.S. Trustee before filing an objection to confirmation (*id.* at 3-9, 3-10, 3-12), objecting to a claim (*id.* at 3-15), or filing a motion to dismiss or convert (*id.* at 3-17).

3. Trustee's duties upon removal of debtor as debtor in possession

Under new § 1185(a), the court may remove the debtor as debtor in possession. If the court does so, the sub V trustee has the duties of a trustee specified in paragraphs (1), (2), and (6) of § 1106.[62] New § 1183(b)(5) specifically directs the sub V trustee to operate the debtor's business when the debtor is not in possession. Similar provisions apply in chapter 12 cases.[63]

Under paragraph (1) of § 1106(a), the trustee must perform the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These duties are: (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); (3) to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); (4) to file reports (§ 704(a)(8)); (5) to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9)); (6) to provide required notices with regard to domestic support obligations (§ 704(a)(10)); (7) to perform any obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and (8) to use reasonable and best efforts to transfer patients from a health care business that is being closed (§ 704(a)(12)).[64]

Paragraph (2) of § 1106(a) requires the trustee to file any list, schedule, or statement that § 521(a)(1) requires if the debtor has not done so. Paragraph (6) requires the trustee to file tax returns for any year for which the debtor has not filed a tax return.

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[62] New § 1183(b)(5). New § 1183(b)(5) also requires the sub V trustee to perform duties specified in § 704(a)(8). The specification of the duty is duplicative because the § 704(a)(8) duty is one of the duties listed in § 1106(a)(1) that the sub V trustee must perform.

[63] The court may remove a chapter 12 debtor from possession under § 1204. Under § 1202(b)(5), the chapter 12 trustee then has the duties of a trustee under § 1106(a)(1), (2), and (6). §§ 1106(a), 1202(b).

[64] § 1106(a)(1).

C. Trustee's Disbursement of Payments to Creditors

1. Disbursement of preconfirmation payments and funds received by the trustee

Paragraphs (a) and (c) of new § 1194 contain provisions dealing with the trustee's disbursement of money prior to confirmation. It is not clear, however, how they can have any operative effect. Nothing in subchapter V requires preconfirmation payments to the trustee or authorizes the court to require them.

New § 1194(a) states that the trustee shall retain any "payments and funds" received by the trustee until confirmation or denial of a plan.[65] Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph's direction for their disbursement based on whether the court confirms a plan or denies confirmation indicates that it deals only with money the trustee receives prior to confirmation.

If a plan is confirmed, new § 1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee. The provision is effectively the same as the provisions that govern disbursement of preconfirmation payments in chapter 12 and 13 cases.[66]

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[65] New § 1194(a).

[66] New §§ 1194(a), 1226(a), 1326(a)(2). The chapter 12 provision, § 1226(a), does not specifically provide for fees of a trustee who is not a standing trustee and does not permit a deduction for adequate protection payments. The fees of a non-standing chapter 12 trustee are allowable as an administrative expense and as such are within the scope of the deduction.

The chapter 13 provision, § 1326(b)(2), does not specifically provide for fees of the chapter 13 trustee. It does provide for the trustee to deduct adequate protection payments.

A standing chapter 13 trustee collects a percentage fee as the debtor makes payments. 28 U.S.C. § 586(e)(2) (2018); *see* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, CHAPTER 13 PRACTICE AND PROCEDURE § 17:5 (2019). Thus, the funds a standing chapter 13 trustee has upon denial of confirmation are net of the trustee's fee that has already been paid. A non-standing chapter 13 trustee's fee is included in the deduction because it is an administrative expense.

Provisions for a trustee's disbursement of preconfirmation funds make sense in a chapter 13 case because a chapter 13 debtor must begin making preconfirmation payments to the trustee, adequate protection payments to creditors with a purchase-money security interest in personal property, and postpetition rent to lessors of personal property within 30 days of the filing of the chapter 13 case.[67] If the court denies confirmation in a chapter 13 case, therefore, it is possible that the chapter 13 trustee will be holding money that the debtor paid.

No such provisions for preconfirmation payments exist in a sub V case. Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the court to require the debtor to make preconfirmation payments to the trustee.

Nevertheless, paragraph (c) of new § 1194 authorizes the court, prior to confirmation and after notice and a hearing, to authorize the trustee to make payments to provide adequate protection payments to a holder of a secured claim.[68] But a court can hardly require a sub V trustee to make adequate protection payments as new § 1194(c) contemplates if the trustee has no money to make them.

It is perhaps arguable that the new § 1194(a) and (c) provisions impliedly authorize the court to require a debtor to make preconfirmation payments to the trustee, particularly if the court orders the trustee to make adequate protection payments. But the concept of the sub V debtor remaining in possession of its assets and operating its business includes the debtor retaining control of its funds. It is more appropriate (and simpler) for a court to require the debtor, not the trustee, to make whatever adequate protection or other payments the court orders.

[67] § 1326(a).
[68] New § 1194(c).

2. Disbursement of plan payments by the trustee

Whether the sub V trustee makes disbursements to creditors under a confirmed plan depends on the type of confirmation that occurs. Under new § 1194(b), the trustee makes payments under a plan confirmed under the cramdown provisions of new § 1191(b), unless the plan or confirmation order provides otherwise.[69] If a consensual plan is confirmed under new § 1191(a), however, the trustee's service terminates under new § 1183(c) upon "substantial consummation," and the debtor makes plan payments.[70] Part IX discusses payments under the plan.

D. Termination of Service of the Trustee and Reappointment

1. Termination of service of the trustee

When termination of the trustee's service occurs depends on whether the court confirms a consensual plan under new §1191(a) or confirms a plan that one or more impaired classes of creditors have not accepted under the cramdown provisions of new § 1191(b).

When the court confirms a consensual plan under new § 1191(a), the trustee's service terminates upon substantial consummation,[71] which ordinarily occurs when distribution commences.[72] Confirmation of a plan under the cramdown provisions of new § 1191(b) does not terminate the trustee's service. As just discussed, the trustee continues to serve and makes payments under the plan as new § 1194 requires.

Part IX further discusses these provisions.

[69] New §1194(b).
[70] New § 1191(a).
[71] Section IX(A) discusses substantial consummation in the context of payments under a consensual plan.
[72] New § 1183(c).

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.[73]

2. Reappointment of trustee

New § 1183(c)(1) provides for the reappointment of a trustee after termination of the trustee's service in two circumstances.

First, new § 1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee's duty under new § 1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.[74] The reason for this provision is unclear. If a debtor seeks modification after cramdown confirmation, the trustee continues to serve, so reappointment is unnecessary. When confirmation of a consensual plan has occurred, the trustee's service terminates upon substantial consummation, after which new § 1193(b) prohibits modification. Perhaps the purpose of the reappointment provision is to make sure that someone appears at the hearing to point this out to the court if a debtor attempts to modify a confirmed consensual plan after its substantial consummation.

Second, new § 1183(c) permits reappointment of the trustee if necessary to perform the trustee's duties under new § 1185(a). New § 1185(a) provides for the removal of the debtor in possession, among other things, for "failure to perform the obligations of the debtor under a plan confirmed under this chapter."[75] Because new § 1185(a) contemplates the postconfirmation removal of the debtor in possession, a trustee must be available to take charge of the assets and

[73] Section 701(a) directs the U.S. Trustee to appoint an interim trustee promptly after entry of an order for relief under chapter 7. In a converted case, the U.S. Trustee may appoint the trustee serving in the case immediately before entry of the order for relief.

Sections 1202 and 1302 provide for a standing trustee to serve in cases under those chapters, if one has been appointed, or for the U.S. Trustee to appoint a disinterested person to serve as trustee.

[74] New § 1183(c)(1).

[75] New § 1185(a).

the business. Section XII(B) further discusses the postconfirmation removal of the debtor in possession.

E. Compensation of Subchapter V Trustee

If the trustee in a sub V case is a standing trustee, the trustee's fees are a percentage of payments the trustee makes to creditors under the same provisions that govern compensation of standing chapter 12 and chapter 13 trustees.

If the sub V trustee is not a standing trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of § 330(a), without regard to the limitation in § 326(a) on compensation of a chapter 11 trustee based on money the trustee disburses in the case. As Section IV(E)(2) discusses, some observers expect that technical amendments will impose a limit on compensation of five percent of payments under the plan, which is the rule for a non-standing chapter 12 or 13 trustee.[76]

1. Compensation of standing subchapter V trustee

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586.[77] As amended, § 326(a) excludes a subchapter V trustee from its provisions governing compensation of a chapter 11 trustee, and § 326(b) provides that the court may not allow compensation of a standing trustee in a subchapter V case under § 330.

Under SBRA's amendments to 28 U.S.C. § 586(e),[78] the U.S. Trustee Program establishes the compensation for a standing sub V trustee in the same manner it does for standing chapter 12 and 13 trustees.[79] Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12

[76] The observers are bankruptcy judges, lawyers, and professors who have followed and supported enactment of SBRA with whom the author has discussed the issue.
[77] SBRA § 4(a)(4).
[78] SBRA § 4(b)(1)(D).
[79] 28 U.S.C. § 586(e).

and 13 cases are extended to cover subchapter V standing trustees. Thus, the standing subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.

If the service of a standing trustee is terminated by dismissal or conversion of the case or upon substantial consummation of a consensual plan under new § 1181(a) (as Section IX(A) discusses, the trustee does not make payments under a consensual plan), new 28 U.S.C. § 586(e)(5) provides that the court "shall award compensation to the trustee consistent with the services performed by the trustee and the limits on the compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."[80] The limits require reference to the standing trustee's maximum annual compensation, 28 U.S.C. § 586(e)(1)(A), and to the maximum percentage fee, 28 U.S.C. § 586(e)(1)(B).

2. Compensation of non-standing subchapter V trustee

Questions have arisen concerning the provisions of the new statute for compensation of a subchapter V trustee who is not a standing trustee.

Section 330(a) permits the court to award compensation to trustees. Sections 326(a) and (b) impose limits on compensation of trustees. SBRA does not amend § 330(a), but it does amend §§ 326(a) and (b). Under a "plain meaning" interpretation of these provisions as amended, a non-standing sub V trustee is entitled to "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" under § 330(a), and §§ 326(a) and (b) do not impose any limits on compensation.

[80] 28 U.S.C. § 586(e)(5).

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error.[81] The drafters of subchapter V intended that provisions for compensation of non-standing sub V trustees be the same as those for non-standing chapter 12 and 13 trustees.

Specifically, § 326(b) limits compensation of a non-standing chapter 12 or chapter 13 trustee to "five percent upon all payments under the plan." Although it appears the drafters intended this limitation to apply to compensation of sub V trustees, the language of the SBRA amendments to § 326(b) do not make this limitation applicable to a non-standing sub V trustee.[82] Observers close to the legislative process expect a technical amendment to resolve this issue by

[81] See *supra* note 76.

[82] A full understanding of the issue requires further elaboration.

Section 330(a) provides for the allowance of compensation to "trustees," subject to § 326 (and other sections). SBRA does not amend § 330(a).

SBRA did not change the provisions of subsections (a) and (b) of § 326(a) with regard to compensation of trustees other than sub V trustees. Thus, § 326(a) limits the compensation of a chapter 11 (and chapter 7) trustee to a percentage of moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor.

Section 326(b) deals with compensation of trustees in chapter 12 and 13 cases in two ways. First, it provides that a standing chapter 12 or 13 trustee is not entitled to compensation under § 330(a); instead, a standing chapter 12 or 13 trustee receives compensation, and collects percentage fees, under 28 U.S.C. § 586(e). Second, § 326(b) limits the compensation of a non-standing chapter 12 or 13 trustee to "five percent upon all payments under the plan." § 326(b). The exact language of § 326(b) is that the limitation applies to a "trustee appointed under section 1202(a) or 1302(a) of this title." *Id.*

Generally, then, pre-SBRA § 326(a) dealt with chapter 7 and 11 cases and § 326(b) dealt with chapter 12 and 13 trustees. Without an amendment, a sub V trustee would be a chapter 11 trustee, and § 326(a) would apply. Similarly, unamended §326(b) would not apply because it is for chapter 12 and 13 cases.

SBRA § 4(a)(4)(A) amended § 326(a) by excluding sub V trustees from its application. SBRA § 4(a)(4)(B) amended § 326(b) to prohibit a standing sub V trustee from receiving compensation under § 330. SBRA's amendments to 28 U.S.C. § 586(e) provide for compensation of a standing sub V trustee under its provisions, so the same provisions that govern compensation of standing chapter 12 and 13 trustees apply. SBRA § 4(b)(1).

What the SBRA amendments did <u>not</u> do was add "§ 1183" (the new subchapter V section that calls for the appointment of a sub V trustee) before "§ 1202(a) and 1302(a)" (the sections under which chapter 12 and 13 trustees are appointed) in the language quoted above. Without this insertion, amended § 326(b) does not limit the compensation of a non-standing sub V trustee. As the next footnote discusses, one reading of amended § 326(b) is that nothing authorizes compensation of a non-standing sub-V trustee.

making the five percent limitation also applicable to sub V trustees.[83] Technical corrections in the CARES Act, however, did not address this issue.[84]

3. Deferral of non-standing subchapter V trustee's compensation

A standing sub V trustee receives compensation as a percentage of payments the trustee makes from funds paid by the debtor under a plan. The percentage fees of a standing trustee are necessarily deferred until payments are made.

A non-standing trustee's compensation is allowable as an administrative expense, which has priority under § 507(a)(2) subject only to claims for domestic support obligations. Under § 1129(a)(9)(A), a plan must provide for payment of administrative expenses in full on or before the effective date of the plan.[85] This requirement applies in subchapter V cases to confirmation of a consensual plan under new § 1191(a).[86]

New § 1191(e) permits payment of administrative expense claims through the plan if the court confirms it under the cramdown provisions of new § 1191(b).[87] Accordingly, a non-standing sub V trustee faces deferral of payment of compensation for services in the case.

As Section IV(E)(2) discusses, it is possible that a technical amendment to § 326(b) will impose a limitation on a non-standing trustee's compensation to five percent of payments under

[83] Such an amendment would also clarify that a non-standing trustee is entitled to compensation. As amended, § 326(b) applies to cases under subchapter V, chapter 12, and chapter 13. Before and after the amendment, § 326(b) states that the court "may allow reasonable compensation under section 330 of this title to a trustee appointed under section 1202(a) or 1302(a) of this title," but it does not state that the court may allow compensation under § 330 of a trustee appointed under new § 1183. § 326(b). Because § 330(a) is subject to § 326, and § 326(b) does not provide for compensation of a non-standing sub V trustee, it may be arguable that a sub V trustee is not entitled to compensation. The position of the United States Trustee Program is, "Case-by-case trustees are compensated through § 330(a)(1) which allows for 'reasonable compensation for actual, necessary services rendered by the trustee . . . and by any paraprofessional person employed by such person.'" SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-21.

[84] The technical corrections in the CARES Act involved the exclusion of public companies from the definition of a small business debtor and unclaimed funds in subchapter V cases. CARES Act § 1113(a)(4).

[85] § 1129(a)(9)(A).

[86] New § 1191(a).

[87] New § 1191(e).

the plan. If this occurs, a non-standing trustee's compensation may arguably be limited to five percent of payments as they are made.

F. Trustee's Employment of Attorneys and Other Professionals

Section 327(a) permits a bankruptcy trustee to employ attorneys and other professionals "to represent or assist the trustee in carrying out the trustee's duties." SBRA does not modify this provision for subchapter V cases. If a standing sub V trustee is appointed, the standing trustee presumably would follow the practice of standing trustees in chapter 12 and 13 cases and not retain counsel or other professionals except in exceptional circumstances.

A non-standing sub V trustee's employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances.[88] In this regard, a person serving as a sub V trustee should have a sufficient understanding of applicable legal principles to perform the

[88] *See In re* Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 (E.D.N.C. 2020). The court declined to approve the sub V trustee's application to approve the employment of the trustee's law firm, stating, "[A]uthorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA." *Id.* at *2. In a footnote, the court cautioned that "overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved." *Id.* at *2 n. 2.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-17 to 3-18, states:

> Although the trustee may employ professionals under section 327(a), SBRA is intended to be a quick and low cost process to enable debtors to confirm consensual plans in a short period with less expense while returning appropriate dividends to creditors. Therefore, the services required of outside professionals, if any, will be limited in many cases. This is especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. See 11 U.S.C. § 1184. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether the employment of the professional is warranted under the specific circumstances of each case.

trustee's monitoring and supervisory duties, and appear and be heard on specified issues, without the necessity of separate legal advice.

A question exists whether a trustee who is not an attorney may appear and be heard in a bankruptcy case. Section 1654 of title 28 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.[89]

The statute applies only to natural persons; it does not permit a corporation or other entity to appear in federal court except through licensed counsel.[90]

Courts have applied the rule to prohibit an individual who serves as the trustee for a trust or as the personal representative of an estate from representing the trust or estate unless the trust or estate has no creditors and the individual is the sole beneficiary.[91] Because a bankruptcy trustee acts as the representative of the estate[92] and creditors have an interest in the estate, the same rule would appear to require a non-attorney trustee to retain a lawyer in order to appear and be heard in a bankruptcy court.

The nature of reorganization proceedings in bankruptcy courts and the facilitative, advisory, and monitoring role that subchapter V specifically contemplates for the trustee suggest that the rule applicable in a federal lawsuit between discrete parties should not be extended to apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

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[89] 28 U.S.C. § 1654.
[90] *E.g.*, Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993) ("[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.").
[91] *E.g.*, Guest v. Hansen, 603 F.3d 15 (2d Cir. 2010) (estate); Knoefler v. United Bank of Bismarck, 20 F.3d 347 (8th Cir. 1994) (trust); C.E. Pope Equity Trust v. United States, 818 F.2d 696 (9th Cir. 1987) (trust).
[92] § 323(a).

In this regard, 28 U.S.C. § 1654 and the case law establishing the rule have their roots in 18th and 19th century practice in federal courts[93] when the availability of bankruptcy relief was either nonexistent or short-lived.[94] The statute could not have contemplated a reorganization case involving many parties and many inter-related moving parts that involve business issues and often require negotiations and compromise to achieve a successful outcome for all the parties. In other words, a bankruptcy reorganization is quite different from a lawsuit that involves discrete parties asserting claims and defenses to establish their rights and obligations.

This distinction is particularly important in a subchapter V case. Specific duties of the sub V trustee are to facilitate the development of a consensual plan of reorganization,[95] and to appear and be heard on confirmation and other significant issues that relate to confirmation.[96] The statute makes it clear that the trustee's primary role is to work with the parties and then to *report* to the court, not to engage in litigation with them.

A nonlawyer trustee does not need an attorney to work with the parties on business issues, to investigate and obtain information about the debtor and its business, to facilitate confirmation, and to report to the court. When the time comes to report to the court, the trustee should be permitted to perform the reporting function without a lawyer.

Assuming that the nonlawyer trustee is knowledgeable about reorganization law and practice (and a sub V trustee who is not knowledgeable should not be a sub V trustee), neither

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[93] Section 35 of the Judiciary Act of 1789 is the statutory predecessor to 28 U.S.C. § 1654 (2018) and contained substantially the same language. *See* United States v. Dougherty, 473 F.2d 1113, 1123 n. 10 (D.C. Cir. 1972).

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), provided "that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

[94] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States,* 3 Am. Bankr. Inst. L. Rev. 5, 12-23 (1995). *See also* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 1:2.

[95] New § 1183(b)(7).

[96] New § 1183(b)(3).

the debtor, creditors, nor the court need a lawyer to present the trustee's reports and views to the court. In short, unless a sub V trustee needs to *litigate* something, the trustee does not need counsel. The statute and case law governing federal *litigation* should not be extended to the trustee's appearance in court to *report*.

The subchapter V trustee's primary role is analogous to the role of an examiner in a standard chapter 11 case,[97] or an expert witness that a court appoints.[98] Such parties provide information to the court and the parties and may do so without counsel. A sub V trustee with similar advisory duties should similarly be permitted to provide information to the court without the necessity of having to do so through a lawyer.[99]

Finally, the trustee is an officer of the court. The court need not insist that its officer hire a lawyer to hear what the officer has to say.

If a nonlawyer is the sub V trustee, the trustee's ability to appear in court without a lawyer is critical to accomplishment of the objective of subchapter V of providing debtors – and creditors – with the opportunity to accomplish an expeditious and economic reorganization, hopefully on a consensual basis. A requirement for employment of counsel adds an additional layer of expense that should not ordinarily be necessary and that threatens accomplishment of

[97] § 1106(b). Although bankruptcy courts often authorize an examiner to employ counsel or other professionals, § 327(a) does not provide authority for an examiner to employ a professional person. *See generally* 5 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 99:29 (3d ed. 2019). *See also In re* W.R. Grace & Co., 285 B.R. 148, 156 (Bankr. D. Del. 2002) ("[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings. The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals." (citation omitted)).

[98] FED. R. EVID. 706.

[99] In some jurisdictions, some chapter 7 panel trustees are not lawyers. The author's informal discussions with bankruptcy judges indicate that in some courts nonlawyer trustees appear without counsel when the matter does not require actual litigation.

subchapter V's primary objective.[100] Moreover, if a nonlawyer trustee must have a lawyer, the additional expense may as a practical matter preclude the appointment of a nonlawyer trustee.

If a court determines that the rule prohibiting a nonlawyer trustee from appearing in federal court requires the trustee to retain counsel in order to be heard, economic considerations may lead the court to limit the services that will be compensated to those for which a lawyer is legally required. Non-compensable services might include, for example, work in connection with the investigation of the debtor and its business or negotiations or development of business information to facilitate a consensual plan. And because it is the trustee, not the lawyer, who is to be heard, any written report concerning confirmation and other matters would seem to be the responsibility of the trustee, not the lawyer.

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

The debtor, as debtor in possession, remains in possession of assets of the estate.[101] A sub V debtor in possession has the rights, powers, and duties of a trustee that a standard chapter 11 debtor in possession has, including the operation of the debtor's business.[102] The court may

[100] This consideration suggests that a court may invoke § 105(a) to permit a nonlawyer to appear without counsel as being "necessary or appropriate" to carry out the provisions of the Bankruptcy Code.
[101] New § 1186(b).
[102] New § 1184. Section 1107(a), which provides for the debtor to remain in possession with the rights, powers, and duties of a trustee, is inapplicable in a sub V case. New § 1181(a). New § 1184 replaces § 1107(a) in sub V cases.

remove the debtor as debtor in possession under new § 1185(a). The court may reinstate the debtor in possession.[103]

B. Duties of Debtor in Possession

Upon the filing of a voluntary case, a small business debtor must file documents required of a small business debtor under §§ 1116(1)(A) and (B).[104] If a small business debtor elects to proceed as a sub V debtor, §1116 is inapplicable, but new § 1187(a) requires the sub V debtor to comply with §§ 1116(1)(A) and (B) upon making the election.[105]

The timing of the election does not change the time for the debtor to file the required documents from the date of the filing of the petition. If the debtor makes the election in the petition (as Interim Rule 1020(a) requires), § 1187(a) requires the debtor to file the documents at that time. If the debtor does not make the election in the petition, § 1116(1) is applicable and requires the debtor to append the documents to the petition. In an involuntary case, the debtor must file the documents within seven days after the order for relief.[106]

The documents that § 1116(1) requires are: the debtor's most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.[107]

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[103] New § 1185(b).
[104] New. § 1187(a).
[105] Section 1116 does not apply in a sub V case, § 1181(a), but new § 1187 incorporates all its requirements. In view of this, it is unclear why § 1116 does not apply in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee.
[106] Section 1116(1) requires a small business debtor in an involuntary case to file the required documents within seven days after the order for relief. Interim Rule 1020(a) permits a debtor to make the subchapter V election within 14 days after entry of the order for relief in an involuntary case. New § 1187(a) requires compliance with the requirements of § 1116(1) upon the debtor's election to be a subchapter V debtor.

Unless and until the debtor makes the election, § 1116 applies. Accordingly, the debtor must comply with § 1116(1) and file the required documents within seven days after the order for relief, regardless of when the debtor makes the election.
[107] § 1116(1).

SBRA does not change a small business debtor's duty under § 308 to file periodic reports.[108] Under § 308(b), the periodic reports must contain information including: (1) the debtor's profitability; (2) reasonable approximations of the debtor's projected case receipts and cash disbursements; (3) comparisons of actual case receipts and disbursements with projections in earlier reports; (4) whether the debtor is in compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and (5) if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.[109]

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7).[110] Thus, the debtor's senior management personnel and counsel must: (1) attend meetings scheduled by the court or the U.S. Trustee (including initial debtor interviews, scheduling conferences, and § 341 meetings, unless waived for extraordinary and compelling circumstances[111]); (2) timely file all schedules and statements of financial affairs (unless the court after notice and a hearing grants an extension not to exceed 30 days after the order for relief, absent extraordinary and compelling circumstances); (3) file all postpetition financial and other reports required by the Bankruptcy Rules or local rule of the district court;[112] (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other

[108] New § 1187(b).
[109] § 308.
[110] New § 1187(b).
[111] As in non-sub V cases, the debtor and counsel must attend the initial debtor interview scheduled by the U.S. Trustee and must attend the § 341 meeting of creditors, at which the U.S. Trustee presides. *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-3, 3-5. The U.S. Trustee expects the sub V trustee to participate in both. *Id.*
[112] That is not a typo. The statute specifies local rule of the district court.

government filings and pay all taxes entitled to administrative expense priority; and (6) allow the U.S. trustee to inspect the debtor's business premises, books, and records.[113]

A sub V debtor in possession has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).[114]

The duties under § 1106(a)(1) include the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a).[115] These provisions include duties: to be accountable for all property received; to examine and object to proofs of claim if a purpose would be served; to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise; to file reports; to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee; to provide required notices with regard to domestic support obligations; to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.

Other § 1106(a) duties applicable to the sub V debtor under new § 1184 are the duties under § 1106(a)(5) through (a)(8): to file a plan;[116] to file tax returns for any year for which the

[113] § 1118.
[114] New § 1184.
[115] § 1106(a)(1).
[116] The duty under § 1106(a)(5), applicable to the sub V debtor under new § 1184, is to "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." New § 1184.

The § 1106(a)(5) language is somewhat problematical in a sub V case. First, § 1121 (dealing with who may file a plan) does not apply in a sub V case because only the debtor may file a plan. Second, the statutory deadline of 90 days for the debtor to file a plan, new § 1189(b), is inconsistent with the "as soon as practicable" direction in § 1106(a)(5). § 1106(a)(5).

Nevertheless, the clear import of the statutory scheme is that the sub V debtor has a duty to file a plan.

debtor has not filed a tax return; to file postconfirmation reports as are necessary or as the court orders; and to provide required notices with regard to any domestic support obligations.[117]

C. Removal of Debtor in Possession

New § 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.[118] "Cause" includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case." This language is identical to § 1104(a),[119] which provides for appointment of a trustee in a standard or non-sub V chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case.

New § 1185(a) also provides for removal of the debtor in possession "for failure to perform the obligations of the debtor" under a confirmed plan, as Sections V(C) and XII(B) discuss. Sections 1104(a) and 1204(a) do not contain this ground for removal of a debtor in possession.[120]

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[117] § 1106(a)(5-8).

[118] New § 1181(a). Sections 1104 and 1105, which deal with appointment of a trustee and termination of the trustee's appointment, are inapplicable in a sub V case.

Section 1104 also permits appointment of a trustee if it is "in the interests of creditors, any equity security holders, and other interests of the estate." New § 1185(a) does not include this reason as "cause" for removing a debtor in possession.

Section 1104 also permits the appointment of an examiner. Subchapter V has no provision for appointment of an examiner. As Section IV(B)(1) notes, the court may authorize a trustee to investigate for cause shown under new § 1183(b)(2).

[119] Section 1104 does not apply in a sub V case. New § 1181(a).

[120] New § 1185(a).

If the court removes the debtor in possession, the trustee has the duty to operate the business of the debtor,[121] and other duties that Section IV(B)(3) discusses. The trustee cannot, however, file a plan.[122]

New § 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing.[123] Section 1202(b) contains identical language in chapter 12 cases, and § 1105 similarly permits the court to terminate the appointment of a chapter 11 trustee and restore the debtor to possession and management of the estate and operation of the debtor's business.[124]

Like §§ 1104(a) and 1204(a), new § 1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists.[125] A potential issue is whether removal of the debtor for failure to perform under a confirmed plan is mandatory if the failure is not material or if the debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at

[121] *Id*.§ 1183(b)(5).
[122] *Id*.§ 1189(a) (stating that only the debtor may file a plan).
[123] *Id*.§ 1185(b).
[124] §§ 1105, 1202(b). If the debtor is removed from possession, a question arises whether the attorney (and other professionals employed by the debtor) is entitled to compensation for services rendered to the debtor after the removal.

The Supreme Court in *Lamie v. United States Trustee,* 540 U.S. 526, 124 S. Ct. 1023 (2004), ruled that an attorney for a former chapter 11 debtor in possession who provides services after conversion to chapter 7 is not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney. The same principle applies when a trustee is appointed in a chapter 11 case, thus removing the debtor as debtor in possession.

Subchapter V does not address this issue. If the *Lamie* ruling precludes compensation of a sub V debtor's attorney after removal and the debtor cannot find an attorney to provide counsel without compensation, the debtor will not have a realistic chance of obtaining reinstatement or filing a plan.
[125] New § 1185(a).

the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

VI. Administrative and Procedural Features of Subchapter V

Subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. These features include elimination of the committee of unsecured creditors and the requirement of a separate disclosure statement unless the court orders otherwise; the requirement of a status conference; an expedited timetable for the filing of a plan; elimination of U.S. Trustee fees; and a modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a).

A. Elimination of Committee of Unsecured Creditors

SBRA amends § 1102(a)(3) to provide that a committee of unsecured creditors will not be appointed in the case of a small business debtor unless the court for cause orders otherwise.[126] Prior to the amendment, § 1102(a)(3) permitted the U.S. Trustee to appoint a committee unless the court, for cause, ordered that a committee not be appointed. The other provisions of § 1102[127] (dealing with appointment of committees) and § 1103 (dealing with powers and duties of committees) do not apply in a sub V case unless the court orders otherwise.[128]

Although SBRA eliminates the appointment of a committee of unsecured creditors in both sub V and non-sub V cases unless the court orders otherwise, the Interim Rules did not

[126] SBRA § 4(a)(11).
[127] The other provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).
[128] New § 1181(b).

change the requirement of Bankruptcy Rule 1007(d) that a debtor in a voluntary chapter 11 case file a list of its 20 largest unsecured creditors, excluding insiders.

The requirement of the list serves two purposes. First, an objection to the debtor's designation of itself as a small business debtor or to its election of subchapter V[129] must be served on the creditors on the Rule 1007(d) list under Interim Rule 1020(c). Second, if the court directs the appointment of a committee, the list provides the information that the U.S. Trustee needs to identify the largest unsecured creditors for purposes of selecting committee members from the holders of the largest claims willing to serve under § 1102(b)(1).

B. Elimination of Requirement of Disclosure Statement

Section 1125 regulates postpetition solicitation of acceptances or rejections of a plan. It requires that creditors receive "adequate information"[130] about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.[131] The court must hold a hearing on approval of the disclosure statement after at least 28 days' notice before solicitation of votes on the plan may occur.[132]

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing,[133] so that solicitation may occur without prior notice and hearing on the disclosure statement.[134] The hearing on approval of the disclosure statement may be combined with the hearing on confirmation.[135] In addition, the court in a small business case may determine that the plan itself provides adequate

[129] See Section III(A).
[130] Section 1125(a)(1) defines "adequate information" as information that would enable "a hypothetical investor of the relevant class to make an informed judgment about the plan." § 1125(a)(1).
[131] § 1125(b).
[132] FED. R. BANKR. P. 3017(a).
[133] § 1125(f)(3)(A).
[134] § 1125(f)(3)(B).
[135] § 1125(f)(3)(C).

information and that a separate disclosure statement is not necessary,[136] and may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B.[137]

In a sub V case, § 1125 is inapplicable unless the court orders otherwise.[138] Thus, the debtor need not file a disclosure statement in connection with its plan unless the court requires it. If the court orders that § 1125 apply, the provisions of § 1125(f) apply.

A sub V debtor's plan must contain certain information that a disclosure statement typically contains, including: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.[139] Subchapter V does not require that the plan contain "adequate information," and it does not provide for judicial review of the required information. Material or intentional errors or omissions might provide a basis for denial of confirmation for the debtor's lack of good faith in proposing the plan.[140]

C. Required Status Conference and Debtor Report

Section 105(d) permits, but does not require, the court to convene a status conference in a case under any chapter, on its own motion or on request of a party in interest.[141] Section 105(d) does not apply in a sub V case.[142] Instead, new § 1188(a) makes a status conference mandatory and requires the court to hold it not later than 60 days after the entry of the order for relief in the case. The court may extend the time for holding the status conference if the need for an

[136] § 1125(f)(1).
[137] § 1125(f)(2).
[138] New § 1181(b).
[139] New § 1181(a)(1).
[140] § 1129(a)(3). *See also* Brubaker, *supra* note 5, at 10.
[141] § 105(d).
[142] New § 1181(a).

extension is "attributable to circumstances for which the debtor should not justly be held accountable."[143] The statutory purpose of the status conference is "to further the expeditious and economical resolution" of the case.

Not later than 14 days prior to the status conference, the debtor must file, and serve on the trustee and all parties in interest, a report that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."[144] The trustee has the duty to appear and be heard at the status conference.[145]

Neither subchapter V nor the Interim Rules specify how the court schedules the status conference, the agenda for the status conference, or the contents of the debtor's report. The practitioner must consult local rules, orders, and procedures to determine how the bankruptcy judge will address these matters and the judge's expectations about the report and the status conference.[146]

Some courts include the time for the status conference in the Notice of Chapter 11 Bankruptcy Case that the clerk sends at the outset of the case. Others schedule it in a separate notice, or include it in a scheduling order, that the clerk or debtor's counsel mails to parties in interest.

New § 1188(a) states only that the purpose of the status conference is "to further the expeditious and economical resolution" of the subchapter V case, and new § 1188(c) requires only that the report detail "the efforts the debtor has undertaken and will undertake to attain a

[143] New § 1188(b).
[144] New § 1188(c).
[145] New§ 1183(b)(3).
[146] For example, the New Jersey bankruptcy court has promulgated a mandatory form for the debtor's report, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms. Bankruptcy courts in the District of Maryland, https://www.mdb.uscourts.gov/content/local-bankruptcy-forms, and in the Central District of California, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms, have published suggested forms.

consensual plan of reorganization." While some courts are scheduling the status conference without further direction, others have provided more specific instructions.

For example, a scheduling order for the status conference may remind counsel that senior management must attend the conference, that the report will be covered, and that the debtor should be prepared to discuss any anticipated complications in the case (such as adversary proceedings, discovery, or valuation disputes), the timing of the confirmation hearing and related procedures and deadlines, and monthly operating reports.

A scheduling order may also outline specific items to be included in the report, which may include one or more of the following: (1) the efforts the debtor has undertaken or will undertake to obtain a consensual plan of reorganization, as new § 1188(c) requires; (2) the goals of the reorganization plan; (3) any complications the debtor anticipates in promptly proposing and confirming a plan, including any need for discovery, valuation, motion practice, claim adjudication, or adversary proceeding litigation; (4) a description of the nature of the debtor's business or occupation, the primary place of business, the number of locations from which it operates, and the number of employees or independent contractors it utilizes in its normal business operations; and the goals of the reorganization plan; (5) any motions the debtor contemplates filing or expects to file before confirmation; (6) any objections to any claims or interests the debtor expects to file before confirmation and any potential need to estimate claims for voting purposes; (7) the estimated time by which the debtor expects to file its plan; (8) whether the debtor is current on all required tax returns; (9) other matters or issues that the debtor expects the court will need to address before confirmation or that could have an effect on the efficient administration of the case.

Regardless of whether the court specifies its requirements with regard to the debtor's report or sets an agenda for the scheduling conference, counsel for the parties should anticipate that the court will be interested in any of these matters that the case involves and that debtor's counsel must ultimately address in connection with plan confirmation. Creditors may use the status conference as an opportunity to obtain information about the financial affairs of the debtor and to articulate their views and concerns about the debtor's operations, prospects for a feasible plan, and other matters.[147]

D. Time for Filing of Plan

Only the debtor may file a plan.[148] The debtor has a duty to do so.[149]

The deadline for the sub V debtor to file the plan is 90 days after the order for relief.[150] The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable,[151] the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221.[152] New § 1193(a) permits preconfirmation modification of a plan.[153]

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[147] *See* Bradley, *supra* note 9, manuscript at 18, 26.
[148] New§ 1189(a).
[149] New§ 1184. Note 116 discusses the debtor's duty to file a plan.
[150] New§ 1189(b).
[151] *Id.*
[152] The court in *In re Trepetin,* 2020 WL 3833015 (Bankr. D. Md. 2020), found guidance for determining whether to extend the deadline in a chapter 12 case that addressed the issue under § 1221, *In re Gullicksrud,* 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016). The *Trepetin* court reasoned, 2020 WL 3833015, at *6:

> The Court finds it appropriate to apply a standard similar to that articulated in *Gullicksrud* to sections 1188(b) and 1189(b) and the facts before it. Not only does that standard align with the Court's understanding of the Subchapter V deadlines but it also reflects the plain meaning of the words of the statute. Indeed, "justly" in this context is commonly defined as "in accordance with justice, law, or fairness" and "accountable" as "responsible" or "liable to be called to account or to answer for responsibilities and conduct." *Justly*, Oxford English Dictionary Online, oed.com/view/Entry/102238?redirectedFrom=justly#eid (last visited July 7, 2020); *Accountable*, Oxford English Dictionary Online, oed.com/view/Entry/1198?redirectedFrom=accountable#eid (last visited July 7, 2020). The question thus becomes whether the Debtor is fairly responsible for his inability to timely submit his status report, attend the status conference, or file a plan in this Subchapter V case.

[153] New § 1193(a).

Section 1121(e) requires that a debtor in a small business case file a plan within 300 days of the filing date,[154] and § 1129(e) requires that confirmation occur within 45 days of the filing of the plan.[155] These requirements do not apply in a subchapter V case.[156] They continue to apply in the case of a small business debtor who does not elect subchapter V. The schedule for the filing of the plan in a sub V case thus differs from the schedule in a non-sub V case in two ways. First, a sub V debtor must file a plan much more promptly than a non-sub V debtor – 90 days instead of 300.[157] Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

As in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal.[158] Section 1112(b)(1) states that the court *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interest of creditors and the estate, unless the court determines that the appointment of a trustee or an examiner *under § 1104* is in the best interests of the estate.[159] Because § 1104 does not apply in a sub V case,[160] the court apparently has no alternative to conversion or dismissal.

E. No U.S. Trustee Fees

28 U.S.C. § 1930(a)(6)(A) requires the quarterly payment of U.S. Trustee fees in chapter 11 cases based on disbursements in the case. SBRA amends this subparagraph to except cases under subchapter V from this requirement.[161]

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[154] § 1121(e).
[155] § 1129(e).
[156] New § 1181(a).
[157] Because of the short time to file a plan, counsel for a sub V debtor should promptly request the court to issue a bar order establishing a deadline for the filing of proofs of claim if the court by local rule or general order has not fixed a deadline for filing proofs of claim in sub V cases.
[158] § 1112(c)(4)(J).
[159] 1112(b)(1).
[160] New § 1181(a).
[161] SBRA § 4(b)(3).

F. Modification of Disinterestedness Requirement for Debtor's Professionals

Section 327(a) permits employment of professionals by a debtor in possession in a chapter 11 case only if, among other things, the professional is a "disinterested person." A person who holds a claim against the debtor is not a disinterested person under the term's definition in § 101(14)(A).[162] A disinterested person cannot not have an interest "materially adverse to the interest of the estate."[163]

These provisions disqualify an attorney or other professional to whom the debtor owes money at the time of filing because the professional is a creditor. Moreover, because payment of amounts owed to the professional prior to filing would in most instances be a voidable preference under § 547 and result in the professional having a material adverse interest to the estate in a preference action, the debtor's professionals must either waive any unpaid fees or forego representation of the debtor.

New Section 1195 addresses this issue in part. It provides that a person is not disqualified from employment under § 327(a) solely because the professional holds a prepetition claim of less than $ 10,000.[164]

Depending on what the debtor's plan will propose to pay to unsecured creditors, the economic impact of the new provision may be limited. An important practical implication is that debtor's counsel will no longer have to explain to accountants and other professionals who are not familiar with bankruptcy practice that they must waive their fees to provide services to the debtor in the case – something that may be contrary to their standard practice of declining to provide services if the client fails to pay fees in a timely manner.

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[162] § 327(a).
[163] § 101(14)(C).
[164] New § 1195.

G. Time For Secured Creditor to Make § 1111(b) Election

Section 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse.[165] If the election is made, the claim is allowed as secured to the extent it is allowed. The election may be made at any time prior to the conclusion of the hearing on the disclosure statement.[166] Alternatively, if the disclosure statement is conditionally approved under Bankruptcy Rule 3017.1 and a final hearing on the disclosure statement is not held, the election must be made within the date fixed for objections to the disclosure statement under Bankruptcy Rule 3017.1(a)(2) or another date fixed by the court.[167]

Interim Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the § 1111(b) election may be made not later than a date the court may fix.[168]

Courts are taking varied approaches to scheduling the date for the § 1111(b) election. Many have decided not to address it unless a party requests it. Others are fixing the date by reference to the date the plan is filed (such as 14 or 30 days after the plan's filing) in a scheduling or other order or notice. When the court on its own does not set a date and a party anticipates that a creditor will make the election, the party should request that the court establish a deadline.

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[165] § 1111(b). For a discussion of strategic considerations for creditors regarding the § 1111(b) election, see Bradley, *supra* note 9, manuscript at 21.
[166] FED. R. BANKR. P. 3014.
[167] FED. R. BANKR. P. 3017.1.
[168] INTERIM RULE 3017.

H. Times For Voting on Plan, Determination of Record Date for Holders of Equity Securities, Hearing on Confirmation, Transmission of Plan, and Related Notices

Bankruptcy Rule 3017: (1) requires the court to fix the time for holders of claims or interests to vote to accept or reject a plan on or before approval of the disclosure statement; (2) provides that the record date for creditors and holders of equity securities is the date that the order approving the disclosure statement is entered or another date fixed by the court; (3) permits the court to set the date for the hearing on confirmation in connection with approval of the disclosure statement; and (4) requires that, upon approval of the disclosure statement, the court must fix the date for transmission of the plan, notice of the time for filing acceptances or rejections, and notice of the hearing on confirmation.[169]

New Interim Rule 3017.2 provides for the court to establish all these times in a subchapter V case in which the disclosure statement requirements of § 1125 do not apply.[170]

I. Bar Date for Filing of Proof of Claim

Bankruptcy Rule 3003 governs the filing of proofs of claim or interest in a chapter 11 case. The Interim Rules made no change in its provisions.

Rule 3003 does not establish a deadline for filing a proof of claim. Instead, Rule 3003(c) provides that the court "shall fix and may extend the time within which proofs of claim or interest may be filed."

Many courts have adopted procedures for fixing the bar date for the filing of proofs of claim at the outset of the case. Some are including the bar date in the Notice of Chapter 11 Bankruptcy Case that the clerk sends. Others establish the deadline in a separate document, such as a scheduling order or other notice. A lawyer representing a creditor in a subchapter V case

[169] FED. R. BANKR. P. 3017.1.
[170] INTERIM RULE 3017.2.

who is accustomed to the usual practice in chapter 11 cases – the issuance of a separate bar date order – must check local practice to make sure that she knows the deadline.

Some courts have set the bar date as 70 days after the filing of the petition. This is the same time that Bankruptcy Rule 3002(c) establishes in chapter 12 and 13 cases. Others have set the date as 90 days after the § 341(a) meeting of creditors.

An advantage of fixing the bar date as 70 days after the filing date is that it expires before the deadline under new § 1189(b) for the debtor to file a plan, which is 90 days after the order for relief. If a debtor must know with certainty what the claims in the case are before it can file its plan, the debtor will need to ask the court to extend the time until some time after expiration of the bar date. The debtor will have to establish that the need for the extension is "attributable to circumstances for which the debtor should not justly be held accountable" under new § 1189(b).

The court cannot shorten the time for a governmental unit to file a proof of claim, which is 180 days after the order for relief under § 502(b)(9). Although it would be helpful for tax claims to be filed before the debtor files a plan, this should rarely be an obstacle. Most taxes are self-assessed by the debtor upon filing a return. If the debtor does not know its tax liability, it is unlikely that the taxing authority does either. A debtor might not be able to accurately calculate the exact amount of interest and penalties, but it should know the principal amount.

VII. Contents of Subchapter V Plan

The requirements for the contents of a sub V plan are contained in §§ 1122 and 1123 (with two exceptions) and in new § 1190. An important provision is that new § 1190(3) permits

modification of a claim secured only by a security interest in real property that is the principal residence of the debtor if the loan arises from new value provided to the debtor's business.[171]

Section 1122 states rules for classification of claims in a chapter 11 plan, and § 1123 states what provisions a plan must and may have. Two provisions in § 1123 – (a)(8) and (c) – are not applicable in sub V cases.[172]

Official Form 425A, which is a permissible, but not required, form for a chapter 11 plan, has been modified and may be used in a subchapter V case. Courts may adopt local forms for subchapter V plans[173] or make the use of Official Form 425A mandatory and provide guidance on its preparation.[174]

A. Inapplicability of §§ 1123(a)(8) and 1123(c)

Section 1123(a)(8) requires the plan for an individual debtor to provide for payment to creditors of all or such portion of earnings from postpetition services or other future income as is necessary for the execution of the plan.[175] Section 1123(c) prohibits a plan filed by an entity other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.[176]

SBRA replaces § 1123(a)(8) with a similar provision applicable to all debtors in new § 1190, which contains additional provisions for the content of a plan. Section 1123(c) is superfluous in a subchapter V case because only the debtor can propose a plan.[177]

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[171] New § 1190(3).
[172] New § 1181(a).
[173] E.g., *Debtor's Chapter 11, Subchapter V Plan* (D.Md.) (suggested), available at https://www.mdb.uscourts.gov/content/local-bankruptcy-forms; *Chapter 11 Subchapter V Small Business Debtor's Plan of Reorganization [or Liquidation]* (D. New Jersey) (mandatory), available at http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms; *Plan of Reorganization* (W.D. Wisconsin) (suggested), available at https://www.wiwb.uscourts.gov/forms.
[174] E.g., *SBRA Plan Instructions*, available at http://www.canb.uscourts.gov/forms/district.
[175] § 1123(a)(8).
[176] § 1123(c).
[177] New § 1189(a).

B. Requirements of New § 1190 for Contents of Subchapter V Plan; Modification of Residential Mortgage

New § 1190 contains three provisions governing the content of the plan.

First, new § 1190(1)[178] requires information that would otherwise be included in a disclosure statement. The plan must include: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan.

Second, new § 1190(2) requires the plan to 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." In an individual case, this provision replaces the similar rule in the inapplicable § 1123(a)(8). In non-individual cases, it imposes a new requirement.

Because a plan ordinarily must provide for payment of creditors from the debtor's income, the requirement for the submission to the trustee of income as necessary for the execution of the plan states nothing more than a feasibility requirement.

New § 1190(2) raises interpretive issues regarding the requirement that future income be submitted to the "supervision and control" of the trustee.

If a consensual plan is confirmed under new § 1191(a), new § 1194 does not contemplate that the trustee make the payments. Moreover, new § 1183(c)(1) provides for termination of the trustee's service upon substantial consummation of a consensual plan under new § 1191(a). Under § 1101(2), "substantial consummation" occurs upon (among other things[179])

[178] No apparent reason exists for using numbers for the subsections of this section instead of the customary lower-case letters.

[179] Substantial consummation also requires transfer of all or substantially all of the property proposed by the plan to be transferred, § 1101(2)(A) (2018), and assumption by the debtor or by the successor to the debtor of the business or of the management of all or substantially all of the property dealt with by the plan, § 1101(2)(B).

"commencement of distribution under the plan."[180] An issue is whether a consensual plan must provide for submission of future income to the trustee's supervision and control when the trustee's service will terminate once the first plan payment is made.[181]

The third content provision in new § 1190(3) changes the rule of § 1123(b)(5) that a plan may not modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence. The same antimodification rule applies in chapter 13 cases under § 1322(b)(2).

New § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value was "used primarily in connection with the small business of the debtor."[182]

Courts have considered whether the prohibition on modification of a residential mortgage applies when the property in which the debtor resides has nonresidential characteristics or uses, usually in chapter 13 cases.[183] For example, the property may be a multi-family dwelling that does or can generate rental income or a farm. The debtor may use it for business purposes, or it may include additional tracts or acreage beyond a residential lot.

The issue in such cases is whether the claim is secured by property other than the debtor's residence. Some courts have ruled that antimodification protection extends to a mortgage

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[180] § 1101(2)(C).
[181] *See infra* Section IX(A).
[182] New § 1190(3). For a discussion of strategies for lenders to consider to preclude application of the subchapter V exception to the anti-modification rule, see Bradley, *supra* note 9, manuscript at 26-27. Professor Bradley suggests lenders might require more than half of the loan proceeds to be used for personal expenses or that, in the case of a proposed loan secured by a second mortgage, the lender instead pay off the first mortgage and refinance that amount so that most of the loan is not for the business. *Id.*
[183] *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 5:42.

secured by any real property that the debtor uses, at least in part, as a residence. Other courts, however, have concluded that the debtor's use of real property as a residence does not alone mean that the debt is secured only by the debtor's principal residence, and that a mortgage on property the debtor uses as a residence is subject to modification if the property has sufficient nonresidential characteristics or uses.[184]

The court in *In re Ventura*[185] concluded that application of new § 1190(3) requires a different analysis. There, an individual operated a bread and breakfast business in her residence through a limited liability company she owned. In her chapter 11 case filed prior to SBRA's enactment, the court had ruled that she could not modify the mortgage on the property, applying the cases holding that a debtor may not modify a mortgage on property in which she resides even if she uses it for other purposes.

After SBRA's effective date, the debtor amended her petition to elect application of subchapter V. In addition to permitting her to proceed under subchapter V,[186] the court addressed the lender's contention that she could not invoke § 1190(3) because the proceeds from the mortgage had been used to acquire the property.[187]

The court concluded that § 1190(3) specifically permits the modification of a residential mortgage if the conditions of subparagraphs (A) and (B) exist. The questions, therefore, were whether the mortgage proceeds were "not used primarily to acquire the real property" (new § 1190(3)(A)) and were "used primarily in connection with the small business of the debtor" (new § 11903(3)(B)).[188]

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[184] *Id.*
[185] *In re Ventura,* 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
[186] *Id.* at 7-14. Part XIII discusses the court's ruling on the availability of subchapter V in the case.
[187] The lender also argued that § 1190(3) could not be applied to a transaction arising prior to its effective date. Part XIII discusses the court's ruling rejecting this contention.
[188] *In re Ventura,* 615 B.R. 1, 23 (Bankr. E.D.N.Y. 2020).

The court focused on two terms in subparagraph (A). "Primarily," the court said, means "for the most part," "of first importance," or "principally," rather than "substantial." The phrase "real property," the court continued, refers back to the real property that is the debtor's residence.[189]

Based on these definitions, the court phrased the question of subparagraph (A)'s application in the case before it as "whether the Mortgage proceeds were used primarily to purchase the Debtor's Residence."[190] The inquiry thus differs from the issue under § 1123(b)(5) (and § 1322(b)(2) in chapter 13 cases) that, under the court's prior ruling, prohibited modification of the mortgage because the debtor resided in the property, regardless of its other uses. New § 1190(3), the court explained, "asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor's residence."[191]

Subparagraph (B), the court stated, required it to determine "whether the mortgage proceeds were used primarily in connection with the debtor's business."

The court concluded that subparagraphs (A) and (B) directed it "to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor's business activities."[192]

The court proposed five factors to consider in this analysis: "(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

[189] *Id.* at 24.
[190] *Id.*
[191] *Id.*
[192] *Id.*

the business; (4) Do customers need to enter the property to utilize the business; and (5) Does the business utilize employees and other businesses in the area to run its operations."[193]

The court found that the debtor bought the property to operate it as a bed and breakfast, that its primary purpose was the offering of rooms for nightly fees, that the debtor's LLC provided additional services to guests for additional fees, and that the mortgage proceeds were used to purchase the building that houses the business. The court ruled that the evidence was sufficient to hold a full evidentiary hearing to determine whether the debtor could use § 1190(3) to modify the mortgage.[194]

A business debtor may grant a security interest in a principal residence as additional collateral without receiving new value, perhaps in connection with a workout involving forbearance or restructuring of the debt. A potential issue is whether the new § 1190(3) exception to the antimodification rule applies in this situation when the debtor receives no additional loan proceeds.

C. Payment of Administrative Expenses Under the Plan

If the court confirms a plan under the cramdown provisions of new § 1191(b), new § 1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date.[195] Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 502(f).

[193] *Id.* at 25.
[194] *Id.*
[195] New § 1191(e).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of the trustee and of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.[196]

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

Under pre-SBRA law, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits so-called "cramdown" confirmation "if the plan does not discriminate unfairly, and is fair and equitable" with regard to each impaired class that has not accepted it.[197] Section 1129(b)(2) states the rules for the "fair and equitable" requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)).[198] The effects of confirmation are the same regardless of whether cramdown confirmation occurs under § 1129(b).

New § 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual if an unsecured creditor invokes it.[199] Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual

[196] The permission to pay these priority claims "through the plan" without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. *See* Brubaker, *supra* note 5, at 15-16.
[197] § 1129(b)(1).
[198] § 1129(b)(2).
[199] New § 1181(a).

debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.[200]

If all the applicable requirements in § 1129(a) are met except for the projected disposable income rule of paragraph (a)(15), new § 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.[201] This paper refers to it as a "consensual plan."

New § 1191(b) states the rules for cramdown confirmation. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case.[202] In general, new § 1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)). The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims remain applicable in a sub V case.[203]

Cramdown confirmation under new § 1191(b) does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as the next Section discusses. For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* do not accept the plan. Unless a class consists of only one creditor, a single creditor cannot invoke the projected

[200] INTERIM RULE 1007(b).
[201] New § 1191.
[202] § 1181(a).
[203] New § 1191(c)(1).

disposable income requirement, which a single creditor can do in a standard or non-sub V case even if all impaired classes accept the plan.[204]

Importantly, the effects of confirmation differ depending on whether confirmation occurs under new § 1191(a) (where all classes have accepted it) or under new § 1191(b) (where one or more – or even all – classes have not accepted it).[205]

B. Cramdown Confirmation Under New § 1191(b)

1. Changes in the cramdown rules and the "fair and equitable" test

Discussion of the revised cramdown rules in a sub V case begins with a summary of the key provisions that govern cramdown confirmation under pre-SBRA law.

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan.[206] Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.[207]

Section 1129(b) permits cramdown confirmation if all the requirements for confirmation in § 1129(a) are met except the requirement of paragraph (a)(8) that all impaired classes accept it. Section 1129(b), however, does not affect the confirmation requirement of § 1129(a)(10) that

[204] § 1129(a)(15). One may view the projected disposable income requirement for cramdown confirmation as protection for a dissenting class of unsecured creditors that substitutes for the inapplicable absolute priority rule. *See In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020). In absolute priority rule theoretical terms, it recognizes "sweat equity" (i.e., future income) as "new value" that permits equity owners to retain their interests. The inability of a single creditor to invoke the projected disposable income rule is consistent with the inability of a single creditor to invoke the absolute priority rule under § 1129(b); both apply only if a class does not accept.

[205] Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (Part IX); compensation of the trustee (Section IV(E)); postconfirmation modification of the plan (Section VIII(C)); discharge (Part X); contents of property of the estate (Part XI); and postconfirmation default and remedies (Part XII).

[206] § 1129(a)(8).

[207] § 1129(a)(10).

at least one impaired class of creditors accept the plan. Cramdown confirmation under § 1129(b) is not available if no impaired class of creditors has accepted the plan.

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).[208] 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.[209]

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.[210] Instead, new § 1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.[211] New § 1191(c) states a new "rule of construction" for the requirement that a plan be "fair and equitable."[212] It replaces the "fair and equitable" requirements of §1129(b), which do not apply in a subchapter V case.

The debtor may invoke new § 1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, new § 1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income test applicable to all debtors.[213]

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[208] § 1129(b)(2)(B).
[209] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d] (Richard Levin & Henry J. Sommer eds., 16th ed. 2019)
[210] New § 1181(a).
[211] New § 1191(b).
[212] New § 1191(c).
[213] New § 1191(d).

Under the cramdown rules in new § 1191(b), if all other confirmation standards are met, the court must confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. These two general standards are the same as the ones that govern in a cramdown under § 1129(b).

It does not appear that the new statute effects any change in the unfair discrimination requirement. New § 1191(c) does, however, provide a new "rule of construction" in subchapter V cases for the condition that a plan be "fair and equitable," to replace the detailed definition of that term that § 1129(b) contains.

The following text explains the requirements of the "fair and equitable" test in sub V cases.

2. Cramdown requirements for secured claims

Subchapter V does not change existing law about permissible cramdown treatment of secured claims. With regard to a class of secured claims, a subchapter V plan is "fair and equitable" if it meets the existing rules for secured claims stated in § 1129(b)(2)(A).

Subchapter V does limit the ability of a partially secured creditor with an unsecured deficiency claim to block cramdown confirmation. An undersecured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a standard or non-sub V case because of the absence of an accepting impaired class of claims, which § 1129(a)(10) requires.[214] This requirement is inapplicable for cramdown confirmation in a sub V case under new § 1191(b).

[214] § 1129(a)(10).

In addition, the creditor cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

3. Components of the "fair and equitable" requirement in subchapter V cases; no absolute priority rule

New § 1191(c) does not state a "fair and equitable" rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the "best efforts" test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.[215]

4. The projected disposable income (or "best efforts") test

The projected disposable income (or "best efforts") requirement is in new § 1191(c)(2).[216]

The plan must provide that all of the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.[217] Alternatively, the plan may provide that the value of property to be distributed under the

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[215] The court in *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020), reasoned that the projected disposable income is a substitute for the absolute priority rule. See also *supra* note 204.

[216] New § 1191(c)(2). Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under new § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

[217] New § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

This was the chapter 13 rule until the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. BAPCPA in 2005, which amended 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.

Presumably, the amended chapter 13 provision takes account of the fact that the "means test" standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.[218]

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.[219] Like the chapter 12 requirement (and unlike chapter 11 cases), it applies to entities as well as individuals.

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?

i. Determination of projected disposable income

The Bankruptcy Code does not define "projected disposable income," but it defines "disposable income" in chapters 12[220] and 13.[221] In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.[222]

New § 1191(d) defines disposable income as income that is received by the debtor and that is not "reasonably necessary to be expended" for these specified purposes:

— the maintenance or support of the debtor or a dependent of the debtor;[223] or

— a domestic support obligation that first becomes payable after the date of the filing of the petition;[224] or

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The difference in how the debtor must use projected disposable income may affect the timing of payments to unsecured creditors but appears to have no material effect on the amount of money that must be paid under the plan or how much of it goes to unsecured creditors. *See id.* § 8:68.

[218] The projected disposable income tests in chapters 11 and 12 also contain this alternative, but the chapter 13 one does not.

[219] See § 1225(b). Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. New § 1191(c)(2) does not contain this provision, raising the possibility that a creditor could insist on commitment of disposable income to pay more than the allowed amount of the claim. *See* Brubaker, *supra* note 5, at 13. It seems unlikely that Congress could have intended such a result that is inconsistent with the common-sense principle, even if unstated, that payment of the full amount of the claim (perhaps with interest) resolves it.

[220] § 1225(b)(2).

[221] § 1325(b)(2).

[222] § 1129(a)(15).

[223] New § 1191(d)(1)(A).

[224] New § 1191(d)(1)(B).

— payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.[225]

The definition of disposable income in new § 1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2). It is also substantially the same definition as in § 1325(b)(2), except that § 1325(b)(2) permits a deduction for charitable contributions. The chapter 11 provision incorporates the chapter 13 definition.[226]

The definition of disposable income in all cases is substantially the same. But the manner of determining permissible deductions in calculating disposable income differs materially with regard to expenditures for the "maintenance or support" of the debtor and the debtor's dependents.

In chapter 13 cases, the so-called "means test" standards govern the deductions that an "above-median"[227] debtor may take in calculating disposable income.[228] The means test rules do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.[229]

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[225] § 1191(d)(2).
[226] § 1129(a)(15).
[227] Generally, an "above-median" debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a "below-median" debtor is one whose income is below the median. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 8:12. The rules for determining the debtor's status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the "means test" rules for determination of disposable income; and § 1325(b)(4), which defines "applicable commitment period" for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an "above-median" debtor must use the means test rules and pay projected disposable income for five years. A "below-median" debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor's plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, §§ 4:9, 8:12.
[228] § 1325(b)(3).
[229] In chapter 11 cases, § 1129(a)(15) states that projected disposable income is "as defined in [§ 1325(b)(2)]." §1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of "amounts reasonably necessary to be expended" under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in

New § 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are "reasonably necessary to be expended" for "maintenance or support" in new § 1191(d)(1) in sub V cases is the same as it is in chapter 12 and below-median chapter 13 cases, and as it was in chapter 13 cases prior to the introduction of the means test standards in BAPCPA.[230] The case law on disposable income in such cases should provide guidance in making such determinations.

With regard to expenditures for the business, income is not "disposable income" under new § 1191(d)(2) if it is "reasonably necessary to be expended" for expenditures "necessary for the continuation, preservation, or operation" of the business.[231] The rule 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.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that are anticipated (*e.g.,* the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.,* increasing inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

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§ 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

[230] Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor's dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that new § 1191(d)(1) states. For a discussion of application of the "reasonably necessary" standard for expenditures for maintenance and support in chapter 13 cases, see W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 8:28.

[231] New § 1191(d)(2).

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.[232] As later text discusses, an extension of the period that the debtor must make payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or to grow the business.

Another question arises if a debtor is a "pass-through" entity for income tax purposes (*e.g.*, a subchapter S corporation or an entity taxed as a partnership, including a limited liability company). Such a business does not pay tax on its income. Rather, its income is "passed through" to its owners, who must pay tax on it regardless of whether the income is distributed to them. Payment of profits to owners of a business does not easily fit within the concept of an expenditure reasonably necessary for its continuation, preservation, or operation.

If the debtor's disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income[233] but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

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[232] *See, e.g.*, Hammrich v. Lovald (*In re* Hammrich), 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve); *In re* Schmidt, 145 B.R. 983 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re* Kuhlman, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re* Janssen Charolais Ranch, Inc., 73 B.R. 125 (Bankr. D. Mont. 1987) (dicta) (reserve is allowable). *But* see Broken Bow Ranch, Inc. v. Farmers Home Admin. (*In re* Broken Bow Ranch, Inc.), 33 F.3d 1005 (8th Cir. 1994).

[233] Payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

Courts will have to decide whether distributions to owners to pay taxes the owners incur are an appropriate expenditure that is "reasonably necessary for the continuation, preservation, or operation of the business" when the debtor is not obligated to pay the tax.

ii. Determination of period for commitment of projected disposable income for more than three years

A projected disposable income test applies in cases under chapter 12[234] and 13[235] and in standard chapter 11 and non-sub V cases of individuals.[236] Each section prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the "commitment period," but only chapter 13 specifically uses the term by defining the "applicable commitment period" – the period for which the debtor must use projected disposable income to pay unsecured creditors – as three years for "below-median" debtors and five years for "above-median" debtors.[237]

For sub V cases, new § 1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.[238] The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the chapter 11 and above-median chapter 13 tests.[239]

New § 1191(c)(2) contains no standards for fixing the commitment period. And because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent under the tests in other chapters may not provide guidance.

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[234] § 1225(b).
[235] § 1325(b).
[236] § 1129(a)(15).
[237] § 1125(b)(4).
[238] New § 1191(c)(2).
[239] The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A), and five years for above-median debtors, § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

In chapters 12 and 13 and in non-sub V chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor wants.[240] Case law dealing with the length of a plan under the other tests does not deal with the issue that new § 1191(c)(2) presents.[241]

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[240] In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

In chapter 13 cases, the court has no choice to make. The statute fixes the "applicable commitment period" as three years for a below-median debtor and five years for an above-median debtor. The only dispute for the court is whether the debtor is below-median or above-median.

In chapter 11 cases, § 1129(a)(5) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

[241] The court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years. §§ 1222(c), 1322(d).

In chapter 13 cases, the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

In a non-sub V chapter 11 case, § 1129(a)(15) sets the commitment period as the longer of five years or the period for which the plan provides payments. Thus, the terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments.

Until enactment of BAPCPA in 2005, which increased the minimum commitment period in chapter 13 cases for above-median debtors to five years, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. § 1322(c) (2000) (current version at § 1322(d) (2018)) (BAPCPA renumbered subsection (c) as subsection (d)); *see* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:9. And the pre-BAPCPA projected disposable income test required use of projected disposable income for only three years, regardless of the length of the plan. 11 U.S.C. § 1325(b)(1)(B) (2000) (current version at 11 U.S.C. § 1325(b)(4) (2018)).

The pre-BAPCPA rules for chapter 12 cases were different, and BAPCPA did not change them. As in pre-BAPCPA chapter 13 cases (and as in cases of below-median chapter 13 debtors under current law), the maximum duration of a plan under § 1222(c) is three years unless the court approves a longer period for cause. But unlike pre-BAPCPA chapter 13, the chapter 12 projected disposable income test in § 1225(b)(1) requires use of projected disposable income during any longer period that the court approves.

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under §1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA

Courts will have to determine what facts and circumstances justify a longer commitment period and, if so, how much longer the period should be.

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.[242]

Courts will also have to decide how to proceed when a creditor or trustee asks to fix the commitment period for a longer time than proposed in the debtor's plan.[243] The authority of the court to fix the commitment period implies authority to order more payments than the debtor's plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court's determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

The court's authority to fix the commitment period implies that the court may raise the issue *sua sponte.*

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amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

Although the case law deals with the question of how long a plan should be, it does so in the context of a debtor's proposal of a longer period. The case law does not consider the different question of whether the court should require the debtor to make payments for a longer period than the plan proposes.

[242] *See* 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (Richard Levin & Henry J. Sommer eds., 16th ed. 2019) (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

[243] Subchapter V does not expressly give the trustee standing to object to confirmation. The trustee's duty to appear and be heard at the confirmation hearing, new § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee's views on any confirmation issue to the court.

If the trustee is not a lawyer, a trustee's "objection" may initiate a dispute that requires legal representation, whereas a trustee's report bringing potential issues to the attention of the court may not. *See supra* Section IV(F). Unless the court concludes as a legal matter that it has no independent duty to determine compliance with confirmation requirements, it makes no practical difference, unless the trustee plans to appeal an adverse determination. Failure to object might be a waiver of it for appellate purposes.

5. Requirements for feasibility and remedies for default

New § 1191(c)(3) adds two additional factors to the "fair and equitable" analysis.

First, new § 1191(c)(3)(A) requires that the debtor will be able to make all payments under the plan,[244] or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan.[245] The requirement strengthens the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposes it.[246]

Second, new § 1191(c)(3)(B) requires that the plan provide appropriate remedies to protect the holders of claims or interests if the debtor does not make the required plan payments.[247] Section XII(B) discusses remedies for default in the plan.

6. Payment of administrative expenses under the plan

New § 1191(e) permits confirmation of a plan under new § 1191(b) that provides for payment through the plan of administrative expense claims and involuntary gap claims. Section VI(C) discusses this provision.

C. Postconfirmation Modification of Plan

The rules for postconfirmation modification in new § 1193 differ depending on whether the court has confirmed a consensual plan under new § 1191(a) or a cramdown plan under new § 1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case.[248]

[244] New § 1191(c)(3)(A)(i).
[245] § 1191(c)(3)(A)(ii).
[246] § 1129(a)(11).
[247] New § 1191(c)(3)(B).
[248] New § 1181(a).

1. Postconfirmation modification of consensual plan confirmed under new § 1191(a)

If the court has confirmed a consensual plan under new § 1191(a), new § 1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under new § 1191(a).[249] The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote.[250] These are the same rules that govern postconfirmation modification in standard and non-sub V cases under § 1127(b).

2. Postconfirmation modification of cramdown plan confirmed under new § 1191(b)

If the plan has been confirmed under new § 1191(b), new § 1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the court fixes.[251] The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of new § 1191(b).[252]

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. In these chapters, postconfirmation modification is permitted at any time prior to the completion of payments under the plan, on condition that the modified plan meet confirmation requirements.[253] Unlike

[249] § 1193(b).
[250] § 1193(d).
[251] § 1193(c).
[252] The provisions of new § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.
[253] §§ 1229, 1329.

the provisions in the other chapters, new § 1193(c) does not permit modification at the request of creditors or the trustee.[254]

IX. Payments Under Confirmed Plan; Role of Trustee After Confirmation

Subchapter V has different provisions for the disbursement of payments to creditors and the role of the trustee depending on whether the court confirms a consensual plan or a cramdown plan.

A. Debtor Makes Plan Payments and Trustee's Service Is Terminated Upon Substantial Consummation When Confirmation of Consensual Plan Occurs Under New § 1191(a)

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other than § 1129(a)(15),[255] the court must confirm the plan.[256] Confirmation of a consensual plan under new § 1191(a) leads to the termination of the trustee's service under new § 1183(c)(1) when the plan has been "substantially consummated."[257] The debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest.[258]

Under § 1101(2), "substantial consummation" generally occurs upon "commencement of distribution under the plan."[259] Unless the plan implicates other requirements for substantial consummation, the sub V trustee's service terminates under new § 1183(c)(1) when the first payment under the plan occurs.

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[254] New § 1193(c).
[255] Section 1129(a)(15) states chapter 11's projected disposable income requirement, which applies only in the case of an individual. *See supra* Section VIII(B)(4).
[256] New § 1191(a).
[257] § 1183(c)(1).
[258] § 1183(c)(2).
[259] § 1101(2)(C). "Substantial consummation" under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A) and (2) assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(B).

Arguably, a sub V trustee could make the first payment under the plan, although the statute does not appear to require this. But it is clear that, at least after the first payment, the sub V trustee no longer exists and cannot make payments thereafter.

B. Trustee Makes Plan Payments and Continues to Serve After Confirmation of Plan Confirmed Under Cramdown Provisions of New § 1191(b)

When the court confirms a cramdown plan, new § 1194(b) provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise.[260] Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.[261]

Because the sub V trustee must make payments under a cramdown plan, the trustee's service does not terminate upon its substantial consummation. The trustee's service continues, at a minimum, until the trustee has made the required disbursements. Subchapter V does not specify when the trustee's service is terminated under a cramdown plan. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge, as Section X(B) discusses. That seems to be the appropriate time for the trustee or the debtor to

[260] New § 1194(b). Curiously, paragraph (b) of new § 1194 is titled "Other Plans," even though it applies exclusively to plans confirmed under the cramdown provisions of new § 1191(b) and no other provisions of new § 1194 deal specifically with payments under a consensual plan confirmed under new § 1191(a).
[261] § 1226(c), 1326(c).

request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.[262]

New § 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.[263] The statute contains no standards for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because new § 1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee. In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.[264] Courts vary as to whether the debtor may make direct payments to other types of creditors.

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated and postpetition payments due on leases or executory contracts that are being assumed. In such

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[262] *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-16 ("Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee.").

[263] New § 1194.

[264] W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:10.

instances, the trustee usually disburses the amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the plan does not modify.[265]

Some courts require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.[266] In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as Section VIII(B)(4) discusses.

X. Discharge

The discharge that a debtor receives in a sub V case and its timing depend on whether consensual or cramdown confirmation occurs.

A. Discharge Upon Confirmation of Consensual Plan Under New § 1191(a)

Section 1141(d) governs discharge in a chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan. It does not apply when the court confirms a cramdown plan.[267]

Section 1141(d)(5) does not apply in a sub V case.[268] The omission is material only in an individual case because (d)(5) applies only when the chapter 11 debtor is an individual. Section 1141(d)(5) has two primary effects in an individual case.[269]

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[265] *Id.*
[266] *Id.*
[267] New § 1181(c).
[268] New § 1181(a).
[269] Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been

First, § 1141(d)(5) prohibits entry of a discharge order until the individual has completed payments under the plan unless the court orders otherwise for cause.[270]

Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable.[271]

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under new § 1191(a).[272] Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in § 502(g) (claims from the rejection of an executory contract or unexpired lease lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising

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liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.

Subparagraph C of § 1141(d)(5) provides the court may not grant a discharge under either subparagraph (A) or (B) if the court finds that § 522(q)(1) is applicable, certain criminal proceedings are pending, or the debtor is liable for a debt described in § 522(q)(1). The same grounds for discharge are in § 727(a)(12). Section 522(q)(1) denies a debtor an exemption of assets in excess of an aggregate amount of $ 170,350 (as of April 1, 2019; it is subject to adjustment every three years) under circumstances described in subparagraphs (A) or (B) of § 522(q)(1) unless the court finds under § 522(q)(2) that certain exempt property is reasonably necessary for the support of the debtor or any dependent.

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B) denies the exemption if the debtor owes a debt arising from (1) violation of state or federal securities laws; (2) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under the federal securities laws; (3) any civil remedy under 18 U.S.C. § 1964; or (4) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

[270] § 1141(d)(5)(A).

[271] § 1141(d)(5)(B).

[272] The individual debtor also does not have to deal with the § 522(q) issues discussed in footnote 258, although they rarely arise.

after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan.[273]

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.[274] Only an individual is entitled to a discharge in a chapter 7 case.[275] An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.[276]

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order. Section 1141(d) has two exceptions applicable in a sub V case.

First, in the case of an individual debtor, a § 1141(d)(1)(A) discharge does not discharge the individual from any debt that is excepted under § 523(a).[277] No such exceptions to the § 1141(d)(1)(A) discharge exist for a debtor that is not an individual.

Second, the § 1141(d)(1)(A) discharge does not discharge any debtor from any debt (1) specified in § 523(a)(2)(A) or (B) that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 of the United States Code; or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid.[278]

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[273] § 1141(d)(1)(A).
[274] § 1141(d)(3).
[275] § 727(a)(1).
[276] § 727(a).
[277] § 1141(d)(1)(A).
[278] § 1141(d)(6).

B. Discharge Upon Confirmation of a Cramdown Plan Under § 1191(b)

When the court confirms a cramdown plan, § 1141(d) does not apply, except as provided in new § 1192.[279] Instead, the debtor receives a discharge under new § 1192.

New § 1192 provides for discharge to occur "as soon as practicable" after the debtor completes all payments due within the first three years of the plan, "or such longer period not to exceed five years as the court may fix."[280] Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with cramdown confirmation under new § 1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The cramdown discharge under new § 1192 discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions discussed below, unless § 1141(d), the plan, or the confirmation order provides otherwise.

The new § 1192 discharge also applies to "all other debts allowed under [§ 503] and provided for in the plan."[281] Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;[282] compensation of the trustee and professionals employed by the trustee and the debtor;[283] and claims for goods the debtor received within 20

[279] New § 1181(c).
[280] New § 1192. Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. New § 1192 contains no provision for an earlier discharge.
[281] New § 1192.
[282] § 503(b)(1).
[283] § 503(b)(2).

days of the filing.[284] The discharge provision recognizes that a plan confirmed under new § 1191(b) may provide for the payment of administrative expenses through the plan.[285]

New § 1192 excepts certain debts from discharge. First, new § 1192 does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court.[286] Again, any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation. Second, new § 1192(2) excepts any debt "of the kind specified in [§ 523(a)]."[287] The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual under § 1141(d)(2).

It is unclear whether the § 523(a) exceptions apply when a debtor that is not an individual receives a discharge under § 1192. In the case of a non-individual, the § 1141(d) discharge is not subject to the exceptions in § 523(a). Section 1141(d)(2) makes the § 523(a) exceptions applicable, but expressly limits application of § 523(a) to a debtor who is an individual.

New § 1192(2), in contrast, states, without qualification, that debts "of the kind specified" in § 523(a) are excepted from discharge. Because § 523(a) specifies various debts, the conclusion is that a debt listed in § 523(a) is excepted from the § 1192 discharge.[288]

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[284] § 503(b)(9).

[285] New § 1191(c). Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). New § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under new § 1191(b). *See supra* Section VI(C).

New § 1191(e) also permits payment of claims specified in § 507(a)(3) through the plan. Section 507(a)(3) provides a priority for "involuntary gap claims" allowed under § 502(f).

[286] New § 1192(1).

[287] New § 1192(2).

[288] Without discussing this issue, some commentators have stated this conclusion. 5 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 107:17 (3d ed. 2019); James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, *Norton Bankr. L. Adviser*, Oct. 2019, Part IX.

The language of § 523(a) permits a different conclusion. As amended, § 523(a) begins as follows:

> A discharge under section 727, 1141, *1192,* 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – [defined in paragraphs (1) through (19) of § 523(a)].[289]

(The other listed sections are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.)

As amended, therefore, § 523(a) states that a discharge under new § 1192 does not discharge an *individual* debtor from the listed types of debts. This amendment would be superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), new § 1192 alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

In other words, although new § 1192 states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of a non-individual has no operative effect. Section 523(a), as amended, applies only to individuals.

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a new § 1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the new § 1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and "any debt that is otherwise nondischargeable."[290] The use of the words "otherwise nondischargeable" logically refers to § 523(a), which applies only to individuals.

[289] § 523(a) (language inserted by amendment in italics).
[290] H.R. REP. NO. 116-171, at 8.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law – one would expect the House Judiciary Committee Report to point that out. It does not.[291] To the contrary, the Report's explanation that the exceptions are for "any debt that is otherwise nondischargeable" demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Limited case law under chapter 12 supports the conclusion that the § 523(a) exceptions may apply to a new § 1192 discharge of a non-individual debtor. The chapter 12 discharge provision, § 1228(a)(2),[292] has the same language as new § 1192, and the prefatory language of § 523(a) as amended refers to § 1228 and new § 1192 in the same way.

In two corporate chapter 12 cases, the corporate debtors contended that the § 523(a) exceptions to the chapter 12 discharge did not apply to them because § 523(a) states that it only excepts debts of an individual.[293] Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

In *In re JRB Consolidated, Inc.*,[294] the court reasoned that the operative language in § 1228(a)(2) ("debts of the kind" specified in § 523(a)) "does not naturally lend itself to also incorporate the meaning 'for debtors of the kind' referenced in § 523(a)."[295] Instead, the court concluded, "debts of the kind" is limited to the types of debts that the subparagraphs of § 523(a)

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[291] Retired Bankruptcy Judge A. Thomas Small, Jr., submitted testimony in support of the legislation. Judge Small's explanation of the new § 1192 discharge similarly made no reference to the § 523(a) exceptions to the discharges of non-individuals. Testimony of A. Thomas Small, *supra* note 44.

[292] The chapter 12 discharge provision, § 1228(a)(2), excepts from discharge any debt "of a kind specified" in § 523(a). The language also appears in § 1228(c)(2), which governs the so-called "hardship" discharge that a debtor who cannot complete plan payments may receive under § 1228(b).

[293] *In re* Breezy Ridge Farms, Inc., 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009); *In re* JRB Consol., Inc., 188 B.R. 373 (Bankr. W.D. Tex. 1995).

[294] *In re JRB Consol.*, 188 B.R. at 373.

[295] *Id.* at 374.

identify.[296] Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.[297]

The court in *In re Breezy Ridge Farms, Inc.*,[298] adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)[299] apply to debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)" that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms.[300] The *Breezy Ridge Farms* court explained that its interpretation harmonized the provisions of § 1228 and § 523(a):

> Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.[301]

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge under subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is nondischargeable.[302] Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting.[303] If the debtor does not list the creditor, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of a proof of claim and a timely request for the determination, unless the creditor had

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[296] *Id.*
[297] *Id.*
[298] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.
[299] Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. *See supra* Section X(A).
[300] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.
[301] *Id.*
[302] § 523(c)(1).
[303] FED. R. BANKR. P. 4007(c).

actual notice of the deadlines in time to do so.[304] The clerk's office must give at least 30 days' notice of the deadline.[305]

XI. Changes to Property of the Estate in Subchapter V Cases

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.[306] Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, new § 1186 provides that, if the court confirms a plan under the cramdown provisions of new § 1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.[307] New § 1186 applies to debtors that are entities as well as individuals.

Discussion of the effects of these changes begins with a summary of postpetition property and earnings under pre-SBRA law.

A. Property Acquired Postpetition and Earnings from Services Performed Postpetition as Property of the Estate in Chapter 11 Cases Under Current Law

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).[308]

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[304] § 523(a)(3).
[305] The new Official Forms for the notice of the filing of a sub V case (Form B309E2 for cases of individuals and Form B309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.
[306] New § 1181(a).
[307] § 1186.
[308] § 541.

Section 541(a)(7) provides that any interest in property that the *estate* acquires after the commencement of the case is property of the estate.

In the case of an entity, the debtor in possession (or trustee) controls the entity and all its property and acts on behalf of the estate. Bankruptcy does not recognize any distinction between the property interests of an entity debtor and those of the estate. Any interest in property that an entity acquires after the commencement of the case (including any postpetition earnings) must be property that the estate acquires and is property of the estate under § 541(a)(7).

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,[309] unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).[310] Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.[311] In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.[312]

The rules in chapter 11 cases of individuals were the same as in chapter 7 cases before enactment of BAPCPA. Thus, property that an individual chapter 11 debtor acquired after the filing of the case and earnings from postpetition services were not property of the estate (with limited exceptions as noted above).

[309] Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.
[310] § 541(a)(6).
[311] *Id.*
[312] §§ 1207(a), 1306(a).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,[313] and earnings from postpetition services,[314] both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.[315] New § 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).[316] New § 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

1. Property of the estate in subchapter V cases of an entity

Section 1115(a) does not apply to an entity, so its inapplicability in a sub V case has no effect on the property of the estate in a sub V case of an entity.

New § 1186 deals with property of the estate when cramdown confirmation occurs under new § 1191(b). It provides that property of the estate consists of property of the estate under

[313] § 1115(a)(1).
[314] § 1115(a)(2).
[315] New § 1181(a).
[316] New § 1186(a)

§ 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of new § 1186 when it applies begins with an explanation of what happens when it does not, *i.e.,* when the court confirms a consensual plan under §1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.[317]

The vesting of property of the estate in the debtor means that the automatic stay with regard to acts against property terminates. Section 362(c)(1) provides, "[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate."[318] Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.[319]

In the cramdown situation, new § 1186 provides that property of the estate consists of property of the estate under § 541 (which covers all the debtor's property at the time of confirmation, as earlier text explains) and any postpetition assets and earnings. This means that the automatic stay does not terminate at confirmation under § 362(c)(1) because all property of the debtor and all its earnings remain property of the estate.

New § 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1114(b) provides for vesting of property of the estate in the debtor upon

[317] §§ 1227(b), 1327(b).
[318] § 362(c)(1).
[319] § 1141(b).

confirmation. New § 1186, however, keeps the property in the estate when cramdown confirmation occurs.

The purpose seems to be to maintain judicial supervision of a debtor's assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation[320] and makes payments under the plan,[321] and discharge does not occur until the debtor has completed payments for the specified period.[322]

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.[323] New § 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these concepts, the provisions of new § 1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

2. Property of the estate in subchapter V cases of an individual

SBRA's new rules governing property of the estate just discussed apply in the case of an individual sub V debtor.

Because § 1115(a) does not apply, postpetition assets and earnings of an individual are not property of the estate. The pre-BAPCPA rule recognizing the distinction between property of the estate and property of the debtor comes back into play.

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[320] *See supra* Sections IV(D)(1).
[321] *See supra* Section IX(B).
[322] *See supra* Section X(B).
[323] "[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statues should prevail over older or more general ones." United States v. Lara, 181 F.3d 183, 198 (1st Cir. 1999) (*citing* HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) and Morton v. Mancari, 417 U.S. 535, 550-51 (1974)); *accord, e.g., In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); Tug Allie-B, Inc., v. United States, 273 F.3d 936, 941, 948 (11th Cir. 2001); Southern Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373 (11th Cir. 1999); *In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); *see* 2B Sutherland Statutory Construction § 51:2 (7th ed. 2019-20 Supp.).

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.[324] The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

The exclusion of postpetition assets and income from property of the estate of an individual in a sub V case raises questions. In a chapter 7 case, an individual is free to use postpetition assets and earnings without restriction or judicial approval. That is the same rule that governed pre-BAPCPA chapter 11 cases of individuals, and it now applies in a sub V case. Does this mean, for example, that an individual who acquires assets postpetition, or has earnings from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?[325]

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[324] *E.g.*, *In re* Copeland, 609 B.R. 834 (D. Ariz. 2019); *In re* Meier, 550 B.R. 384 (N.D. Ill. 2016); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re* Hoyle, No. 10-01484, 2013 WL 3294273 (Bankr. D. Idaho June 28, 2013); *In re* Tolkin, No. 808-72583-REG, 2011 WL 1302191 (Bankr. E.D.N.Y. Apr. 5, 2011), *aff'd sub nom.* Pagano v. Pergament, No. 11-CV-2630 SJF, 2012 WL 1828854 (E.D.N.Y. May 16, 2012); *accord, e.g., In re* Lincoln, No. 16-12650, 2017 WL 535259 (Bankr. E.D. La. Feb. 8, 2017); *In re* Gorniak, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re* Vilaro Colón, No. 13-05545 EAG, 2016 WL 5819783 (Bankr. D.P.R. Oct. 5, 2016). *Contra, e.g., In re* Markosian*,* 506 B.R. 273, 275-77 (9th Cir. BAP 2014); *In re* Evans*,* 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

[325] Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate. May the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, new § 1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.[326]

One consequence of the addition of postpetition assets and earnings to the estate is that, if conversion to chapter 7 occurs after cramdown confirmation, postconfirmation property and earnings will be property of the chapter 7 estate. If the court confirms a consensual plan, such property may not be property of the estate because neither § 1115(a) nor new § 1186 applies. Sections XII(C) and (D) further discuss this issue.

Issues may arise because of the retroactive nature of the operation of new § 1186: property that was not property of the estate becomes property of the estate upon cramdown confirmation. For example, what happens if, at the time of the confirmation hearing, an individual debtor has disposed of postpetition assets or earnings, which the debtor had the right to do when the property was not property of the estate? A creditor opposing confirmation could argue that the court cannot confirm the plan because the estate will not have all the property that new § 1186 requires it to have.

[326] New § 1186.

XII. Default and Remedies After Confirmation

If a debtor defaults after confirmation of a plan, creditors must decide what remedies are available and how to invoke them. If the court confirmed the plan under the cramdown provisions of new § 1191(b), the sub V trustee must also decide what to do if a default occurs.

A. Remedies for Default in the Confirmed Plan

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan's provisions for default and remedies control. In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. Secured creditors and lessors are unlikely to accept a plan unless it includes acceptable remedies in the plan that allow them to exercise their remedies if the debtor defaults. Unsecured creditors and tax claimants often do not participate actively in the case of a small business debtor, but if they do, they likewise have the opportunity to negotiate acceptable terms to deal with defaults.

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in new § 1191(c) provide the source of remedies for default. Cramdown confirmation requires that the plan provide "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."[327] The only specific remedy in new § 1191(c)(3)(B) is "the liquidation of nonexempt assets."[328]

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include

[327] New § 1191(c)(3)(B).
[328] *Id*.

secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of new § 1191(c)(3)(B), creditors will want remedies that will protect their rights to recover.

For secured creditors and lessors who have property rights in specific assets, the primary objective is to recover possession of the encumbered or leased property and to exercise their rights promptly upon the debtor's default. Secured creditors and lessors will want provisions in the plan that recognize their rights to proceed against the debtor's property and that confirm that neither the automatic stay nor the discharge injunction will apply to their efforts to do so.

An unsecured creditor can subject the debtor's assets to its debt only through judicial process, a somewhat cumbersome and potentially lengthy process with uncertain results and expense that may not justify the effort. An effective remedy for unsecured creditors might include conversion to chapter 7 to permit a trustee to liquidate the assets. Later text in Section XII(C) discusses issues that arise upon postconfirmation conversion to chapter 7 that the plan might appropriately address to protect unsecured creditors.

B. Removal of Debtor in Possession for Default Under Confirmed Plan

New Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or "for failure to perform the obligations of the debtor under a plan confirmed under this subchapter."[329] If removal of the debtor in possession occurs after the trustee's service has been terminated upon

[329] New § 1185(a). Section V(C) discusses removal for cause.

substantial consummation of a consensual plan confirmed under new § 1191(a), new § 1183(c)(1) provides for reappointment of the trustee.

New § 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. A specific duty is operation of the business of the debtor. The duties do not include liquidation of the debtor's assets. Nothing in subchapter V appears to authorize the trustee to do so.

The trustee's operation of the business will be difficult, if not impossible, if secured creditors or lessors take possession of assets on account of the debtor's defaults. Even if the trustee can operate the business, its future is unclear. Perhaps the plan will have provisions for the cure of defaults and the trustee can manage the business to cure defaults so that the plan can go forward. If not, the plan will remain in default, and the trustee will do nothing more than observe as creditors exercise their remedies under the plan unless the plan is modified or the case is converted to chapter 7.

Property of the estate issues arise when reappointment of the trustee based on the debtor's default occurs after confirmation of a consensual plan under new § 1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan or confirmation order provides otherwise.[330] If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no "debtor in possession" to be removed.

Under this view, new § 1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the

[330] *See supra* Section XI(B).

estate remains property of the estate under new § 1186[331]) or because the plan or confirmation order so provides.

It is arguable that Congress did not intend to limit the operation of new § 1185(a) based on how property vests at confirmation. One possible interpretation of new § 1185(a), therefore, is that it impliedly authorizes the trustee to take possession of property of the debtor. Another potential interpretation is that it impliedly revests the debtor's assets into the estate.

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.[332] Moreover, if the plan was a consensual one confirmed under new § 1191(a), postconfirmation modification under new § 1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan). Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.[333]

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes

[331] *See supra* Section XI(B).
[332] New § 1193(b).
[333] § 721.

"material default by the debtor with respect to a confirmed plan."[334] Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.[335]

1. Postconfirmation dismissal

The effects of postconfirmation dismissal differ depending on whether the debtor has received a discharge. The timing of the discharge under subchapter V depends on the type of confirmation that occurs.

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under new § 1191(a).[336] Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.[337]

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.[338] Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the

[334] § 1112(b)(4)(N).
[335] § 702(d).
[336] *See supra* Section X(A).
[337] *E.g.,* National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt."); *In re* T&A Holdings, LLC, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) ("[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan."); *In re* Potts, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).
[338] New § 1192.

case is dismissed prior to the entry of discharge.[339] Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause, (1) § 349(b)(1) provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and (2) § 349(c) revests property of the estate in the entity in which such property was before the filing of the case.[340]

2. Postconfirmation conversion

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of

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[339] Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a "hardship" discharge, §§ 1228, 1328. Chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by BAPCPA. In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. *See* First National Bank of Oneida, N.A. v. Brandt, 597 B.R. 663, 668-69 (M.D. Fla. 2018) (Collecting cases holding that chapter 12 or 13 confirmed plan is no longer binding upon dismissal). *But see* Weise v. Community Bank of Central Wisconsin (*In re* Weise), 552 F.3d 584 (7th Cir. 2009).

The district court in *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663 (M.D. Fla. 2018) addressed the binding effect of a confirmed plan upon dismissal of an individual's chapter 11 case on remand from the Eleventh Circuit. First National Bank of Oneida, N.A. v. Brandt, 887 F.3d 1255 (11th Cir. 2018). The Eleventh Circuit noted that case law in chapter 13 cases dealing with dismissal without a discharge "could perhaps become relevant to a determination of whether and how the dismissal of Brandt's Chapter 11 case without a discharge affects the enforceability of his confirmed Chapter 11 plan." *Id.* at 1261. The district court determined that it was, 597 B.R. at 669, and ruled that the confirmed plan was not binding upon dismissal prior to confirmation based on that case law, the provisions of § 349(b), and public policy. *Id.* at 671.

In *Community Bank of Central Wisconsin (In re Weise*), 552 F.3d 584 (7th Cir. 2009), the bankruptcy court, on the debtors' motion, dismissed their chapter 12 case after confirmation of their plan that incorporated a settlement between debtors and bank that, among other things, released lender liability claims against the bank. In connection with dismissal, the bankruptcy court determined that, under U.S.C. § 349(b), cause existed for the plan's terms with regard to the settlement to remain binding on the parties. The Seventh Circuit ruled that the bankruptcy court did not abuse its discretion and that cause existed under § 349(b) to keep some terms of the plan binding on the parties. The Seventh Circuit stated that § 349(b) "explicitly contemplates that the court can choose to keep some terms binding on the parties where there is cause." *Weise, supra,* 552 F3d at 591. The court observed, "[N]egotiation alone would not be an acceptable standard for 'cause,' since every confirmed plan that required the consent of the creditor would involve some degree of negotiation." *Id.* at 589.

The district court in *Brandt, supra*, 597 B.R. 663, distinguished *Weise* because the bankruptcy court in dismissing Brandt's chapter 11 case made no mention of binding the parties to plan provisions and "chose not to keep specified plan terms binding." *Id*. at 670.

[340] § 349.

the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor, unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under new § 1191(a), but not when cramdown confirmation occurs under new § 1191(b) because new § 1186 keeps property in the estate.[341]

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not revest property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.[342] Other courts have ruled that property of the estate

[341] *See supra* Section XI(B).

[342] *E.g.,* Bell v. Bell (*In re* Bell), 225 F.3d 203, 216 (2d Cir. 2000); National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("Property which revested in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case."); Lacy v. Stinky Love, Inc. (*In re* Lacy), 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re* L & T Machining, Inc., 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re* Sundale, Ltd., 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re* Canal Street Limited Partnership, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re* K & M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz 1997); Carter v. Peoples Bank and Trust Co. (*In re* BNW, Inc.), 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.,* 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. "[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor's pre-confirmation estate. . . ."); *In re* TSP Indus., Inc., 117 B.R. 375 (Bankr. N.D. Ill. 1990). *See also* Pioneer Liquidating Corp. v. United States Trustee (*In re* Consol. Pioneer Mortgage Entities), 264 F.3d 803 (9th Cir. 2001) (holding that "language and purpose" of liquidating plan demonstrated that assets vested in debtor upon confirmation revested in estate upon conversion); 6 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 14:13 (3d ed. 2019) (discussing different approaches to revesting of assets upon conversion after confirmation).

Property of the estate that vests in a chapter 11 debtor at confirmation may not include avoidance actions. *See* Still v. Rossville Bank (*In re* Wholesale Antiques, Inc.), 930 F.2d 458 (6th Cir. 1991) (Trustee in case converted to chapter 7 may recover unauthorized postpetition transfers under § 549 that occurred prior to confirmation.); *In re* Sundale, Ltd., 471 B.R. 300, 307 n. 15 (Bankr. S.D. Fla. 2012); *In re T. S. Note Co.,* 140 B.R. 812, 813 (Bankr. D. Kan. 1992).

upon conversion consists of property owned by the debtor at the time of commencement of the case,[343] on the confirmation date,[344] or on the date of conversion.[345]

Under these principles, property of the estate in a sub V case converted to chapter 7 after *cramdown* confirmation includes all the debtor's property. The result is the same if a consensual plan or the order confirming it provides that property of the estate not vest in the debtor until the occurrence of some later event that has not occurred at the time of conversion.

If property of the estate vested in the debtor at the time of confirmation of a *consensual* plan, however, what constitutes property of the estate at conversion is uncertain. In the first instance, it depends on whether the court applies the vesting principles in existing case law noted above and, if so, which view it adopts.

An alternative argument is that the provision in new § 1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that new § 1185(a) requires the revesting of property of the estate upon removal of the debtor in possession after default under a consensual plan; otherwise, § 1185(a) has no effective operation in that circumstance. If so, the same result follows if conversion occurs.

To avoid these potential issues and to insure that the estate has property at the time of conversion, creditors negotiating a consensual plan may want to insist on a provision in the plan that will keep assets as property of the estate until the debtor completes payments or meets some other milestone.

[343] Smith v. Lee (*In re* Smith), 201 B.R. 267 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9th Cir. 1998).
[344] Carey v. Flintridge Lumber Sales, Incl (*In re* RJW Lumber Co.), 262 B.R. 91 (Bankr. N.D. Ca. 2001).
[345] *In re* Midway, Inc., 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

XIII. Effective Date and Retroactive Application of Subchapter V

Section 5 of SBRA provides:

> This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

This language does not restrict application of subchapter V to cases filed on or after the effective date of February 19, 2020. It thus differs from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which provided that most of its provisions did not apply "with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act."[346]

Debtors in pending chapter 11 cases have sought to amend their petitions after SBRA's effective date to elect application of subchapter V. They argue that Bankruptcy Rule 1009(a) permits amendment of a petition "as a matter of course at any time before the case is closed" and that SBRA does not restrict application of subchapter V to cases filed after its enactment.

One court rejected the debtor's argument, concluding, "Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect."[347] The court observed that to rule otherwise would create a "procedural quagmire" in that the debtor would be unable to comply with the statute's requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA's effective date. The debtor's failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[348]

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[346] Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).
[347] *In re* Double H Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. 2020).
[348] *Id.* at 554.

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.[349] Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor's amendment to the petition to elect subchapter V in an existing case means that the case proceeds under subchapter V unless and until the court orders otherwise;[350] the court need not approve the election.[351]

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.[352]

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[349] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020); *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re* Moore Properties of Person County, LLC, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re* Progressive Solutions, Inc., 2020 WL 975464 (Bankr. C.D. Cal. 2020). *Accord, In re* Blanchard, Case No. 12440 (Bankr. E.D. La. July 16, 2020); *In re* Trepetin, 2020 WL 3833015 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re* Bonert, 2020 WL 3635869 (Bankr. C.D. Cal. 2020); *In re* Bello, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

[350] *See supra* Section III(A).

[351] *In re* Body Transit, 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020) (treating objection to debtor's motion for authority to proceed under subchapter V as an objection to amendment of the petition to make the election); *In re* Progressive Solutions, Inc., 2020 975464, at *5 (Bankr. C.D. Cal. 2020).

[352] *In re* Ventura, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020) ("Given that the Debtor's case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor."); *In re* Progressive Solutions, Inc., 2020 WL 975464, at *4 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord, In re* Trepetin, 2020 WL 3833015 (Bankr. D. Md. 2020).

In *In re Trepetin,* 2020 WL 3833015 (Bankr. D. Md. 2020), the court considered whether to extend the statutory deadlines for the debtor's report, status conference, and filing of a plan after it had granted the debtor's motion to convert his pre-SBRA chapter 7 case to chapter 11. In permitting the debtor to proceed under subchapter V and extending the deadlines, the court reasoned, *id.* at *6-7:

> The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.
>
> The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC.*[353] The *Moore Properties* court and others[354] have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*[355] in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

One canon, said the *Landgraf* Court, is that "a court is to apply the law in effect at the time it renders its decision."[356] The conflicting one is that "[r]etroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[357]

The *Landgraf* Court explained that the presumption against retroactive application arises from "[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and from the principle that

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the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor's conduct and potential prejudice to creditors.

Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case.

[353] *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).
[354] *In re* Ventura, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020); *In re* Body Transit, 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020)
[355] Landgraf v. USI Film Products, 511 U.S. 244, 264-71 (1994).
[356] *Id.* at 264, *quoting* Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974).
[357] *Id.* at 264, *quoting* Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988).

"settled expectations should not be lightly disrupted."[358] The presumption against retroactivity particularly applies, the Court reasoned, to "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance."[359] The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee's appeal after a bench trial was pending, did not apply to the employee's action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank*.[360] At issue in *Security Industrial* Bank was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest on exempt personal property.[361] The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

The Court in *Security Industrial Bank* recognized that the Constitution's bankruptcy clause[362] "has been regularly construed to authorize the retrospective impairment of contractual obligations"[363] but that the bankruptcy power could not be exercised "to defeat traditional property interests" because the bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.[364] The Court thus recognized

[358] *Id.* at 265.
[359] *Id.* at 271. Among other cases, the Court cited United States v. Security Industrial Bank, 459 U.S. 70, 79-82 (1982), which the text discusses next.
[360] United States v. Security Industrial Bank, 459 U.S. 70 (1982).
[361] 11 U.S.C. § 522(f)(1)(B).
[362] U.S. Const. Art. I, § 8, cl. 4.
[363] United States v. Security Industrial Bank, 459 U.S. 70, 74 (1982), *citing* Hanover National Bank v. Moyses, 186 U.S. 181 (1902).
[364] *Id.* at 75, *citing* Louisville Joint Stock Bank v. Radford, 295 U.S. 555 (1935).

a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.[365]

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."[366]

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created "none of the taking or retroactivity concerns" that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank.* [367] With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not "alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights."[368]

The *Moore Properties* court explained that the modification of prepetition contractual relationships in a chapter 11 case occurs through a plan. The court then set out the changes that subchapter V made to existing requirements for the contents of the plan and for its confirmation and concluded that none of them amounted to an impermissible retroactive taking.

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. New § 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from

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[365] *Id.*
[366] *Id.* at 81, *citing* Holt v. Henley, 232 U.S. 637 (1913) and Auffm'ordt v. Rasin, 102 U.S. 620 (1881).
[367] *In re Moore Properties of Person County, LLC,* 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).
[368] *Id.*

personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.[369] The third change is that new § 1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.[370]

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.[371]

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under new § 1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.[372]

New § 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does

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[369] See *supra* Section VII(A).

[370] See *supra* Section VII(B).

[371] *In re* Moore Properties of Person County, LLC, 2020 WL 995444, at *4 (Bankr. M.D.N.C. 2020).

In a footnote, the court observed that new § 1190(2), which requires any debtor to contribute earnings as necessary for execution of the plan, rendered § 1123(a)(8) superfluous and that § 1123(c) is inapplicable because only the debtor can propose a plan. *Id.* at *4 n. 13.

In another footnote, the court explained that the exception to the antimodification provision did not prohibit the availability of subchapter V in the case before it for two reasons. First, the exception could not apply because the debtor was an artificial entity with no principal residence. Second, even if it did apply, the question would be whether its application would constitute an impermissible taking. If it did, the court said, it would not apply the exception rather than declare the entirety of subchapter V inapplicable, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). *Id.* at *4, n. 14.

[372] *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of new § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.

not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of "fair and equitable" for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.[373]

The court concluded, "The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking."[374]

The court acknowledged that, if a case were pending for an extended period of time on SBRA's effective date, the case "could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights."[375] In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider "the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make its application offend '[e]lementary considerations of fairness' such that the parties 'have an opportunity to know what the law is and to conform their conduct accordingly.'"[376]

Because the application of new subchapter V in the existing case did not violate the Supreme Court's rulings in *Landgraf* or *Security Industrial Bank,* the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.[377]

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[373] *Id.* See *supra* Section VIII(B)(3), (4).
[374] *Id.*
[375] *Id.*
[376] *Id., quoting* Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994), and *citing In re* Progressive Solutions, Inc., 2020 WL 975464 (Bankr. E.D. Cal. 2020).
[377] *Id.*

The bankruptcy court in *In re Body Transit*[378] applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA's effective date to reject the secured creditor's contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor's argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor's assets and business, would also have the right to file a plan.[379]

The court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.[380] In addition, the court noted that a debtor's ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would unduly prejudice a party.[381] The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.[382]

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its

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[378] *In re* Body Transit, 613 B.R. 400 (Bankr. E.D. Pa. 2020).
[379] The court had scheduled a hearing on the creditor's motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.
[380] *Id.* at 408.
[381] *Id.* at 408-09, *citing In re* Cudeyo, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re* Brooks, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re* Romano, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re* Bendi, Inc., 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).
[382] 213 B,R. at 409.

burden of showing prejudice in the case before it.[383] The court summarized, "[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor's right to amend its petition under [Bankruptcy Rule] 1009."[384]

In *In re Ventura,*[385] an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA's effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a "residence" based on her use of it as a bed and breakfast. After the court had ruled that the exception applied as long as the debtor used any party of the property for her residence,[386] the court scheduled a hearing on confirmation of the lender's plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA's effective date.[387]

The court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had

[383] *Id.* at 409.
[384] *Id.* at 410.
[385] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
[386] Other courts have accepted the debtor's position. *See generally* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, AND ADAM M. GOODMAN, *supra* note 66, § 5:42 (2d ed. 2019).
[387] *In re* Ventura, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020).

vested rights at the time of the amendment in that its plan was ripe for confirmation.[388] The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

The *Ventura* court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit.* In addition, the court concluded that the revision of the definition of "small business debtor" does not appear to affect contractual or vested property rights.[389]

The court then addressed whether the exception in new § 1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender's property rights that vested prior to SBRA's effective date. The court held that, because the debtor had discharged her personal liability in

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[388] *Id.* at 11. The debtor in the current case and in two previous bankruptcy cases had asserted that her debts were "primarily consumer debts." *Id.* at 8. The debtor owed $ 1,678.664.80 on the mortgage, and the property was worth no more than $ 1,200,000. *Id.* at 9. Although the opinion does not reflect what other debts the debtor has, the context indicates that she had other unsecured debt that were relatively small.

The lender asserted that, in these circumstances, the debtor did not qualify as a small business debtor, and that, even if she did, she should be judicially estopped from amending her petition to designate herself as a small business debtor based on her representations in the previous and current cases.

The court acknowledged that a purchase money mortgage on a residence is generally a consumer debt, but ruled that "the fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is a consumer debt." *Id.* at 19. The test, the court explained, is whether a debt is incurred with an eye toward profit. "Courts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction," the court stated. *Id., quoting In re* Martin, 2013 WL 54233954, at *6 (S.D. Tex. 2013) and *citing In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988) (debt incurred with an eye toward profit is a business debt, rather than a consumer debt).

The court found that the property was the debtor's residence but that the primary purpose of purchasing it was to own and operate a bed and breakfast. The court concluded that the mortgage was a business debt and that she qualified as a small business debtor. *Id.* at 20.

The court declined to apply judicial estoppel to bar her amendment to designate herself as a small business debtor. The court ruled that her amendment to describe the mortgage as a business debt was not necessarily with her prior descriptions of the debt. She had referred to it as a bed and breakfast and described it on her Schedule A/B as a "B & B Inn" rather than as a "single-family" home. Moreover, the court had taken no action in any of the cases based on the description of the mortgage debt as a consumer debt, so it was not misled. Nor had the debtor taken unfair advantage of the lender by changing the description of her debt to fit within a statute that did not exist when she filed her cases. *Id.* at 20-22.

[389] *Id.* at 16-17, *citing* Moore Properties of Person County, LLC, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).

her previous chapter 7 case, application of new § 1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the court observed, even if the debt had not been discharged, new § 1190(3) might not "raise significant Constitutional doubts to warrant only prospective application."[390] Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of new § 1190(3) to modify the mortgage would not violate the lender's Fifth Amendment rights.[391] The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.[392]

The *Ventura* court found no prejudice to the lender based on the history of the case, including the fact that the lender's plan was before the court for confirmation. The court saw no Constitutional issues and declined to treat its prior rulings as creating "vested" rights. The court reasoned, "Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender]."[393]

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a small subchapter V debtor under SBRA's revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-

[390] *Id.* at 17.
[391] *Id.* at 17.
[392] *Id.* at 24-25. Section VII(B) discusses this aspect of the court's ruling in connection with consideration of new § 1190(3).
[393] *Id.* at 18.

by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.[394]

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to $ 7.5 million.[395] Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than $ 7.5 million cannot amend its petition to elect application of subchapter V.

[394] *In re* Body Transit, 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).
[395] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See supra* Section III(B).

Lists of Sections of Bankruptcy Code and Title 28 Affected or Amended By The Small Business Reorganization Act of 2019

Enacted August 23, 2019, Effective February 19, 2020

(As Amended By The CARES Act, Enacted and Effective March 27, 2020)

May 2020

	Sections of The Small Business Reorganization Act of 2019	
SBRA § 1	Short Title – "The Small Business Reorganization Act of 2019"	
SBRA § 2	Enacts Subchapter V of Chapter 11 of the Bankruptcy Code, new §§ 1181—1195.	
SBRA § 3(a)	Amends 11 U.S.C. § 547(b) to provide that trustee's avoidance of preferential transfer must be "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c). Applicable in all bankruptcy cases.	
SBRA § 3(b)	Amends 28 U.S.C. § 1409(b) to provide for venue only in the district of the defendant, for a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than $ 25,000. Applicable in all bankruptcy cases.	
SBRA § 4(a)	Conforming amendments to the Bankruptcy Code.	
SBRA § 4(b)	Conforming amendments to Title 28.	
SBRA § 5	Effective date.	
SBRA § 6	Determination of budgetary effects.	
11 U.S.C.	**Amendments Relating to Cases of All Small Business Debtors**	SBRA
§ 101(51C)	New definition of "small business case" as a case in which a small business debtor (defined in § 101(51D)) does not elect application of subchapter V	§ 4(a)(1)(A)
§ 101(51D)	Revised definition of "small business debtor"; CARES Act makes technical correction dealing with exclusion of public companies	§ 4(a)(1)(B); CARES Act § 1113(a)(4)(A)

§ 103(*i*)	New subsection (*i*) provides that subchapter V applies only to a case in which a small business debtor elects its application CARES Act amendment provides that subchapter V applies only to a case in which a "debtor (as defined in section 1182)" elects its application.	§ 4(a)(2); CARES Act § 1113(a)(2)
§1102(a)(3)	No committee of unsecured creditors will be appointed in the case of a small business debtor (regardless of election), unless the court orders otherwise	§ 4(a)(11)

11 U.S.C.	**Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases**	New Subchapter V Section
§ 105(d)	§ 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it.	New § 1181(a)
§ 327(a)	New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than $ 10,000.	New § 1195(a)
§ 1101(1)	§ 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2).	New § 1181(a)
§ 1102(a) § 1102(b) § 1103	Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees. These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise.	New § 1181(b)
§ 1104 § 1105	Provisions for appointment of trustee (§ 1104) and termination of trustee's appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession)	New § 1181(a)
§ 1106	§ 1106 specification of duties of trustee and examiner is inapplicable. New § 1183(b) states the trustee's duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new § 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).	New § 1181(a)

§ 1107	§ 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties. § 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional's representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than § 10,000 impliedly has the same effect.	New § 1181(a)
§ 1108	§ 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business)	New § 1181(a)
§ 1115	§ 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor.	New § 1181(a)
§ 1116	§ 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties.	New § 1181(a)
§ 1121	Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1123(a)(8)	Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1123(c)	Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1125	Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c).	New § 1181(b)
§ 1127	Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193.	New § 1181(a)

§ 1129(a)(9)(A)	Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b).	New § 1191(e)
§ 1129(a)(15)	Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1129(b)	"Cramdown" provisions are not applicable. New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met. New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is "fair and equitable with respect to" each impaired, nonaccepting class. The "fair and equitable" requirement in subchapter V does not include the absolute priority rule. For a secured creditor, the "fair and equitable" requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1). To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3).	New § 1181(a)
§ 1129(c)	Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1129(e)	Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time) but does not contain a deadline for confirmation.	New § 1181(a)
§ 1141(d)	Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs.	New § 1181(c)

	In the cramdown context, discharge does not occur under new § 1192 until the debtor has completed payments under the plan for three years, or such longer period not to exceed five years as the court determines. The new § 1192 discharge applies to (1) debts listed in § 1141(d)(1)(A) and (2) all other debts allowed under § 503 and provided for in the plan, except for debts (x) on which the last payment is due after the applicable three to five year period and (y) of the kind specified in § 523(a).	
	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V	
11 U.S.C.		SBRA
§ 322(a)	Amended to make its provisions for qualification of trustee in a case applicable to a subchapter V trustee appointed under new § 1183.	§ 4(a)(3)
§ 326(a)	Excepts subchapter V trustee appointed under new § 1183 from percentage limitations on compensation applicable to trustees in chapter 11 (and chapter 7) cases.	§ 4(a)(4)(A)
§ 326(b)	Provides that standing subchapter V trustee (like standing chapter 12 and 13 trustees) cannot receive compensation under § 330. (Standing trustees receive compensation under 28 U.S.C. § 586(e), as amended to include standing subchapter V trustees.)	§ 4(a)(4)(B)
§ 347	Current § 347(a) provides for a chapter 7, 12, or 13 trustee to pay into the court, for disposition under chapter 129 of title 28, funds that remain unclaimed 90 days after final distribution under § 726, § 1226, or § 1326. It thus does not apply in chapter 11 cases. SBRA § 4(a)(5)(a) adds subchapter V to the list of trustees and adds new § 1194 to the list of sections providing for distributions. New § 1194 provides for the subchapter V trustee to make distributions under a plan confirmed under the cramdown provisions of new § 1191(b). Current § 347(b) provides that unclaimed property in a case under chapter 9, 11, or 12 at the expiration of the time for presentation of a security or performance of any other act as a condition to participate under any plan confirmed under § 1129, § 1173, or § 1225 becomes property of the debtor or any entity acquiring the debtor's assets under the plan. SBRA § 4(a)(5)(B) added new § 1194 to the list of plans confirmed, but the CARES Act made a technical correction to change this to § 1191. Accordingly, § 347(b) as amended and corrected provides for property that is distributed under a confirmed plan and that is unclaimed to become property of the debtor. It is unclear under these amendments what happens to funds that a trustee disburses under a confirmed plan that a creditor does not	§ 4(a)(5); CARES Act § 1113(a)(4)(B)

	claim. Amended § 347(a) directs the trustee to pay them into court, but amended § 347(b) makes them property of the debtor. Perhaps the intended result is that unclaimed disbursements that a trustee makes become unclaimed funds subject to § 347(a) whereas unclaimed disbursements that a debtor makes become the debtor's property under § 347(b).	
§ 363(c)(1)	Extends provisions authorizing trustee who is authorized to conduct business to enter into transactions in the ordinary course of business without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 363 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(6)
§ 364(a)	Extends provisions authorizing trustee who is authorized to conduct business to obtain unsecured credit and incur unsecured debt without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 364 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(7)
§ 523(a)	Applies exceptions to discharge to discharge of individual subchapter V debtor under new § 1192 (which is the discharge that a debtor receives when a plan is confirmed under the cramdown provisions of new § 1191(b)). It is unclear whether under new § 1192 the exceptions apply to the discharge of a debtor that is not an individual. If the court confirms a consensual plan under new § 1191(a), the debtor receives a discharge under § 1141(d)(1)-(4), under which the § 523(a) discharge exceptions apply only in cases of individuals.	§ 4(a)(8)
§ 524(a)(1)	Makes discharge injunction applicable to discharge granted under new § 1192.	§ 4(a)(9)(A)(i)
§ 524(a)(3)	Makes discharge provisions relating to community claims applicable to discharge under new § 1192.	§ 4(a)(9)(A)(ii)
§ 524(c)(1) § 524(d)	Extends provisions governing reaffirmation of debt and for hearing on proposed reaffirmation (which apply to a discharge under § 1141(d)) to discharge granted under new § 1192.	§ 4(a)(9)
§ 557(d)(3)	Makes provisions for expedited consideration of appointment of trustee and for retention and compensation of professionals subject to § 1183 in cases of debtors that own or operate grain storage facilities	§ 4(a)(10)
§ 1146(a)	Prohibition on taxation of issuance, transfer, or exchange, or of the making or delivery of an instrument of transfer, under a plan confirmed under § 1129 is extended to a plan confirmed under § 1191.	§4(a)(12)

	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter	SBRA
28 U.S.C. § 586(a)(3), (b), (d)(1), (e)	Provisions applicable to U.S. Trustees duties to supervise the administration of cases and trustees, (a)(3), appoint standing trustees (b), prescribe qualifications of trustees, (d)(1), and fix compensation of standing trustees, (e), extended to include cases and trustees under subchapter V. Adds new 28 U.S.C. § 586(e)(5), which provides for compensation of standing trustee in subchapter V case when trustee's services are terminated due to dismissal or conversion of the case or substantial consummation of a plan under new § 1183(c)(1). In these circumstances, the standing trustee does not make disbursements on which a percentage fee would be due. The court is to award compensation "consistent with services performed by the trustee and the limits on compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."	§ 4(b)(1)
28 U.S.C. § 589b	Provisions relating to reports of trustees and debtors in possession made applicable in subchapter V cases.	§ 4(b)(2)
28 U.S.C. § 1930(a)(6)(A)	Subchapter V cases excluded from requirement of payment of quarterly U.S. Trustee fees	§ 4(b)(3)
	Amendments Applicable in All Cases	
11 U.S.C. § 547(b)	As amended, 11 U.S.C. § 547(b) provides that a trustee may avoid a preferential transfer "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c).	SBRA § 3(a)
28 U.S.C. § 1409(b)	As amended, 28 U.S.C. § 1409(b) provides for venue only in the district of the defendant of a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than $ 25,000.	SBRA § 3(b)

Summary of SBRA Interim Amendments to The Federal Rules of Bankruptcy Procedure To Implement SBRA

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as Rule 2015(c). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in "small business case" also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a "small business case," although a subchapter V debtor is a "small business debtor.")

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13
Prepared by Mary Jo Heston's Chambers
(Updated July 6, 2020)

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1] No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person who primary activity is the business of owning single asset real estate or operating real property or conducting services incidental to the real property) person whose primary activity is business of	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than $7,500,000 (will return to $2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended § 101(51D)(A); new § 103(i); BR 1020(a).	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below $10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the farming operation, more than 80% of asset value relates to farming operations, and	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); § 1113, CARES Act.

[1] Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

	owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is "an affiliate of an issuer" under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over $2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a "small business debtor" hinges, at least in part, upon whether a creditor's committee is appointed, and on how much that creditor's committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor's committee thereby extinguishing debtor's small business status. The UST appoints any such committee. *Id.*	No committee of creditors unless the court orders for cause. § 1102(a)(3).	aggregate noncontingent, liquidated debts are below $10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B). Family farmer must be engaged in a farming operation, including "farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." § 101(21).	

	Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.			
Filing Fees	$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is $325 for disbursements up to $15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first $450,000 paid under the plan, and 3% of any payments in excess of $450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when final decree is entered. BR 2015(a). Small Business Debtors:	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

	Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.			
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in Possession (DIP) falters. Creditors may seek to elect a trustee	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13 trustee. The trustee is also authorized to operate the debtor's business if the debtor	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11 cases. This provides additional oversight of the debtor but it comes at a cost of usually 10%	A disinterested trustee is appointed in every ch. 13 case. § 1302. A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set

	by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the plan is completed. The ch. 12 trustee may seek	out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."
Trustee Fees				

	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	dismissal under § 1208(c) for "cause." Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).
Estate Property **Estate Property Post-confirmation**	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	Section 1186 augments § 541 and parallels § 1115 in ch. 11. No separate rule.	Section 1207 augments § 541 and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Section 1306 augments § 541, and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).
Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a).	Section 361 applies. The debtor is required to make preconfirmation adequate protection

	of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b).	payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order. § 1123(b)(3)(B).	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.

Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d). Small Business Debtors: Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes. Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.
Status Conference				

	information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f).			
Commencement of Plan Payments	None required.	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).	None required.	None required.
Plan Content	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.		Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019).	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1).
	Plans *must*: 1) designate classes of claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2) provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission	Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year

	means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123. Plans *may*: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2). Plans *may*: 1) 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 granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222. Under § 1222(b)(1)-(12), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322. Under § 1322(b)(1)-(11), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 *debtors in possession* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the		Ch. 12 debtors in possession *and* trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which applies only in ch. 12, allows *trustees* under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a	Ch. 13 *debtors* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's

	interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017. Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act.	

			Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants.	
Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice

	satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. *In re Rogers*, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements as their larger ch. 11 counterparts.	needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income. Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).

Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets

				3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch. 12 based on the motion date, not the petition date). There is no specific provision	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the conversion. § 1307(f).

			permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523. Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under

	debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1). An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.			§ 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328.

Key Events in the Timeline of Subchapter V Cases[1]

Benjamin A. Kahn[2]
Samantha M. Ruben[3]

- Election to Have Subchapter V Apply

  - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).[4]

  - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).[5]

[1] A chart containing more detailed subchapter V deadlines follows.

[2] United States Bankruptcy Judge, Middle District of North Carolina. No copyright is claimed in these materials by the authors, who give permission to reproduce in whole or in part.

[3] Law Clerk to Judge Benjamin A. Kahn. B.A., University of Miami, Departmental Honors in International Studies; J.D., Chicago-Kent College of Law, *magna cum laude*, Order of the Coif.

[4] All references to rules herein are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated. On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein.

[5] There is no deadline in the rules for a debtor to amend its statement or election, and Rule 1009 permits a debtor to amend any statement as a matter of course at any time before the case is closed. Nevertheless, § 1188 of subchapter V requires the court to hold a status conference no later than 60 days after the order for relief, and requires the debtor to serve and file a report detailing efforts to attain a consensual plan no later than 14 days prior to the status conference. The court may extend the period of time for holding the status conference only "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." Similarly, § 1189(b) requires a debtor under subchapter V to file a plan no later than 90 days after the order for relief, and permits the court to extend this period only "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." If the debtor does not elect subchapter V, but seeks to amend its statement to elect subchapter V more than 30 days after the order for relief, the court and the debtor will not be able to comply with the time requirements under §§ 1188 and 1189, unless the court extends these periods, and the court only may do so if the need to do so is attributable to circumstances for which the debtor should not justly be held accountable.

- Status Conference

  - Not later than 60 days after the order for relief the court shall hold a status conference "to further the expeditious and economical resolution of a case under this subchapter." 11 U.S.C. § 1188(a).

  - 14 days BEFORE the status conference under 11 U.S.C. § 1188(a), the debtor shall file and serve on all parties in interest "a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." 11 U.S.C. § 1188(c).

- Filing Plan of Reorganization

  - Not later than 90 days after the order for relief, the debtor shall file a plan. The court may extend this period if the need for an extension "is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b).

- Confirmation Hearing[6]

  - 28 days' notice must be given for the deadline to accept or reject and file objections to a proposed plan, and for the hearing to consider confirmation of the proposed plan.[7] Rule 2002(b). The court fixes the date for the confirmation hearing. Rule 3017.2(c).

- Appointment and Termination of Service of Trustee

  - The United States Trustee shall appoint a standing trustee for subchapter V cases, appoint one disinterested person to serve as trustee, or may serve as trustee. 11 U.S.C. § 1183(a).

  - If the plan is consensually confirmed under 11 U.S.C. § 1191(a), the service of the trustee is terminated when the plan is substantially consummated. However, the United

[6] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

[7] Section 1129(e), which requires that the court confirm a plan in a small business case within 45 days after the plan is filed, does not apply to cases under subchapter V. See 11 U.S.C. § 1181(a); see also 11 U.S.C. 101(51C) (excluding any case in which a debtor elects to have subchapter V apply from the definition of "small business case").

States Trustee may reappoint the trustee for modification of the plan or if the debtor is removed from possession. 11 U.S.C. § 1183(c)(1).

- If the plan is non-consensually confirmed, the trustee will make all payments under the plan, unless the plan or the order confirming the plan provides otherwise. 11 U.S.C. § 1194(b).

- Discharge

  - Consensually Confirmed Plans Under 11 U.S.C. § 1191(a). If a plan is consensually confirmed under 11 U.S.C. § 1191(a), then the general discharge provisions under 11 U.S.C. § 1141(d)(1)-(4) shall apply. See 11 U.S.C. § 1181(a), (c). Therefore, in a non-liquidating subchapter V case, discharge will occur on confirmation of a consensual plan. See 11 U.S.C. § 1141(d)(1).[8]

  - Non-consensually Confirmed Plans Under 11 U.S.C. § 1191(b). If a plan is confirmed under 11 U.S.C. § 1191(b), then the timing provisions for entry of discharge under 11 U.S.C. § 1141(d) shall not apply. See 11 U.S.C. § 1181(c). In such a case, discharge will be entered after completion of all payments due "within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix . . . ." 11 U.S.C. § 1192.[9]

- Modification of a Plan

  - The debtor may modify a plan at any time prior to confirmation. 11 U.S.C. § 1193(a).

  - After confirmation, the debtor may modify the plan prior to substantial consummation of the plan. 11 U.S.C. § 1193(b), (c).[10]

- Plan Term

  - Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express

[8] Section 1141(d)(5), which delays discharge until the completion of payments under a plan in an individual case unless otherwise ordered by the court, does not apply in subchapter V cases. 11 U.S.C. 1181(a).

[9] Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.

[10] A consensually confirmed plan only may be modified by consent. 11 U.S.C. § 1193(b).

prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

- Timing of Payments

  - The court may authorize the trustee to make payments to the holder of a secured claim prior to confirmation for purposes of providing adequate protection. 11 U.S.C. § 1194(c).

Subchapter V Deadlines[11]

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	Deadline	Act to Be Performed	Code or Rule[12]
Voluntary debtor	Petition Date	State whether the debtor is a small business debtor and, if so, whether the debtor elects to have subchapter V apply	Federal Rule of Bankruptcy Procedure ("Rule") 1020(a)
Subchapter V DIP, or Trustee if debtor removed from possession	As soon as possible after the commencement of the case	Give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor	Rule 2015(a)(4)
Subchapter V debtor	Upon electing to proceed under subchapter V	Append to its petition its most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return; or a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no federal tax return has been filed	11 U.S.C.A § 1187(a); 11 U.S.C. § 1116(1)(A), (B)[13]
Involuntary debtor	14 days after the entry of the order for relief	File a statement indicating whether the debtor is a small business debtor and, if so, whether the debtor elects to have subchapter V apply	Rule 1020(a)

[11] On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein. Deadlines and notations set forth herein that existed under the Federal Rules of Bankruptcy Procedure prior to enactment of subchapter V and that have not been modified by the proposed interim rules have been excerpted from COLLIERPAMPHLET EDITION 2018 Supplement, Time Periods Prescribed by the Bankruptcy Rules (Richard Levin & Henry Sommer eds., Matthew Bender) (the "Collier Supplement").

[12] With respect to deadlines under title 11, only those time periods and deadlines arising under subchapter V of title 11 are included herein. Time periods relating to adversary proceedings, appeals, and claims are not included. For comprehensive deadlines generally applicable to all cases, including subchapter V, see the Collier Supplement.

[13] Section 1181(a) provides that 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(a).

Chapter 11 parties in interest	30 days after the conclusion of the meeting of creditors or 30 days after any amendment to the debtor's statement under Rule 1020(a), whichever is later	File objection to the chapter 11 debtor's designation as a small business debtor	Rule 1020(b)[14]
Involuntary debtor	7 days after entry of the order for relief	File a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H	Rule 1007(a)(2)
Chapter 11 debtor	14 days after entry of the order for relief	File a list of the debtor's equity security holders, with the number and kind of interests, and the last known address or place of business of each holder	Rule 1007(a)(3)
Voluntary debtor	14 days after filing petition	File the schedules, statements and other documents required by 1007(b)(1)	Rule 1007(c)
Individual chapter 11 debtor	14 days after filing the petition	File a statement of current monthly income	Rule 1007(c)
Voluntary individual debtor	14 days after entry of the order for relief	File a certificate of credit counseling if debtor filed a statement that debtor received counseling but did not have the certificate on the filing date	Rule 1007(c)
Petitioning creditor(s) in an involuntary case	7 days after issuance of the summons	Serve the summons and a copy of the petition on the debtor	Rule 1010(a); Rule 7004(e)
Involuntary debtor	14 days after entry of the order for relief	File the schedules, statements, and other documents required by Rule 1007(b)(1)	1007(c)
Involuntary chapter 11 reorganization on debtor	2 days after entry of the order for relief	File a list of creditors holding the 20 largest unsecured claims	Rule 1007(d)

[14] Any objection is governed by Rule 9014. See F.R.B.P 1020(c).

Involuntary debtor	21 days after service of the summons, unless made by publication on a party not residing or found within the state in which the court sits	File and serve defenses and objections to an involuntary petition	Rule 1011(b)
U.S. Trustee in a chapter 11 health care business case	21 days after the commencement of the case	File motion to appoint a patient care ombudsman	Rule 2007.2(a)
Debtor's attorney	14 days after the order for relief	File statement whether the attorney has shared or agreed to share the compensation with any other entity	Rule 2016(b)
The court	60 days after entry of the order for relief	Hold a status conference to further the expeditious and economical resolution of a case under subchapter V[15]	11 U.S.C. § 1188(a)
Subchapter V debtor	14 days before the date of the § 1888(a) status conference	Debtor file and serve on the trustee and all parties in interest a report that details the efforts debtor has undertaken and will undertake to attain a consensual plan of reorganization	11 U.S.C. § 1188(c)

TIME PERIODS RELATED TO PLANS

Entity	**Deadline**	**Act to Be Performed**	**Code or Rule**
Subchapter V debtor	90 days after the order for relief	File a chapter 11 plan[16]	11 U.S.C. § 1189
Chapter 11 plan proponent	With the plan or within a time fixed by the court	File a disclosure statement or evidence of prepetition acceptance of a plan <u>if</u> the court has ordered that 11 U.S.C. 1125 will apply[17]	Rule 3016(b)

[15] Under §1188(b), the court may extend the time for holding a status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

[16] The court may extend the 90-day period if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.

[17] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility

Class Including Secured Creditor	Date fixed by the court	Make the election under § 1111(b)	Rule 3014
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time fixed for filing objections and the hearing to consider approval of a disclosure statement, if applicable. See note 17, infra.	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of hearing on disclosure statement and objections in a chapter 11 case, if applicable. See note 17, infra.	Rule 3017(a)
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of time for filing objections to an injunction provided in a chapter 11 plan	Rule 3017(f)(1)
The court	No deadline	Fix a date for the hearing on confirmation.	Rule 3017.2(c)
Holders of claims or interests	Time fixed by the court	Accept or reject the plan	Rule 3017.2(a)
Equity security holder	Time fixed by the court	Record date for eligibility to accept or reject the plan	Rule 3017.2(b)

projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

Subchapter V debtor in possession, trustee, or clerk, as directed by the court	Times fixed by the court	Transmit the plan, provide notice of the time to accept or reject the plan, and provide notice of hearing on confirmation[18]	Rule 3017.2(d)
Chapter 11 parties in interest	14 days after entry of the order	Stay of order confirming a chapter 11 plan	Rule 3020(e)
Subchapter V debtor	Any time prior to confirmation	Modify the plan. After the modification is filed with the court, the plan as modified becomes the plan.	11 U.S.C. § 1193(a)
Subchapter V debtor	Any time after confirmation of the plan and before substantial consummation of the plan	May seek to modify a plan that was consensually confirmed under section 1191(a). The plan, as modified under this subsection, becomes the plan only if the court confirms the plan as modified by consent under section 1191(a) of this title.[19]	11 U.S.C. § 1193(b)
Subchapter V debtor	Any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court	May seek to modify the plan if the plan was confirmed under section 1191(b).	11 U.S.C. § 1193(c)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of time for filing objections to modification of an individual's chapter 11 plan and of hearing on objections	Rule 3019(b), (c)

[18] In non-subchapter V cases under chapter 11, Rule 3017(c) requires that, on or before approval of the disclosure statement, the court shall fix a time within which holders of claims and interests may accept or reject a plan and may fix the date for notice of the confirmation hearing. Rule 3017(d) requires transmission of the plan and the notice of the times so fixed in non-subchapter V cases "in accordance with Rule 2002(b)." Despite the lack of any similar reference to Rule 2002(b) in Rule 3017.2(d), nothing in the interim rule purports to affect the minimum 28 days' notice required of the time fixed for acceptance or rejection of the plan and the hearing to consider confirmation under Rule 2002(b).

[19] Subchapter V does not provide for a contested modification of a consensually confirmed plan.

Any holder of a claim or interest that has accepted or rejected the plan	Within a time fixed by the court	Change the previous acceptance or rejection of the plan if the plan is later modified	11 U.S.C. § 1193(d)
The subchapter V trustee	Until confirmation or denial of confirmation of a plan	Retain payments and funds received pending confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deductions under 11 U.S.C. § 1194(a)(1)-(3).	11 U.S.C. § 1194(a)
The court	After notice and a hearing, and prior to confirmation of a plan	May authorize the trustee to make payments to the holder of a secured claim to provide adequate protection of an interest in property	11 U.S.C. § 1194(c)

DEADLINES THROUGHOUT THE CASE

Entity	**Deadline**	**Act to Be Performed**	**Code or Rule**
Subchapter V debtor	Periodically throughout the case	Comply with the requirements of 11 U.S.C. §§ 308 and 1116(2), (3), (4), (5), (6), and (7)	11 U.S.C. § 1187(b)[20]

[20] Section 1181(a) provides that § 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(b).

Subchapter V debtor	14 days after the information comes to the debtor's knowledge	File supplemental schedule disclosing acquisition of property by bequest, devise, inheritance, property settlement agreement, or as a beneficiary of a life insurance policy or death benefit plan.[21]	Rule 1007(h)
Subchapter V debtor	At any time before the case is closed	File an amendment of any voluntary petition, list, schedule, or statement	Rule 1009(a)
Chapter 11 DIP or trustee in case converted from chapter 7	14 days after conversion of the case	File a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim	Rule 1019(5)(A)(i)
Chapter 11 DIP or trustee in case converted to chapter 7	30 days after conversion of the case	File and transmit to the U.S. Trustee a final report and account	Rule 1019(5)(A)(ii)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of meeting of creditors under § 341	Rule 2002(a)(1)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of proposed use, sale, or lease of property of the estate other than in the ordinary course of business	Rule 2002(a)(2)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on approval of a compromise or controversy other than pursuant to Rule 4001(d)	Rule 2002(a)(3)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on any entity's request for compensation or reimbursement of expenses in excess of $1000	Rule 2002(a)(6)

[21] The obligation to supplement continues post-confirmation for plans confirmed under 11 U.S.C. § 1191(b).

U.S. Trustee in a chapter 11 reorganization case	Between 21 and 40 days after the order for relief	Call a meeting of creditors, except where a prepetition plan has been accepted	Rule 2003(a)
U.S. Trustee	2 years after the conclusion of the meeting of creditors	Preserve recording of § 341 meeting for public access	Rule 2003(c)
Subchapter V debtor	14 days after the plan is substantially consummated	File notice of substantial consummation with the court and serve on the trustee, the U.S. Trustee, and all parties in interest	11 U.S.C. § 1183(c)(2)
Subchapter V trustee	Periodically	File reports and summaries of the operation of the debtor's business, including a statement of receipts and disbursements, if the debtor ceases to be a DIP	11 U.S.C. § 1183(b)(5); 11 U.S.C. §§ 1106(a)(1), (2), (6); 11 U.S.C. § 704(a)(8)
The court	On request and after notice and a hearing	Order that the debtor not be a DIP for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter	11 U.S.C. § 1185(a)
The court	On request and after notice and a hearing	Reinstate the DIP.	11 U.S.C. § 1185(b)
Subchapter V debtor	Periodically	File periodic financial and other reports as required by 11 U.S.C. § 308(b)	11 U.S.C. § 1187(b); 11 U.S.C. § 308(b)
Subchapter V debtor	25 days before the date of the hearing on confirmation of the plan	Mail a conditionally approved disclosure statement if the court directs application of 11 U.S.C. § 1125	11 U.S.C. § 1187(c); 11 U.S.C. § 1125(f)
Subchapter V DIP, or trustee if debtor removed from possession	Periodically	Keep records of receipts and dispositions of money, file reports required by 11 U.S.C. § 704(a)(8)	Rule 2015(b)

Subchapter V DIP, or trustee if debtor removed from possession	Within the time fixed by the court, if so directed	File and transmit to the United States trustee a complete inventory of the property of the debtor	Rule 2015(b)
Subchapter V debtor	No later than 21 days after the last day of each calendar month	File monthly reports as contemplated by 11 U.S.C. § 308	Rule 2015(b)[22]
Chapter 11 trustee or DIP	7 days before the first date set for the § 341 meeting of creditors	File first periodic report of the value, operations, and profitability of each entity that is not a publicly traded corporation or chapter 11 debtor and in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	No less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted	File subsequent periodic reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a chapter 11 debtor in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	14 days before filing the first periodic financial report required by this rule	Send notice to each entity in which the estate has a substantial or controlling interest, and to all holders of an interest in that entity, that it expects to file and serve financial information relating to that entity	Rule 2015.3(e)

[22] The proposed interim rule contemplates that the debtor shall be required to file monthly reports under § 308 and Rule 2015(a)(6) even if removed from possession.

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

Entity	Deadline	Act to Be Performed	Rule
Clerk of court, or some other person as the court may direct	21 days	Provide notice by mail of time for hearing on the dismissal or conversion of a chapter 7, 11, or 12 case, unless the hearing is under § 707(a)(3) or (b) or is on dismissal of the case for failure to pay the filing fee	Rule 2002(a)(4)
The court	As soon as practicable after completion by the debtor of all payments due within the first three years of the plan, or such longer period not to exceed five years as the court may fix	Grant the debtor a discharge[23]	11 U.S.C. § 1192
Chapter 11 party in interest	No later than the first date set for the hearing on confirmation	File complaint objecting to discharge[24]	Rule 4004(a)
Creditor	Any time	File complaint under § 523(a)(2), (4), or (6)	Rule 4007(b)
Creditor in a chapter 11 case	No later than 60 days after the first date set for the § 341 meeting of creditors, with 30 days' notice	File complaint under § 523(a)(2) or (4)	Rule 4007(c)

[23] Such discharge pertains to debts as provided under the plan except any debt (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or (2) of the kind specified in section 523(a).

[24] A complaint seeking revocation of a chapter 11 discharge as procured by fraud may be filed any time before 180 days after the date of the entry of the order of confirmation. 11 U.S.C. § 1144.

Fill in this information to identify the case:	
Debtor name	K-9 Walking Services, LLC
United States Bankruptcy Court for the:	Middle District of Florida
Case number (if known)	1.1 – bk – 00001 – MGW

☐ Check if this is an amended filing

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11 02/20

Debtor's Plan of Reorganization, Dated February 20, 2021

This plan is for a small business debtor under Subchapter V, 11 U.S.C. § 1190. Below is (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.

Background for Cases Filed Under Subchapter V

A. Description and History of the Debtor's Business

The Debtor is a Florida Limited Liability Company (LLC). Since 2015 the Debtor has been in the business of pet walking and pet care as described in more detail as follows:

K-9 Walking Services, LLC operates a pet walking/pet care business out of three locations: Tampa, St. Petersburg and Orlando. The company is 100% owned by John and Marge Litton. K-9 has many residential dog walking contracts, but traditionally 70% of revenues were generated by 13 commercial contracts for the care and feeding of "professional" dogs associated with local police and military installations.[1] These commercial contracts are in writing, have standard terms, including that they are for a specific term and cannot be cancelled at will. The contracts have been modified by agreement to provide that certain expenses for care of the dogs are paid for by the clients rather than the Debtor. K-9 has 25 employees and 50 dog tenders who they pay as independent contractors.

The three locations are leased from three different landlords. K-9 has entered into forbearance agreements with each of the landlords so that there will be no cure required to assume the leases. However, if the leases are rejected or terminate prior to their stated expiration date, the landlords have the right to pursue all rent that not paid. K-9 has $1.5 million term loan with a three year maturity date, and a $500,000 line of credit payable on demand, with no set repayment schedule. Both facilities bear interest at the market rate. Seventh Bank has a blanket lien against the company's assets, including contracts. John and Marge personally guaranteed the loan and put a mortgage on their home to secure the loan. Before the pandemic John and Marge each received

[1] Given that K-9 is the debtor party to the commercial contracts, these are not deemed to be personal service contracts.

a salary of $100,000 (paid as W-2 wages) and a share of profits (paid as a K-1 distribution) in most years.

The company stopped operations for about 6 months at the start of the pandemic, but slowly have been resuming their work with the police and military. Residential contracts have barely restarted. This past summer they we able to secure a Payroll Protection Loan from the government for $150,000 and they wisely used the funds properly. The loan repayment request for waiver of repayment has been made but the SBA has not yet granted the waiver request.

K-9 has been able to retain 20 of its regular employees but only about 15 of its contract dog tenders. Whereas revenue in 2019 exceeded $2.0 million. Revenues in 2020 were $500,000. Historical Financials are attached as exhibit "A".

Revenues for December 2020 were 15% higher than November and October, but K-9 could not make the payment due on the line of credit or the fixed loan to Seventh Bank that was due on January 2, 2021. Shortly after default, they had a meeting with the bank that was not promising. Accordingly, on January 15, 2021 they filed a Subchapter V reorganization case.

On the date of filing, K-9 owed $2.3 million to the bank with interest and fees. The amount of this claim potentially rendered the bank undersecured given solely the value of K-9's assets. The Debtor has determined to treat the claim of Seventh Bank as fully secured. K-9 owed $55,000 in unsecured federal withholding taxes and had unsecured claims of roughly $450,000 in unsecured debt – mostly pet supply companies. K-9 listed one unliquidated debt by Dragnet, a former commercial customer, who alleged that K-9 misrepresented its ability to deal with large dogs and as a result 3 professional dogs died in their care. K-9 does not carry any insurance for this type of liability. Also, each of the three leases was two months in arrears.

B. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to the Plan as Exhibit "B".

C. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.

The Plan Proponent has provided projected financial information as Exhibit "C"

The Plan Proponent's financial projections show that the Debtor will have projected disposable income (as defined by § 1191(d) of the Bankruptcy Code) for the period described in § 1191(c)(2) of at least $ 406,980 with 75 percent of this ($305,235) being available for distribution pursuant to this Plan.

The final Plan payment is expected to be paid on March 25, 2026.

Financial Assumptions for this Plan are as follows:

Twelve month projected revenues post-plan confirmation –

Each of the 15 independent contractors will be assumed to work 8 hours per day, 5 days a week. Each will be paid $15 per hour which is the Florida minimum wage. Even though they are independent contractors, reputable dog walkers cannot be obtained for any amount under the minimum wage. K-9 will bill $30 per hour for each of the independent contractors, the doubling of the amount being the standard for such a markup. Thus, from the independent contractors, gross revenue will be $18,000 per week which amounts to $936,000 for the year. Deducting the cost of the 15 independent contractors, it will provide a gross profit prior to any other expenses of $468,000 for the year.

Of the 20 employees, two of them are John and Marge Litton. Of the other 18 employees, one will be required to be an administrative person in each of the three offices. That leaves two employees for each office to be salaried dog walkers to cover weekends and holidays. Assuming these employees are also paid the minimum wage and are billed at the same rate as the independent contractors, the gross revenue for these employees will be $374,400, with the gross profit before other expenses being $187,200.

Thus, the total gross revenue for the twelve months following confirmation will be $1,310,400, and a gross profit before other expenses totaling $655,200.

In order to curtail the rapidly rising cost of dog food, poop bags and other disposable supplies, K-9 will begin to charge clients for supplies in addition to the hourly charge for the dog walkers. This will reduce the expenses.

Twelve month projected expenses post-plan confirmation

Assuming each of the three locations totals 1000 ft.² at $10 per foot, the yearly rent will be $30,000.

Insurance is $7,500.

Utilities total $12,000.

Advertising totals $24,000.

Supplies that cannot be billed to customers totals $36,000.

The three administrative personnel will be paid minimum wages of $15 per hour. Thus, assuming a 40-work week for five days that equals $18,720.

John and Marge Litton will need to substantially reduce their prior salaries of $100,000 per year down to $60,000 per year each or a total of $120,000 (this will be a gross number which includes unemployment tax, social security, etc.)

Total non-dog walker expenses - $248,220

Summary

Gross revenue - $1,310,400

Gross profit before operating expenses - $655,200

Operating expenses - ($248,220)

Net revenue - $406,980

For the second year after plan confirmation, and for each year thereafter, assume two additional independent contractors each year to generate the same gross profit before operating expenses. For operating expenses, we need to assume an inflation rate increase of 2% per year.

You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of the *Debtor* from cash flow of the debtor's continued business operations.

This Plan provides for:

- **1** class of priority claims;
- **1** class of secured claims;
- **2** classes of non-priority unsecured claims; and
- **1** class of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, as a pro rata percentage of the Debtor's net profits. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. This Plan contains the relevant disclosure information required by 11 USC Sections 1181 (a) (1) and (b).

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)

Article 2: Classification of Claims and Interests

2.01	**Class 1 .....**	All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)).
2.02	**Class 2 .....**	The claim of **Seventh Bank**, which is allowed as a secured claim under § 506 of the Code.
2.03	**Class 3 .....**	All non-priority unsecured claims allowed under § 502 of the Code.
2.04	**Class 4 ……..**	Unimpaired Claims of Landlords
2.05	**Class 5 .....**	Equity interests of the Debtor.

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

3.01	**Unclassified claims**	Under section § 1123(a)(1), administrative expense claims, and priority tax claims are not in classes.

3.02	**Administrative expense claims**	Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor. Or Each holder of an administrative expense claim allowed under § 503 of the Code, will be paid on the Effective Date of the Plan unless otherwise agreed.
3.03	**Priority tax claims**	Each holder of a priority tax claim will be paid in full with statutory interest in equal monthly installments within 6 years from the Petition Date

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

Class	Impairment	Treatment
Class 1 - **Priority claims**	☐ Unimpaired	Class 1 is unimpaired by this Plan, and will be paid in full with statutory interest within 6 years from the Petition Date.
Class 2 – **Secured claim of** Seventh Bank	☐ Impaired	Retains all lien rights and will be paid in full. Payments will be made on a monthly basis for a total of 84 months commencing on the Effective Date based upon a 15-year amortization at 4 percent interest with all remaining principal to balloon and be due and payable on the 85th month following the Effective Date.
Class 3 – Non-priority unsecured creditors	☐ Impaired	Will be paid a pro rata percentage on their allowed claims from 75 percent of the Debtor's Net Operating Income on a monthly basis commencing on the Effective Date of the Plan.
Class 4 – Landlords	☐ unImpaired	Landlords' leases will be assumed pursuant to the applicable provisions of 11 USC Section 365. As per the forbearance agreements in place as of the Petition Date as a result of the assumption of these leases there Is no cure amount due.
Class 5 - **Equity security holders of the Debtor**	☐ unImpaired	The Equity Holders will retain their membership interests in the Debtor.

[redacted] Article 5: Allowance and Disallowance of Claims

5.01	**Disputed Claim**	A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.
5.02	**Delay of distribution on a disputed claim**	No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].
5.03	**Settlement of disputed claims**	The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

[redacted] Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01	**Assumed executory contracts and unexpired leases**	(a) The Debtor assumes, the following executory contracts and unexpired leases as of the effective date: The leases as set forth in Article 4.01 above and all commercial (institutional) dog walking contracts
		(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date. All of the Debtor's contracts with its clients are being assumed as modified. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than **30** days after the date of the order confirming this Plan.

[redacted] Article 7: Means for Implementation of the Plan

Post confirmation all plan payments will be funded by the Debtor's cash flow in accordance with the Projections attached hereto as Exhibit C. The Debtor will continue to be owned and operated by its current managers and members, John and Marge Litton.

Article 8: General Provision

8.01	**Definitions and rules of construction**	The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan.
8.02	**Effective Date**	The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.
8.03	**Severability**	If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.
8.04	**Binding Effect:**	The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.
8.05	**Captions**	The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.
[8.06	**Controlling Effect**	Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of **Florida** govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.
[8.07	**Corporate Governance**	The Debtor will continue to be owned and operated by its current members John and Marge Litton in accordance with the existing operating agreement.
[8.08	**Retention of Jurisdiction**	The Bankruptcy Court shall retain jurisdiction until the payments due under the Plan are completed.

Article 9: Discharge

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

(i) imposed by this Plan; or

(ii) to the extent provided in § 1141(d)(6).

If the Debtor's Plan is confirmed under § 1191(b), confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192;

or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Article 10: Other Provisions

Injunctions. As of the Effective Date, all persons who have held, hold or may hold Claims, or who have held, hold, or may hold Interests, shall be enjoined from taking any of the following actions against the Reorganized Debtor, the Debtor's estate, the assets or properties of the Reorganized Debtor (other than actions brought to enforce any rights or obligations under the Plan or appeals, if any, from the Confirmation Order) (i) commencing, conducting, continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind against the Reorganized Debtor, the Debtor's estate or the assets or properties of the Reorganized Debtor, including the stock of the Reorganized Debtor, or any direct or indirect successor in interest to the Reorganized Debtor, or any assets or properties of any such transferee or successor; (ii) enforcing, levying, attaching, collecting or otherwise recovering by any manner or means whether directly or indirectly any judgment, award, decree or order against the Reorganized Debtor or the Debtor's estate, including the stock of the Reorganized Debtor, or the assets or properties of the Reorganized Debtor or the Debtor's estate or any direct or indirect successor in interest to any of the Reorganized Debtor, or any assets or properties of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Reorganized Debtor or the Debtor's estate or the assets or properties of the Reorganized Debtor or the Debtor's estate or any direct or indirect successor in interest to the Reorganized Debtor, or any assets or properties of any such transferee or successor other than as contemplated by the Plan; (iv) asserting any set off, right of subrogation or recoupment of any kind, directly or indirectly against any obligation due the Reorganized Debtor of the Debtor's estate or the assets or property of the Reorganized Debtor, or any direct or indirect transferee of any assets or property of, or successor in interest to, the Reorganized Debtor; and (v) proceeding in any manner in any place whatsoever that does not conform or comply with the provisions of the Plan.

To the extent that the Debtor's officers, directors, managers, members, shareholders, former shareholders, or insiders are jointly liable to a creditor with respect to a claim against the Debtor (such parties shall include specifically John and Marge Litton, and shall be collectively referred to as "Co-Debtors" and such claims shall be referred to as "Co-Debtor Claim(s)"), then the holder of such claim shall, until such time as any payments or Distributions provided for in the Plan on account of such Co-Debtor Claim are completed, unless expressly provided by agreement approved and incorporated as treatment under this Plan, be enjoined from taking any of the following actions against the Co-Debtors, the assets or properties of the Co-Debtors (other than actions brought to enforce any rights or obligations under the Plan or appeals, if any, from the Confirmation Order) (i) commencing, conducting, continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind against the Co-Debtors, or the assets or properties of the Co-Debtors, or any direct or indirect successor in interest to the Co-Debtors, or any assets or properties of any such transferee or successor; (ii) enforcing, levying, attaching, collecting or otherwise recovering by any manner or means whether directly or indirectly any judgment, award, decree or order against the Co-Debtors, or the assets or properties of the Co-Debtors or any direct or indirect successor in interest to any of the Co-Debtors, or any assets or properties of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Co-Debtors or the assets or properties of the Co-Debtors or any direct or indirect successor in interest to the Co-Debtors, or any assets or properties of any such transferee or successor other than as contemplated by the Plan; (iv) asserting any set off, right of subrogation or recoupment of any kind, directly or indirectly against any obligation due the Co-Debtors or the assets or property of the Co-Debtors, or any direct or indirect transferee of any assets or property of, or successor in interest to, the Co-Debtors; and (v) proceeding in any manner in any place whatsoever that does not conform or comply with the provisions of the Plan. The above injunction with respect to a Co-Debtor claim injunction shall terminate on the earlier of the completion of any payments or Distributions to be made under this Plan on account of such Co-Debtor Claim.

The Co-Debtors have agreed to waive distribution from the estate and its assets in respect of their collective and respective claims against the estate. This waiver is necessary to confirm the Plan. Moreover,

such parties have contributed funds and services to the estate which are necessary to obtain confirmation and to permit the continued operations of the Debtor in Chapter 11, and which are not being sought as administrative expenses to be paid at confirmation. Further, such parties and their payments under the Plan are necessary to the operation of the Reorganized Debtor and its ability to make payments, including those under of the Plan.

Respectfully submitted,

X _____ _____

[Signature of the Plan Proponent] [Printed name]

X _____ _____

[Signature of the Attorney for the Plan Proponent] [Printed name]

EXHIBIT “A”

Historical Financials

Assume for purposes of this presentation that historical financials would show that revenues for 2019 and prior years exceeded $2 million annually and were sufficient for K-9 to meet all of its obligations. In 2020 due to the effects of the pandemic including the cessation of business for approximately six months revenues dropped to only $500,000. While revenues increased by over 15% in December of 2020, they were insufficient to meet operating expenses and debt service.

EXHIBIT “B”

Liquidation Analysis

Assume for purposes of this presentation that the liquidation analysis would show that the value of the assets of K-9 upon liquidation, including the customer contracts, leases, inventory of supplies, accounts, FF&E, and intellectual property, would be less than $50,000; would be substantially consumed by the administrative expenses of a chapter 7 proceeding; and would be insufficient to provide any distribution to unsecured creditors.

EXHIBIT “C”

FINANCIAL BUDGET
FROM APRIL 2021 THROUGH MARCH 2026

April, 2021 through March, 2022

Receipts	April	May	June	July	August	September	October	November	December	January	February	March	Totals
Gross Revenue	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	109,200.00	1,310,400.00
Direct Expenses of Dog Walking Labor	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-655,200.00
Gross Profit	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	655,200.00
Total	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**54,600.00**	**655,200.00**

Disbursements	April	May	June	July	August	September	October	November	December	January	February	March	Totals
Rent	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Insurance	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	7,500.00
Utilities	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	12,000.00
Advertising	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Supplies	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
Administrative Employees	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	18,720.00
Management Salaries	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Total	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**248,220.00**
Profit	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**33,915.00**	**406,980.00**

April, 2022 through March, 2023

Receipts	April	May	June	July	August	September	October	November	December	January	February	March	Totals
Gross Revenue	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	114,660.00	1,375,920.00
Direct Expenses of Dog Walking Labor	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-655,200.00
Gross Profit	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	720,720.00
Total	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**60,060.00**	**720,720.00**

Disbursements	April	May	June	July	August	September	October	November	December	January	February	March	Totals
Rent	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Insurance	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	7,500.00
Utilities	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	12,000.00
Advertising	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Supplies	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
Administrative Employees	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	18,720.00
Management Salaries	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Total	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**248,220.00**
Profit	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**39,375.00**	**472,500.00**

FINANCIAL BUDGET
FROM APRIL 2021 THROUGH MARCH 2026

April, 2023 through March, 2024													
Receipts	**April**	**May**	**June**	**July**	**August**	**September**	**October**	**November**	**December**	**January**	**February**	**March**	**Totals**
Gross Revenue	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	120,393.00	1,444,716.00
Direct Expenses of Dog Walking Labor	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-655,200.00
Gross Profit	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	789,516.00
Total	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**65,793.00**	**789,516.00**
Disbursements	**April**	**May**	**June**	**July**	**August**	**September**	**October**	**November**	**December**	**January**	**February**	**March**	**Totals**
Rent	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Insurance	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	7,500.00
Utilities	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	12,000.00
Advertising	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Supplies	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
Administrative Employees	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	18,720.00
Management Salaries	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Total	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**248,220.00**
Profit	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**45,108.00**	**541,296.00**

April, 2024 through March, 2025													
Receipts	**April**	**May**	**June**	**July**	**August**	**September**	**October**	**November**	**December**	**January**	**February**	**March**	**Totals**
Gross Revenue	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	126,412.65	1,516,951.80
Direct Expenses of Dog Walking Labor	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-655,200.00
Gross Profit	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	861,751.80
Total	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**71,812.65**	**861,751.80**
Disbursements	**April**	**May**	**June**	**July**	**August**	**September**	**October**	**November**	**December**	**January**	**February**	**March**	**Totals**
Rent	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Insurance	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	7,500.00
Utilities	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	12,000.00
Advertising	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Supplies	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
Administrative Employees	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	18,720.00
Management Salaries	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Total	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**248,220.00**
Profit	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**51,127.65**	**613,531.80**

April, 2025 through March, 2026													
Receipts	**April**	**May**	**June**	**July**	**August**	**September**	**October**	**November**	**December**	**January**	**February**	**March**	**Totals**
Gross Revenue	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	132,733.28	1,592,799.36
Direct Expenses of Dog Walking Labor	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-54,600.00	-655,200.00
Gross Profit	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	54,600.00	937,599.36
Total	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**78,133.28**	**937,599.36**

FINANCIAL BUDGET
FROM APRIL 2021 THROUGH MARCH 2026

Disbursements	April	May	June	July	August	September	October	November	December	January	February	March	Totals
Rent	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Insurance	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	7,500.00
Utilities	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	12,000.00
Advertising	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Supplies	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
Administrative Employees	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	1,560.00	18,720.00
Management Salaries	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Total	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**20,685.00**	**248,220.00**
Profit	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**57,448.28**	**689,379.36**

Practical Evidence Manual

by

Judge Michael G. Williamson

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Practical Evidence Manual

by
Judge Michael G. Williamson

* * *

I. The "Basics."

A. Absent a "short cut," i.e., a stipulation, unopposed proffer, judicial or evidentiary admission, judicial notice, or a presumption, there are generally four ways to establish a fact at an evidentiary hearing or trial: (1) real evidence (the thing itself, e.g., the murder weapon); (2) demonstrative evidence (a depiction of the thing, e.g., a picture or diagram); (3) testimonial evidence; and (4) documentary evidence.

B. As a predicate for the admissibility of evidence, the proponent must establish the following:

1. **Relevance**. The evidence must be relevant. That is, under Rule 401 the evidence must have any tendency to make any fact that is of consequence more or less probable.

2. **Personal Knowledge**.

a) The witness must have personal knowledge about the matters about which the witness is testifying. Under Rule 602 a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter (with the exception of experts who may rely on inadmissible evidence in forming opinions).

b) In the case of documentary evidence, as a condition precedent to receiving the exhibit into evidence, there must be evidence sufficient to support a finding that the exhibit in question is what its proponent claims.[1] Typically, this evidence is in the form of testimony of a witness with personal knowledge that the exhibit is what it is claimed to be.[2]

3. **Not Subject to Rule of Exclusion**. Finally, the evidence must not be subject to a rule of exclusion. If the evidence is subject to a rule of exclusion, e.g.,

[1] FED. R. EVID. 901(a).
[2] FED. R. EVID. 901(b)(1).

the hearsay rule, it must fall within an exception to the rule of exclusion, e.g., the business records exception.

C. Under Rule 104, these foundational requirements are considered "preliminary questions" concerning the admissibility of the evidence. Importantly, in making its determination of whether the evidence is admissible, the court "is not bound by the rules of evidence except those with respect to privilege."[3] As a result, when deciding whether certain evidence is admissible, e.g., whether an exception to the hearsay rule applies, the court may consider inadmissible evidence other than privileged evidence including hearsay evidence.[4]

II. Common Rules of Exclusion.

A. Hearsay Rule.[5]

1. Defined.[6]

a) For a statement to be hearsay, three elements must be established:

(1) The statement must be made "other than … while testifying at the trial or hearing."[7]

(2) The statement must be offered in evidence to prove the truth of the matter asserted.[8]

(3) The statement must be an oral or written assertion or nonverbal conduct of a person that is intended by the person as an assertion.[9] The "key to the definition" of an assertion "is that nothing is an assertion unless intended to be one."[10] For example, questions are generally held not be assertions.[11]

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[3] FED. R. EVID. 104.
[4] *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Byrom*, 910 F.2d 725, 734-35 (11th Cir. 1990).
[5] *See also* "Writings are Hearsay," § V.D., *infra.*
[6] Hearsay is also discussed in the context of written hearsay more comprehensively in Section V.C. ("Writings are Hearsay").
[7] Fed. R. Evid. 801(c).
[8] *Id.*
[9] FED. R. EVID. 801(a).
[10] Advisory Committee Note to Rule 801(a).
[11] Arguably, questions not only seek information, but they convey information, too. However, as explained in *U.S. v. Love,* 706 F.3d 832, 839-40 (7th Cir. 2013), "A speaker who asks, 'Son, is it raining outside?' clearly intends to get information about the weather, but the speaker also implicitly communicates information—for instance, that he or she is probably indoors, is interested in the weather, and has a son." This fact has led some commentators to argue that "we should view both

b) Out-of-court statements not offered to prove of the matter asserted are not hearsay. Categories of these not-hearsay statements include words that have an independent legal significance (referred to as "verbal acts" as discussed below); statements that are offered to prove their effect on the listener; statements offered as circumstantial evidence of the declarant's state of mind; and prior statements offered to impeach or rehabilitate.[12]

2. Verbal Acts Are Not Hearsay.

a) A "verbal act" is "an act performed through the medium of words, either spoken or written."[13] The verbal acts doctrine applies where legal consequences flow from the fact that words were said, e.g., the words of offer and acceptance which create a contract.[14]

b) The Federal Rules of Evidence "exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."[15]

c) Thus, a written contract has independent legal significance and is not hearsay. It defines the rights and obligations of the parties thereto regardless of the truth of the assertions in the contract.[16] This includes negotiable instruments.[17] And communications between the parties to a contract that define the terms of a

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imperatives and questions as 'statements' for purposes of the hearsay doctrine" because "both intentionally express and communicate ideas or information." *Id. (citing* 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:6 (3d ed.2007). However, every Circuit to consider the issue has rejected this approach adopting the view that questions are not assertions and, therefore, not hearsay. *U.S. v. Love,* 706 F.3d 832, 839-40 (7th Cir. 2013) (citing *United States v. Thomas*, 453 F.3d 838, 845 (7th Cir. 2006), *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir.2006); *Lexington Ins. Co. v. W. Pa. Hosp*., 423 F.3d 318, 330 (3d Cir. 2005); *United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003); *United States v. Jackson*, 88 F.3d 845, 848 (10th Cir.1996); *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990); *United States v. Oguns*, 921 F.2d 442, 449 (2d Cir. 1990).

[12] Use of such statements for impeachment is discussed below in the Cross Examination portion of these materials.

[13] BLACK'S LAW DICTIONARY 25 (7th ed. 1999).

[14] *Id* at 1554 (7th ed. 1990); *see also* 2 John W. Strong, MCCORMICK ON EVIDENCE § 249, at 100-01 (5th ed. 1999).

[15] FED. R. EVID 801(c) Advisory Committee's Note.

[16] *See, e.g., Stuart v. UNUM Life Ins. Co. of America,* 217 F.3d 1145, 1154 (9th Cir. 2000); *Kepner-Tregoe, Inc. v. Leadership Software*, 12 F.3d 527, 540 (5th Cir. 1994) (finding contract to be a signed writing of independent legal significance and therefore non-hearsay).

[17] *United States v. Tann*, 425 F. Supp. 2d 26, 29 (D.D.C. 2006) (finding negotiable instruments to be legally operative documents that do not constitute hearsay).

contract, or prove its content, are not hearsay, as they are verbal acts or legally operative facts admitted to prove the terms of the contract.[18]

3. Witness's Prior Inconsistent Statements.[19]

a) Rule 613 and 801(d)(1) Compared.

(1) There are two independent Rules that deal with the use of a witness's prior statement during trial. The first of these is Rule 613 that deals generally with the impeachment of a witness by showing that the witness made a prior statement that was inconsistent to the statement being made in court. This will be discussed in further detail in the section of this manual dealing with impeachment.

(2) The other rule dealing with prior statements of a witness is found in Rule 801 that defines hearsay. It provides that a witness's prior inconsistent statement is not hearsay provided the witness testifies and is subject to cross-examination about the prior statement, and the statement was given under oath and is inconsistent with the declarant's testimony at trial.[20]

(3) These rules operate differently and should not be confused with one another. Rule 613(b) applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary—not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question).[21] "The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements."[22]

(4) Thus, while Rule 613 provides that extrinsic evidence of a witness's prior inconsistent statement is admissible if the witness is given an opportunity to

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[18] *See, e.g., Preferred Props., Inc. v. Indian River Estates Inc.,* 276 F.3d 790, 799 n.5 (6th Cir. 2002) (holding that verbal acts creating a contract are not hearsay); *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992) (holding contracts and letters from attorney relating to the formation thereof are non-hearsay);

[19] Prior inconsistent statements are also discussed in Section comprehensively in Section IV.B.6.d) ("Areas of Impeachment").

[20] FED. R. EVID. 801(d)(1).

[21] *U.S. v. Winchenbach,* 197 F.3d 548, 558 (1st Cir. 1999) citing *United States v. Higa*, 55 F.3d 448, 451–52 (9th Cir.1995); *Kasuri v. St. Elizabeth Hosp. Med. Ctr.*, 897 F.2d 845, 853–54 (6th Cir. 1990); *United States v. Causey*, 834 F.2d 1277, 1282–83 (6th Cir.1987); *United States v. Lay,* 644 F.2d 1087, 1090 (5th Cir. 1981).

[22] *McCormick on Evidence*, § 34, at 114 (7th ed. 2013).

explain or deny the statement and the adverse party is given an opportunity to examine the witness about it, prior inconsistent statements are generally admissible for impeachment purposes only under Rule 613 and are inadmissible hearsay for substantive purposes unless they were made at "a trial, hearing, or other proceeding, or in a deposition."[23]

(5) On the other hand, Rule 801(d)(1)(A) provides that a witness's prior inconsistent statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination about the statement and the statement was given under penalty of perjury in a deposition or at another trial. Assuming the prior inconsistent statement fulfills the usual foundational requirements for admissibility of evidence, e.g., relevance and personal knowledge, it is admissible as substantive evidence.[24]

b) Witness's Prior Statements under Rule 801(d)(1)(A).

(1) A witness's prior inconsistent statement is not hearsay provided:

(a) The witness testifies and is subject to cross-examination about the prior statement, and

(b) The statement was given under oath and is inconsistent with the declarant's testimony at trial.[25]

(2) A witness's prior consistent statement is not hearsay provided:

(a) It is offered to dispute a charge (express or implied) that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(b) It is offered to rehabilitate the declarant's credibility as a witness when attacked on another ground.[26]

4. Opposing Party's Statements under Rule 801(d)(2).[27]

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[23] *Santos v. Murdock,* 243 F.3d 681, 684 (2d. Cir. 2001). *See, also, U.S. v. Neal,* 452 F.2d 1085, 1086 (10th Cir. 1971).("The inconsistent statement is admitted, not as competent substantive evidence of the truth of the matters asserted, but only to impeach or discredit the witness.").

[24] *Weinstein's Federal Evidence,* § 801.21[1], at 801-33 (2d ed. 2014).

[25] FED. R. EVID. 801(d)(1).

[26] FED. R. EVID 801(d)(1)(B) (amended 2014) (The Advisory Committee noted that "[t]he intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness . . . prior consistent statements otherwise admissible for rehabilitation are not admissible substantively as well.").

[27] FED. R. EVID. 801(d)(formerly known as "Admission by Party Opponent").

a) An opposing party's statement is not hearsay if it is offered against the opposing party and the statement:

(1) was made by the party in an individual or representative capacity;

(2) is one the party manifested that it adopted or believed to be true;

(3) was made by a person whom the party authorized to make a statement on the subject;

(4) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(5) was made by the party's coconspirator during and in furtherance of the conspiracy.

b) Even though an opposing party's statement can be used against the party who made the statement it cannot be used against any other party unless the party is a coconspirator and the statement was made in furtherance of the conspiracy.[28]

c) This exclusion from hearsay is not to be confused with the Rule 804(b)(3), which provides an exception for declarations against interest. The Committee Note indicates that a statement can be within the exclusion even if it admitted nothing and was not against the party's interest when made.[29]

5. Hearsay Exceptions (Witness Availability Immaterial)--Rule 803.

a) Present Sense Impression.

(1) Rule 803(1) sets out an exception to the hearsay rule for an out-of-court statement that is declarant's present-sense impression describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.[30]

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[28] *See Stalbosky v. Belew*, 205 F.3d 890, 894 (6th Cir. 2000) (stating that "[u]nder Rule 801(d)(2)(A), a party's statement is admissible as non-hearsay only if it is offered against that party."; *United States v. Trujillo*, 146 F.3d 838, 844 (11th Cir. 1198) (indicating agreement with the district court's curative instruction "stating that 'any statements made by [the declarant] after his arrest can only be considered against [the declarant] and cannot be considered as to any other defendant.'"; *accord United States v. Eubanks,* 591 F.2d 513, 519 (9th Cir. 1979) ("Under the provisions of Rule 801(d), inculpatory statement by appellants . . . are admissible as party admissions only against the individual declarants.").

[29] FED. R. EVID 801(c) Advisory Committee's Note.

[30] *See, e.g., U.S. v. Green,* 556 F.3d 151, 155 (3d Cir. 2009).

(2) The underlying premise of this exception is that substantial contemporaneity of event and statement negative the likelihood of defective recollection or conscious misrepresentation. And if the witness is the declarant, the witness may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement.[31]

(3) Courts have not adopted any bright-line rule as to when a lapse of time becomes too lengthy to preclude Rule 803(1)'s application. Generally a statement made within minutes of the event that was observed by the declarant will fall within this exception[32] while statements while statements made after a period of time will not.[33]

b) Excited Utterance.

(1) Rule 803(2) sets out an exception to the hearsay rule for excited utterances relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. This exception requires that (1) there was a startling event; (2) the statement was made while the declarant was under the stress of excitement from this event; and (3) the statement related to this event.[34]

(2) This exception is premised on the belief that a person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while the declarant's mind is preoccupied with the stress of an exciting event.[35]

(3) To qualify for this exception, there must be evidence that an event occurred and that it was startling. The content of the statement itself may be the only proof of the startling event occurred because the court is not bound by the rules

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[31] Advisory Committee Note to 803(1).
[32] *See, e.g., United States v. Shoup,* 476 F.3d 38, 42 (1st Cir.2007) (911 phone call made "only one or two minutes ... immediately following" event admissible); *United States v. Danford,* 435 F.3d 682, 687 (7th Cir.2006) (statement made "less than 60 seconds" after witnessing robbery qualified as present-sense impression).
[33] *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir.1979)("we are nevertheless unaware of any legal authority for the proposition that 50 minutes after the fact may appropriately be considered "immediately thereafter."); *United States v. Narciso*, 446 F. Supp. 252, 287-88 (E.D. Mich. 1977) (note written two hours after event and in response to questions not present-sense impression because declarant "not only had time to reflect on what had transpired [but] was intentionally encouraged to reflect on those events before answering").
[34] *Woodward v. Williams*, 263 F.3d 1135, 1140 (10th Cir. 2001).
[35] *United States v. Joy*, 192 F.3d 761, 766 (7th Cir. 1999)

of evidence in making determinations of admissibility of evidence and is entitled to rely on hearsay.[36]

(4) This exception is different from the present sense impression because the statement need not describe or explain the event or condition observed by the declarant; it must only relate to the event in some manner.[37]

c) Recorded Recollection.[38]

(1) Rule 803(5) sets out an exception to the hearsay rule for a record concerning a matter about which a witness once had personal knowledge but as to which the witness now has insufficient knowledge provided the record can be shown to:

(a) have been made or adopted by the witness when it was fresh in the witness' memory; and

(b) to accurately reflect the witness's memory.

(2) The requirement that the record concern a matter that "accurately reflects the witness's knowledge" means that the record will not be admissible unless the witness had sufficient personal knowledge of the events in question at the time of recording the recollection to satisfy the requirement that a witness must have personal knowledge of the matter to which the witness is testifying.[39]

(3) If the record is admitted, it may be read into evidence but not received as an exhibit unless offered by the adverse party.[40]

6. Residual Exception.[41]

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[36] Fed. R. Evid. 104(a)(in deciding questions of admissibility of evidence, "the court is not bound by the rules of evidence….").
[37] *Woodward v. Williams*, 263 F.3d 1135, 1141 (10th Cir. 2001)("The Advisory Committee Notes to Rule 803 specifically state that an excited utterance is not limited to a "description or explanation of the event or condition" but rather includes anything that "relate[s]" to the event."). In *Woodward,* the court held that the decedent's statement "He is going to kill me" was properly admitted at the defendant's trial for murder as an excited utterance because the statement was made after she witnessed a violent confrontation between her father and her estranged husband and while she was curled in a fetal position even though it did not describe a startling event that precipitated the statement. It was sufficient that the statement "relates to" the startling event.
[38] FED. R. EVID. 803(5).
[39] FED. R. EVID. 602 ("Need for Personal Knowledge").
[40] FED. R. EVID. 803(5).
[41] FED. R. EVID. 807.

a) A statement that does not fall within one of the enumerated hearsay exceptions in Rule 803 or 804 may nevertheless be admissible provided it has equivalent circumstantial guarantees of trustworthiness.

b) Five conditions must be met to admit hearsay evidence under the residual exception of Rule 807:

(1) There must be equivalent circumstantial guarantees of trustworthiness;

(2) It must be offered as evidence of a material fact;

(3) It must be more probative than other available evidence;

(4) Admitting the evidence must serve the interests of justice; and

(5) Reasonable notice of the intent to offer the statement and the substance of the statement must be provided to the opposing party before trial.[42]

c) As to any failure to provide notice, the objecting party must show he was harmed by the testimony or that he did not have "a fair opportunity to meet the statements."[43]

B. Compromise and Offers to Compromise.

1. Evidence of an offer to compromise or conduct or a statements made during compromise negotiations about the claim is not admissible to prove or disprove the validity or amount of a disputed claim.[44]

2. Importantly, the claim must be disputed in some way before this rule of exclusion applies.

a) The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a

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[42] FED. R. EVID. 807. *See, e.g., United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984) (citing *United States v. Mathis*, 559 F.2d 294, 298 (5th Cir. 1977)).
[43] *United States v. Leslie*, 542 F.2d 285, 291 (5th Cir.1976). *See also United States v. Iaconetti*, 540 F.2d 574, 578 (2d Cir.1976), cert. denied, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977) (holding that where "defendant did not request a continuance or in any way claim that he was unable adequately to prepare to meet the rebuttal testimony [it] further militates against a finding that he was prejudiced by it.").
[44] FED. R. EVID. 408.

lesser sum. That is, the rule requires that the claim be disputed as to either validity or amount.[45]

b) "The [Advisory Committee's] Note requires a careful distinction between frank disclosure during the course of negotiations—such as, 'All right, I was negligent. Let's talk about damages' (inadmissible)— and the less common situation in which both the validity of the claim and the amount of damages are admitted—'Of course, I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it' (admissible)."[46]

III. Commonly Overlooked Rules.

A. Limited Admissibility.

When evidence that is admissible as to one party or one purpose but not for another party or purpose is admitted, the court shall, upon request, restrict the evidence to its proper scope and instruct the jury accordingly.[47]

B. Remainder of or Related Writings.

When a writing or recorded statement is introduced by a party, and adverse party may require the introduction at that time of any other part or any other writing or recorded statement that ought in fairness to be considered at the same time.[48]

C. Habit; Routine Practice.

Evidence of a person's habits or an organization's routine practices is relevant to prove that the person or organization acted in conformity with the habit or routine practice on a particular occasion. This is true regardless of whether the evidence is corroborated.[49]

D. Rule of Sequestration of Witnesses.

1. The court must, if requested by a party, order witnesses excluded so that they cannot hear other witnesses' testimony. The court may also do so on its own.[50] The rule is one of the most important trial mechanisms for reaching truth.

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[45] *Molinos Valle Del Cibao v. Lama,* 633 F.3d 1330 (11th Cir. 2011) (citing *Advisory Committee* Note to FED. R. EVID. 901; 2 WEINSTEIN'S FEDERAL EVIDENCE § 408.06 (2d ed. 2010)).
[46] *Id.* (citing *Preis v. Lexington Ins. Co.,* 279 F. App'x 940, 942-43 (11th Cir. 2008); *Dallis v. Aetna Life Ins. Co.,* 768 F.2d 1303, 1306-07 (11th Cir. 1985)).
[47] FED. R. EVID. 105.
[48] FED. R. EVID. 106.
[49] FED. R. EVID. 406.
[50] FED. R. EVID. 615.

Sequestration of witnesses has been referred to as "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[51]

2. The right to exclude witnesses was not created by the Federal Rules of Evidence. Its origin dates to the Book of Susanna, in the Apocrypha.[52] Susanna of Biblical times was charged with adultery, for which the penalty was death. Daniel, suspecting complicity between the two prosecutorial witnesses, issued this order: "Separate the witnesses far from each other, and I will examine them." When the process revealed material discrepancies in the witnesses' stories, Susanna was acquitted and the witnesses were beheaded for giving false testimony. Professor Wigmore, characterizing the pedigree and importance of the sequestration rule, states, "There is perhaps no testimonial expedient which, with as long a history, has persisted in this manner without essential change."[53]

3. The Court, however, may not exclude any of the following:

a) A party who is a natural person.

b) An officer or employer that is a representative of a corporate party.

c) A person who is shown to by a party to be essential to a party's cause.

d) A person authorized by statute to be present. [54]

4. A common exception to this rule is expert witnesses whose presence may be to advise counsel in the management of the litigation.[55] The policy reasons for the sequestration rule preventing one witness from conforming his testimony to that of another are not applicable when an expert is involved. The expert testifies to his opinion, not to controverted facts.[56]

5. The sequestration rule has been held to apply to depositions.[57]

6. This rule has also been interpreted to include prohibiting witnesses from discussing their testimony with other witnesses outside of the courtroom. The rule, however, does not by its terms prohibit lawyers from communicating with witnesses. But the United States Supreme Court[58] has held that a trial court's

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[51] Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996).
[52] "The history of Susanna," Art and the Bible (http://www.artbible.info/bible/susanna/1.html).
[53] *Government of Virgin Islands v. Edinborough*. 625 F.2d 472, 473 (3rd Cir. 1980)(citing 6 Wigmore on Evidence § 1837, at 457).
[54] FED. R. EVID. 615.
[55] *Advisory Committee* Note to FED. R. EVID. 615 (citing 6 Wigmore §1841, n. 4).
[56] *See, e.g., Skidmore v. Northwest Engineering Co.,* 90 F.R.D. 75, 76 (S.D. Fla. 1981).
[57] *Id.* (citing *Williams v. Electronic Control Systems, Inc.,* 68 F.R.D. 703 (E.D. Tenn. 1975)).
[58] *Perry v. Leeke,* 488 U.S. 272, 283-84 (1989).

inherent authority to control its proceedings includes the right to prohibit lawyers from communicating with witnesses—even when the witness is the lawyer's client. A lawyer seeking to preclude opposing counsel from communicating with a witness must request an appropriate order from the trial court. The decision to prohibit lawyers from communicating with witnesses is within the trial court's discretion.[59]

E. Proffers.

1. Where an objection is sustained and evidence is excluded, to preserve a claim of error, the party offering the evidence must inform the court of its substance by an offer of proof, unless the substance is apparent from the context.[60]

2. The method of making the offer of proof is within the court's discretion and can take various forms:

a) Typically, a proffer is made by having the witness answer the question on the record out of the presence of the jury.

b) As an alternative, a proffer may also be made by including in the record a written statement of the anticipated answer.

c) Counsel may also orally proffer to the court the answer which is being excluded.[61]

IV. The "Do's" and "Don'ts" of Effective Witness Examination.

A. Direct Examination.

1. Applicable Rule.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

[59] For an excellent discussion of "invoking the rule" to preclude opposing counsel from communicating with witnesses, *see* Judge Tom Barber, *Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule*, 83 Fla. Bar. J. 58 (July/August 2009).

[60] See FED. R. EVID. 103(a)(2).

[61] *Johnson v. Moore,* 493 F. Supp. 2d 1236, 1240 (citing Charles W. Ehrhardt, Florida Evidence (2006), § 104.3, pp. 31-32).

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

2. Questions asked of the witness by the person calling the witness are called direct examination. With certain exceptions, leading questions should not be used on direct examination.

3. A leading question is one that suggests the answer to the person being questioned. If a question can be answered by a mere "yes" or "no" it is generally considered leading. As a general proposition, questions containing the words, "Who, What, When, Where, Why, or How," are not leading questions.

4. Examples:

a) Leading question—"Was Mr. Jones in the room with you?"

b) Non-leading question—"Who was in the room with you?"

5. Exceptions.

a) "[E]xcept as necessary to develop the witness' testimony." Rule 611(c) provides that even on direct examination leading questions are proper to the extent necessary to develop the witness' testimony. Examples:

(1) Undisputed preliminary or inconsequential matters may be brought out through leading questions. To lead a witness through questions on topics on which there is absolutely no controversy is an efficient use of court time and is harmless to the opposing party.

(2) A witness that has trouble communicating such as a child or an adult with a communication problem may be asked leading questions.

(3) A witness whose recollection has been exhausted may under appropriate circumstances have his or her memory refreshed through the use of leading questions.

(4) In making a transition, a witness may be led to a new topic.

b) Hostile Witnesses. Of course, when an adverse party is called or a witness who is shown to be hostile to the examiner's questions, then leading

questions become necessary to elicit the truth. The harm of having friendly witnesses respond to suggestive questions is not present. In such cases, examination may proceed as if on cross-examination.

B. Cross-Examination.

1. Applicable Rule.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

2. Scope of Cross-Examination.

While the scope of cross-examination should generally be limited to the subject matter of the direct examination and matters affecting credibility, it is often expedient from the standpoint of court time and the convenience of witnesses to inquire in areas that are not covered on direct examination. This is particularly true in bankruptcy court where evidentiary hearings are often conducted on an emergency basis and time is at a premium. Rule 611(b) in fact contemplates that the court has broad discretion to permit inquiry in additional areas. A simple request to the court to inquire outside the scope of direct accompanied by an explanation of the witness's personal needs will ordinarily be granted.

Note, however, that when cross-examination is permitted to go beyond the scope of direct, for example, to establish facts supporting an element of the examining party's case, the examiner is required to ask questions of non-hostile witnesses as if on direct.[62]

[62] *MDU Resources Group v. W.R. Grace and Co.,* 14 F.3d 1274, 1282, n. 14 (8th Cir. 1994).

3. Practice Pointers.[63]

a) Before rising to cross-examine a witness, the advocate should first consider the following questions. Has the witness given any testimony that is harmful to the advocate's case? Are the facts testified to by the witness subject to reasonable dispute? Most importantly, is it necessary for the advocate to cross examine the witness at all?

b) In the words of one of the great trial lawyers of all times:

> "Most young lawyers seem to think it is necessary to cross-examine every witness called against their side of the case. Being conscious of their own capacity as trial lawyers, they are afraid of being criticized by their clients or associates if they lose the opportunity for cross examining. At the very threshold of this discussion let me denounce this idea as most erroneous. Almost daily, even now, lawyers associated with me in my cases expostulate with me for allowing witnesses to leave the stand without any cross-examination, until the excited whisper in my ear, 'Are you going to ask this witness any questions at all?' has become so familiar that I should almost miss its absence in my daily work."[64]

c) More damage is done by attorneys to their client's cases in the area of cross-examination than any other area. All too often, gaps in an opposing party's prima facie case are filled by the other party on cross-examination. "An advocate should remember that 'he is the greatest cross examiner who makes the fewest blunders,' and a single mistake may make an opening for a flood of testimony that may overwhelm him."[65]

4. Cross-Examination of a Friendly Witness.

Oftentimes a party will call as a witness the opposing party or agent of the opposing party. The adverse party may use leading questions in the direct examination because the witness is the adverse party.[66] The attorney representing the party will then often proceed to use leading question on cross-examination of his own client. The same dangers exist in permitting leading questions in such instances. While Rule 611(c) provides that "ordinarily" leading questions should be

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[63] For an informative and entertaining lecture on this topic *see* Irving Younger, The Ten Commandments of Cross-Examination (National Institute for Trial Advocacy 1975) (video recording available from Stetson University College of Law, Law Library) ("Younger's Ten Commandments").
[64] FRANCIS L WELLMAN, DAY IN COURT OR THE SUBTLE ARTS OF GREAT ADVOCATES 182 (The Macmillan Company 1910).
[65] *Id.* at 183.
[66] "Ordinarily, the court should allow leadings questions…when a party calls … an adverse party…." FED. R. EVID. 611(c)(2).

permitted on cross-examination, the general rule has no applicability when the witness is friendly. In such instances, the prohibition against leading questions applies.[67]

5. Ten Rules of Cross-Examination.

Here are Ten Rules to follow when considering whether and how to conduct cross-examination:[68]

Rule #1: Be brief, short, and succinct. Use short questions with plain words. Avoid long complicated sentences containing clauses with subordinate clauses on subordinate clauses. On a good day, you may have three points to make. Make them and sit down. Remember—the shorter the time you're on your feet, the less damage you'll do.

Rule #2: Never ask anything but a leading question. (Go ahead, put words in the witness's mouth—make the witness say what you want.)

Rule #3: Never ask a question to which you do not already know the answer. "[I]t should be remembered that fishing questions are very apt to catch the wrong answers."[69] Cross-examination is not a deposition—the time for discovery has passed! An exception to this is where it doesn't matter what the answer is.

Rule #4: Listen to the answer!

Rule #5: Do not quarrel with the witness. Avoid the one question too many. If you get a stupid answer, STOP. (See Rule #6 below.)

Rule #6: Never permit a witness to explain anything. They will.

Rule #7: Do not give the witness an opportunity to repeat what the witness said on direct examination. All too often the advocate takes the witness over the same story that the witness has already given his adversary in the absurd hope that the witness is going to change the story in the repetition and not

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[67] According to the Notes of Advisory Committee on Proposed Rules to FED. R. EVID. 611, "[t]he purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff." *See also Ardoin v. J. Ray McDermott & Company, Inc.,* 684 F.2d 335, 336 (5th Cir. 1982).

[68] Rules one through seven are adapted from Younger's Ten Commandments.

[69] WELLMAN, *supra* note 15, at 185.

retell it with double effect upon the trier of fact.[70] This only reinforces the other party's case.

Rule #8: When in doubt, stick to safe areas for cross, e.g., areas of impeachment (discussed below) such as bias or lack of sincerity, faulty perception, faulty memory, and prior inconsistent statements.

Rule #9: Don't make a mountain out of a mole hill. "The mistake should be avoided, so common among the inexperienced, of making much of trifling discrepancies. It has been aptly said that juries have no respect for small triumphs over a witness's self possession or memory."[71]

Rule #10: Don't be a jerk. "The sympathies of the jury [or judge] are invariably on the side of the witness, and they are quick to resent any discourtesy toward him."[72] "It is marvelous how much may be accomplished with the most difficult witness simply by good humor, a smile, and tone of friendliness."[73] "An advocate should exhibit plainly his belief in the integrity of the witness and a desire to be fair with him, and try to induce him into being candid."[74]

6. Areas of Impeachment.

a) Bias, Interest, Prejudice, and Corruption.[75]

(1) While the Federal Rules of Evidence do not by their terms deal with impeachment for bias, interest, prejudice, or corruption, it is clear that the Rules do contemplate such impeachment.[76] In this respect, Rule 611(b) allows cross examination on matters affecting the credibility of the witness.

(2) Bias means the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, the witness's testimony in favor of or against a party. Bias may be induced by the witness's like or dislike of a party, or by the witness's self-interest. Proof of bias is always relevant and extrinsic evidence of it is admissible.[77]

(3) Prejudice is an irrational predisposition against the witness.

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[70] *Id.* at 187.
[71] *Id.* at 195.
[72] *Id.* at 189.
[73] *Id.*
[74] *Id.* at 194.
[75] ROBERT E. OLIPHANT, YOUNGER ON EVIDENCE (WITH FEDERAL RULES OF EVIDENCE) 36 (self-published 1978) ("*Younger*").
[76] *United States v. Abel,* 469 U.S. 45, 50 105 S. Ct. 465, 468 (1984).
[77] *Id.*

(4) Interest is having a stake in the outcome.

(5) Corruption is bribing a witness.

(6) Examples:

(a) Bring out any relationship between the witness and litigation that might reflect on the witness's objectivity. For example, after heartrending testimony of mother of plaintiff about how the accident has impaired his ability to function, counsel for the defense asks the following question and then sits down. "Mrs. Smith, you love your son don't you?"

(b) Bring out terms of compensation with respect to paid witnesses.

(c) The witness's meeting with opposing counsel and possible "coaching" received by witness by opposing counsel in connection with the witness's testimony may show bias.

b) Perception and Recollection.

(1) The object of this method is to elicit testimony that reflects adversely on the witness's capacity to observe or recall facts about which the witness is testifying.

(2) Examples:

(a) Physical proximity of witness to object or transaction observed.

(b) Weather, lighting, obstructions, and other conditions that might impair the witness his ability to observe.

(c) Coaching by opposing counsel may show that the witness's perception was not based upon personal knowledge but on what the witness was told by opposing counsel.

(d) The witness's incorporation of new and potentially inaccurate information that was learned afterwards. This could include later conversations with others that reinforced opinions about identification.

(e) Influence of drugs or alcohol either at the time of the event or at trial.

(f) Mental impairment at a time related to the time period about which the witness is testifying.

(3) Practice tips:

(a) Stick to the objective facts.

(b) Bad question: "Mrs. Jones, isn't it a fact that it was dark that night and you could not see what my client was doing?" Inevitably, the witness will testify that she could see just fine.

(c) Good question: "Mrs. Jones, isn't it a fact that the time of day that you saw my client was 1 AM?" Next question: "And the nearest streetlight was approximately 100 feet away?"

c) Character or Reputation for Truthfulness.

(1) Reputation.

(a) While generally evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, character evidence is admissible when it bears upon a witness's credibility. See Fed. R. Evid. 404(a)(3) and 608(a). The inquiry is strictly limited to character for truthfulness rather than allowing evidence as to character generally.

(b) Proof of character for truthfulness or untruthfulness may be made by testimony as to reputation or by testimony in the form of an opinion. Rule 608(a).

(i) For reputation evidence, a foundation must be laid showing that the testifying witness has sufficient contact with the community to enable the witness to be qualified as knowing the general reputation of the person in question (or the community's assessment).

(ii) Opinion evidence does not require the same foundation required for reputation testimony. Opinion testimony relates only to the witness's own impression of an individual's character for truthfulness. Therefore, a foundation of long acquaintance is not required. An opinion witness may testify based upon that witness's personal knowledge.

(c) Character evidence in support of truthfulness is only admissible after the principal witness's character has been attacked by another witness testifying that the principal witness is untruthful. Rule 608(a)(2).

(d) A witness who is called to prove the bad reputation of another may, after he has testified to that reputation, be asked if he would believe the witness under oath.[78]

(e) Examples: testimony of employers, neighbors, family members, or former friends.

(2) Commission of Bad Acts.

(a) Under Rule 608(b), specific instances of bad conduct of a witness for purposes of attacking or supporting his credibility are not admissible with two exceptions:

(i) First, specific instances are admissible as set forth in Rule 609 when they have been the subject of a criminal conviction.

(ii) Second, specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of the principal witness's character for truthfulness. The purpose of such testimony is to show that the witness's conduct is indicative of his character for untruthfulness. The conduct in question must be probative of untruthfulness and not be too remote in time.

(b) Examples: false statements, dishonest acts, or fraudulent acts.

(c) Specific instances of the conduct of the witness for purpose of attacking or supporting the witnesses character for truthfulness may not be proved by extrinsic evidence.

(3) Conviction of a Crime.

(a) Under Rule 609, evidence that a witness has been convicted of a crime shall be admitted to impeach the witness if the following conditions are met:

(i) The crime is punishable by imprisonment in excess of one year or an element of the crime required proof of dishonesty by the witness,

(ii) The court determines that the probative value of admitting the evidence outweighs its prejudicial effect, and

(iii) The witness was convicted or release from confinement less than 10 years ago. (If more than 10 years have elapsed, then the evidence may

[78] *United States v. Walker*, 313 F.2d 236, 239-40 (6th Cir. 1963).

still be admissible if the proponent gives the adverse party notice of intent to use the evidence prior to trial.)

(b) The pendency of an appeal does not render the evidence of the conviction inadmissible.

d) Prior Inconsistent Statement.

(1) Rule 613 deals with impeachment through the use of prior statements of the witness whether written or not. This is a common form of impeachment and often occurs when a witness's testimony at trial differs from the witness's testimony at a deposition.

(2) In practice, there are three steps to impeachment through the use of a prior inconsistent statement -- Commit, Credit, Confront:

(a) Commit. Get the witness to recommit to the testimony that the witness gave on direct examination. For example, on cross you inquire: "Mr. Jones, during your direct testimony you testified that you are unaware of any roof leaks as of January 3, 2008, the date of the closing of the sale. Is that correct?"

(b) Credit. Get the witness to accredit the source of the prior statement. Remember you want the prior statement to win. If the prior source was testimony, go through the oath given prior to testifying, the importance that the witness assigned to signing the affidavit or giving the deposition testimony, and the nearness in time of the testimony to the incident. This is why the "commitment questions" asked at the beginning of a deposition are so important.

(c) Confront. Read the prior inconsistent statement. The only question you need to ask is "Did I read that correctly?" The inconsistency will be self-evident. And then move on. Don't ask the witness to explain the inconsistency. It may also be useful, however, to show some intervening event that resulted in the change of testimony. This could be a meeting with opposing counsel or party, or the passage of time and the inherent human tendency to forget.

(3) The rules governing the impeachment of a witness by use of prior inconsistent statements are as follows:

(a) Under the Federal Rules of Evidence, counsel examining the witness concerning the prior statement need not show the contents nor disclose the contents to the witness at the time. Rule 613(a). In this respect, Rule 613(a) abolishes the requirement that a written statement be shown or read to witness prior to examination there on. This rule originated in the famous 1820 English

decision in *Queen Caroline's Case.*[79] The rule was abolished in England in 1854. The rationale for abolishing this requirement was that showing the prior written statement to the witness on cross-examination may tip off the untruthful witness who will then tailor his testimony in a way that will minimize the impact of the inconsistency.[80] Although repealed in England, many states still follow the *Queen's Case* and require that prior to cross-examination of a witness concerning a prior inconsistent statement, the substance of the statement or the statement must be revealed to the witness.[81]

(b) However, under Rule 613(a), on request, the statement must be shown or disclosed to opposing counsel. This is designed to protect against unwarranted insinuations that a statement has been made when in the fact it has not.

(c) Extrinsic evidence of a prior inconsistent statement by the witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon. Rule 613(b).

(4) If impeachment is by deposition transcript already in the adverse party's possession, it is customary to specify the deposition date, page, and line of the deposition transcript being used to impeach.

(5) The use of prior inconsistent statements to impeach a witness under Federal Rule of Evidence 613 does not apply to statement of a party opponent as defined in Rule 801(d)(2).

(6) Under Rule 801(d)(1), prior statements of witnesses that are subject to cross-examination concerning the statement are by definition not hearsay so long as:

(a) The statement is inconsistent with the declarant's testimony and was given under oath at a hearing or deposition, or

(b) The statement is consistent with the declarant testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

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[79] *The Queen's Case,* 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820).
[80] John H. Wigmore, *Some Evidence Statutes that Illinois Ought to Have,* 1 Ill. L. Rev. 9 (1906) ("In short, if the witness had lied, and was ready to lie again, this gave him full warning and every chance to evade detection. This rule did as much to blunt a legitimate cross-examination as any one rule could do.").
[81] *See, e.g.,* § 90.614(1), Fla. Stat. (2011).

e) Contradiction of Testimony by Other Witnesses.

The testimony of a particular witness can also be impeached by other witnesses who give a different and possibly more credible recitation of the relevant facts.

V. The "ABC's" of Documentary Evidence.

A. Basic Requirements.

1. As with all evidence, absent a stipulation, documents can only be admitted if a witness with personal knowledge establishes the predicate that the documents are **relevant**, **authentic**, and not subject to a **rule of exclusion**.

2. Best Evidence Rule. In early jurisprudence before the development of copy machines, the use of copies was disfavored because of the fear of an error in making copies by hand. This led to the development of the Best Evidence Rule under which the original was required for production at trial. However, with the advent of modern copy machines, there is no longer a problem with the accuracy of copies. As a result, while Rule 1002 provides that an original writing is required, this rule is followed by Rule 1003 which states that a duplicate is admissible to the same extent as an original unless a question is raised as to the authenticity of the original or circumstances exist under which it would be unfair to admit the duplicate in lieu of the original.

B. Authentication of Documents.

1. The authentication burden is a "light one."[82] The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.[83] The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them.[84] Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[85]

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[82] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").
[83] *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury "could have reasonably concluded" that a document was authentic).
[84] *See* FED. R. EVID. 901(b)(1); *Caldwell*, 776 F.2d at 1002–03.
[85] *See Caldwell*, 776 F.2d at 1002.

2. If a document is being introduced through a witness's testimony, it may be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. Fed. R. Evid. 901(b)(1).

3. Sample Predicate Questions.

Q: Ms. Smith, I show you what I've marked as Movant's Exhibit 1. Can you identify this document?

A: Yes I can.

Q: What is it?

A: It is the contract between my company and Acme Corporation.

Q: How do you know that?

A: I signed it. (OK)

I negotiated it. (OK)

I found it in the files. (NOT OK)

C. Writings are Hearsay.

1. Hearsay Defined.

a) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[86] A "statement" includes a written assertion.[87]

b) Thus, as a general proposition, writings are hearsay and are not admissible under Rule 802 unless they fall within one of the categories set forth in "statements which are not hearsay" as defined in Rule 801(d) or within one of the exceptions to hearsay as set forth in Rules 803 or 804.

2. Self-Serving Letters.

Often a party will offer into evidence a letter or other document written by a witness appearing at the trial. There is a misconception that the fact that the witness is available to be cross examined somehow makes the writing admissible. There are several problems with receiving such documents into evidence:

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[86] FED. R. EVID. 801(c).
[87] FED. R. EVID. 801(a).

a) The documents fall within the definition of hearsay as written statements offered in evidence to prove the truth of the matter asserted. There is no exception to the hearsay rule contained in either Rule 803 or 804 for documents simply because they were prepared by a witness who is available to be cross examined.

b) Rule 801(d)(1) specifically deals with prior written statements by a witness who testifies at trial. This Rule provides that a statement is not hearsay if the declarant testifies at trial and the statement is *inconsistent* with the declarant's testimony, that is, it is a prior inconsistent statement. Such statements are commonly used for impeachment. This rule provides no basis for receiving into evidence prior consistent statements except in limited instances such as to rebut a charge of recent fabrication.[88]

c) Such documents typically contain numerous written assertions that have not been subjected to the rigors of the evidentiary process. That is, if the facts contained in the written assertions are to be received into evidence it must be shown that they are: (1) relevant, (2) based on the witness' personal knowledge, and (3) not subject to a rule of exclusion (e.g., the hearsay rule).

3. Appraisals and Other Expert Reports.

a) Invariably, after qualifying an expert witness to testify in the form of an opinion, the attorney calling the expert will move for introduction into evidence of the expert's written report. There is a misconception that because the witness is qualified to give the opinion set forth in the expert report, that the expert's written report is admissible. To the contrary, opposing counsel should object to the admission of the expert report on the following grounds:

(1) The facts or data contained in the expert's written report need not be admissible in evidence in order for the expert's opinion testimony to be admissible.[89] Consequently, the expert's written report will contain inadmissible evidence. If the written report is admitted into evidence without any reservations, then inadmissible evidence relied upon by the expert will then become part of the record.

(2) As with self-serving letters, written reports prepared by experts fall within the definition of hearsay as written statements offered in evidence to prove the truth of the matter asserted. There is no exception to the hearsay rule contained in either Rule 803 or 804 for expert reports.

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[88] FED. R. EVID. 801(d) (1) (B).
[89] FED. R. EVID. 703.

b) The opposing attorney should also be vigilant in objecting to the expert's testimony to ensure that it does not go beyond the opinions set forth in the written report. In this respect, the written report must contain a complete statement of all opinions the witness will express, the basis for the reasons for the opinions, and the data or other information considered by the witness in forming them.[90] Any testimony beyond the areas covered in the expert's written report should be objected to.

c) Even though the expert written report should not be admitted into evidence, it is nevertheless useful to have the report marked as an exhibit and received as a demonstrative aid to assist in following the expert's testimony. In this fashion, the inadmissible evidence contained in the report does not come into evidence. However, the report will be part of the record for reference purposes when considering the expert's testimony.

D. Business Records Exception.

1. Applicable Rule.

Rule 803(6). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.[91]

[90] FED. R. CIV. P. 26(a)(2)(B).
[91] FED. R. EVID. 803(6) (amended 2014) (shifting the burden to the opponent to show a lack of trustworthiness).

2. Historical Basis for Exception.

a) Shop Book Rule. The modern "business record" exception was derived from the common law "shop book rule." The American shop book rule was based upon the ground of necessity.[92] There were many small merchants who kept their own books and did not employ clerks or a bookkeeper; and since at ancient common law the parties to lawsuits were disqualified as witnesses, such merchants were nearly always without any available evidence to prove sales made by them on credit. Out of this necessity arose a rule permitting the use of a party's shop books as evidence of goods sold and services rendered. These are considered trustworthy because they are routine reflections of the day-to-day operations of the business.

b) To be distinguished are such records as accident reports or appraisals that may be routinely generated by the businesses who prepare them but do not have the same character of trustworthiness as "shop books," that is, books of account kept in the regular course of most businesses. As stated by the Supreme Court in *Palmer v. Hoffman,*[93] a case in which it was argued that accident reports regularly generated by a railroad in the conduct of its business were within the exception*:*

> "We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the [Business Records] Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule."

c) It follows that the name by which this exception to the hearsay rule is referred—the "business record exception"—is a misnomer. The trustworthiness of this type of documentary evidence does not come from the fact that it is associated with a business. It comes from the fact that the process by which it was created was part of a regularly conducted activity of the business.[94] That is why the title to the exception is "Records of a Regularly Conducted Activity."

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[92] *State v. Miller,* 144 P.3d 1052, 1058-60 (Or. App. 2006).
[93] 318 U.S. 109, 113-14, 63 S.Ct. 477 (1943).
[94] FED. R. EVID. 801(d) (1) (B); *see also* 28 U.S.C. § 1732.

3. Establishing Business Records Exception Applies.

a) To establish that the business records exception applies, the proponent must show two things. First, that the underlying documents are authentic. Second, that the requirements of Rule 803(6) have been met.[95]

b) The authentication burden is a "light one."[96] The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.[97] The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them.[98] Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[99]

4. Qualified Witness.

a) Rule 803(6) requires that the elements necessary to establish the document is a record of a regularly conducted activity be established by "the testimony of the custodian or other qualified witness." A receiver or bankruptcy trustee qualify as the "records custodians" for purposes of Rule 803(6).[100]

b) What constitutes a "qualified witness" other than a custodian is not defined by Rule 803(6). Generally, this requirement is met by establishing that the witness is familiar with the practices of the business in question at the time.[101] But

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[95] *United States v. Dreer,* 740 F.2d 18, 19-20 (11th Cir. 1984).
[96] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").
[97] *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury "could have reasonably concluded" that a document was authentic).
[98] *See* FED. R. EVID. 901(b)(1); *Caldwell*, 776 F.2d at 1002–03.
[99] *See Caldwell*, 776 F.2d at 1002.
[100] *Curtis v. Perkins (In re International Management Assoc., LLC),* 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006) (holding that the federally appointed receiver for a Ponzi scheme qualified as the scheme's "record custodian").
[101] Information in a business record, supplied by a prior business, can be authenticated by the present business holder of the record if the witness testifies to the present business holder's mechanisms (i.e. as part of the regular practice of business activity) for checking the accuracy of the prior business's information. *See Holt v. Calchas, LLC*, 155 So. 3d 499 (Fla. Dist. Ct. App. 2015) (explaining that a bank can use a prior bank's numbers in a business record when the current bank has "procedures in place to check the accuracy of the information that it received from the previous note holder").

the testifying witness does not need firsthand knowledge of the contents of the records, of their authors, or even of their preparation.[102]

c) The witness need not be the person who actually prepared the records so long as other circumstantial evidence and testimony suggests their trustworthiness.[103] In *International Management Associates,* the Eleventh Circuit held that the bankruptcy court could have reasonably concluded that the underlying documents were a true and authentic record of the debtor's business where the trustee testified that all of the underlying documents were found at the debtor's offices and that the information in those documents substantially matched the records kept by the financial institutions and clients with which the debtor had transacted. "That is all Rule 901 required."[104]

d) Examples of types of testimony by a successor custodian such as a receiver or trustee that are sufficient to establish that the proffered document are business records under Rule 803(6):[105]

(1) The investigation conducted by the trustee into the reliability of the documents.

(2) Interviews with former employees that established that the debtor's office routinely created the documents based on its interactions with financial institutions and other parties.

(3) A reconciliation of the debtor's documents with corresponding files held by third party financial institutions and third parties.

e) The proponent's testimony establishing the foundation for the business records exception may be based on hearsay. Under Rule 104(a), a court in making admissibility determinations is not bound by evidence rules, except those based on privilege. As a result, when deciding whether an exception to the rule against hearsay applies, the court may consider any unprivileged evidence—even hearsay.[106]

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[102] *See United States v. Bueno–Sierra*, 99 F.3d 375, 378–79 (11th Cir. 1996); *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984); *United States v. Atchley*, 699 F.2d 1055, 1058–59 (11th Cir. 1983). *See also United States v. Box*, 50 F.3d 345, 356 (5th Cir. 1995) ("A qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met....[T]he witness need not have personal knowledge of the record keeping practice or the circumstances under which the objected to records were kept.").

[103] *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984).

[104] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015).

[105] *Id.*

[106] *Id. (citing United States v. Byrom*, 910 F.2d 725, 734–35 (11th Cir. 1990).

5. Elements.

a) The exhibit being offered is a business **record**;

b) It is a record of an **event**;

c) The record was **made by**, or from information transmitted by, a person with knowledge of the transaction recorded;

d) The record was **made at or near the time** of the acts or event recorded;

e) The record is kept in the course of a **regularly conducted business activity**; and

f) It was the **regular practice of that business activity to make the record**.[107]

6. Example.

Here's an example in the context of establishing that a check register in a preference action is within this exception:

a) **Record**: check register.

b) **Event**: payment of invoice.

c) **Made by**: accounts payable clerk.

d) **Made at or near time**: when check is written.

e) **Regularly conducted business activity**: payment of invoices.

f) **Regular practice of business to keep records of payments of invoices**: You betcha'!

7. Sample Qualifying Questions.

Q: Ms. Smith, what was your position with company at time of bankruptcy filing?

[107] *See generally In re Vargas*, 396 B.R. 511, 518 (Bankr. C.D. Cal. 2008) (applying the basic elements to records maintained electronically and further detailing an "11-step foundation" for authenticating computer records).

A: Central office manager.

Q: How long were you so employed?

A: One year.

Q: What were your responsibilities?

A: I oversaw different departments in Acme's headquarters.

Q: Did this include bookkeeping?

A: Yes, it did.

Q: As former manager, what, if any, familiarity do you have with record keeping procedures employed by Acme during year prior to bankruptcy?

A: It was one of my areas of responsibility so I was very familiar with bookkeeping procedures and would do reviews and spot checks on a routine basis.

Q: Does this include the method used by the company for preparing check registers?

A: Yes.

Witness qualified? Sure. The witness was not the custodian or person who created the record, but the witness was certainly familiar with the process.

Now that we have a qualified witness, let's go through the elements:

Q: Let me show you what I've marked as Trustee's Ex. 1. What is it?

A: These are the check registers for Acme for the year before filing of the bankruptcy.

Q: What information do they reflect?

A: They list the check number, date of the check, invoice number, invoice date, payee, and the amount.

Q: When are they prepared?

A: On the day that the checks are mailed.

Q: Who prepares the check registry?

A: The accounts payable clerk.

Q: Does he or she actually mail the check?

A: No, it's done by a bookkeeper in one of the remote offices. They are the ones who actually prepared and mailed checks.

Q: What are these checks in payment of?

A: They are everyday A/P's owing to vendors.

Q: Was payment of A/P's in this manner a regularly conducted business activity of Acme?

A: Sure, if we wanted to stay in business.

Q: Was it the regular practice of Acme to make these records in this fashion?

A: Absolutely.

8. Pre-Trial Declaration as Alternative to Witness.

a) FED. R. EVID. 803(6) provides, as an alternative to introducing the evidence at trial through a "qualified witness," the filing and serving of a certification that complies with FED. R. EVID. 902(11).

b) Applicable Rule.

Rule 902. Evidence that is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

E. Summaries to Prove Content.

1. Under Rule 1006 a proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.

2. The only textual limit placed on the use of summaries by Rule 1006 is that "[t]he proponent most make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place."[108]

3. Rule 1007 does not require the proponent to introduce the underlying documents into evidence. However, establishing the admissibility of the underlying records is a condition precedent to introduction of the summary into evidence under Rule 1007.[109]

F. Social Media.

1. As with all evidence, absent a stipulation, copies of information obtained from social media sources can only be admitted if a witness with personal knowledge establishes the predicate that the documents are authentic, relevant, and not subject to a rule of exclusion, e.g., hearsay.

[108] *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Johnson,* 594 F.2d 1253, 1257 (9th Cir. 1979).
[109] *Id.*

2. As with documentary evidence in general, the authentication burden is a "light one." The proponent only needs to establish a prima facie case that the document is what the proponent claims it is. The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them. Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[110]

3. If a document is being introduced through a witness's testimony, it may be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. Fed. R. Evid. 901(b)(1).

4. The authentication burden is a "light one."[111] The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.[112] The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them.[113] Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[114]

5. If a document is being introduced through a witness's testimony, it may be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. Fed. R. Evid. 901(b)(1).

6. See United States v. Browne, 834 F.3d 403, 414 (3d Cir. 2016) (finding authentication burden met when witness offered testimony linking Facebook account to defendant and account details matched those of defendant); State v. Ross, 2018-Ohio-3027, ¶ 40, 118 N.E.3d 371, 383 (affirming lower court's admission of screenshots of Facebook comments allegedly made by defendant based on witness testimony).

7. See, e.g., State v. Griffith, 449 P.3d 353, 357 (Ariz. Ct. App. 2019) (admitting authenticated Facebook messages as statements made by and offered against a party-opponent); State v. McCarrel, 2019-Ohio-2984, ¶ 38–41 (screenshots

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[110] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").

[111] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").

[112] *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury "could have reasonably concluded" that a document was authentic).

[113] *See* FED. R. EVID. 901(b)(1); *Caldwell*, 776 F.2d at 1002–03.

[114] *See Caldwell*, 776 F.2d at 1002.

of Facebook messages admitted as admission by party-opponent); Browne, 834 F.3d 403, 442 (same for Facebook chats).

8. By "liking" Ms. Hyland's comment, Mr. Aleksandr affirmed that the apartment belonged to him. See Bryant v. Wilkes-Barre Hosp. Co., LLC, 2016 WL 3615264, at *3 (M.D. Pa. July 6, 2016) (admitting Facebook comments made and liked by plaintiff on a Facebook page based on probative value).

9. Authenticated social media evidence can be admitted as statements of a party opponent. See, e.g., Griffith, 449 P.3d at 357 (Ariz. Ct. App. 2019) (admitting authenticated Facebook messages).

10. See Tripkovich v. Ramirez, No. CV 13-6389, 2015 WL 13544196, at *2 (E.D. La. June 30, 2015) (holding that plaintiff's Facebook and Instagram photographs undermining her previous testimony are relevant and admissible because they go to the question of her credibility); see also Burdyn v. Old Forge Borough, 2019 WL 1118555, at 7−11 (M.D. Pa. Mar. 11, 2019) (lower court did not abuse discretion by admitting Instagram photograph and caption that raised a question as to plaintiff's motive and bias).

11. Finally, Ms. Mawford and "petroboi4eva"'s wordless "like"s of Ms. Hyland's comment are so vague and ambiguous as to provide the finder of fact with no meaningful probative information. See People v. Johnson, 51 Misc. 3d 450, 455 (N.Y. Co. Ct. 2015) (holding that an image of witness's Facebook page showing that she "liked" a website is inadmissible).

VI. Use of Depositions at Trial.

A. General Rule.

At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.[115] The Advisory Committee drafted Rule 43(a) to combat the practice in equity of presenting juries with edited depositions of witnesses' testimony.[116] The federal rules strongly favor the testimony of live witnesses wherever possible, so that the jury may observe the demeanor of the witness to determine the witness's veracity.[117] For testimony to be presented "orally in open court," the witness must be present in the courtroom.[118] However, there are

[115] Fed. R. Civ. P. 43
[116] See 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2408, at 331 (1991).
[117] See 5 Moore's Federal Practice ¶ 43.03 (1990).
[118] Murphy v. Tivoli Enterprises, 953 F.2d 354, 359 (8th Cir. 1992)

circumstances when the use of a deposition taken prior to the trial may be used as allowed by FED. R. CIV. P. 32.

B. FED. R. CIV. P. 32 in application.

1. Under FED. R. CIV. P. 32, a deposition may be used at an evidentiary hearing if three requirements are met:

a) The testimony must be admissible under the Federal Rules of Evidence as if the deponent were present and testifying at the hearing;

b) The party against who the deposition testimony is being offered must have been present or had the opportunity to be present at the deposition; and

c) One of the following circumstances must be present:

(1) The deposition is being **used to impeach** a witness;

(2) The **deposition is of a party** and it is being **offered by an adverse party**; or

(3) The witness is **unavailable**.

2. A witness is "unavailable" for purposes of FED. R. CIV. P. 32 if the witness is:

a) Dead;

b) Located outside the subpoena range of the court;

c) Unable to attend due to age, illness, infirmity, or imprisonment; or

d) Exceptional circumstances exist.

C. Rule 801(d) in application.

1. This rule defines certain out-of-court statements as not being hearsay. Included among these are two that apply to the use of depositions at an evidentiary hearing:

a) A prior statement by the witness that is inconsistent with the witness's testimony at the evidentiary hearing. FED. R. EVID. 801(d)(1)(A).

b) A statement by a party opponent under FED. R. EVID. 801(d)(2)(A). This can either be the party's own statement or a statement made by the party's agent

concerning a matter within the scope of the agency or employment made during the existence of the relationship.

D. Rule 804(b)(1) in application.

2. This rule creates an exception to the hearsay rule with respect to former testimony given by a witness in a deposition if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct or cross examination if the party offering the deposition testimony can show that the witness is "unavailable."

3. "Unavailability" for purposes of Rule 804(b)(1) is broader than the same term as used in FED. R. CIV. P. 32 and, in addition to the circumstances described therein, includes:

a) A witness exempted from testifying on the ground of **privilege**;

b) A witness who persists in **refusing to testify**;

c) A witness with a **lack of memory;**

d) A witness who is unable to be present or testify at the hearing because of **death** or then existing **physical or mental illness or infirmity**; and

e) A witness who is absent from the hearing and the proponent of the statement has been **unable to procure the declarant's attendance** by process or other reasonable means.

4. If a party seeks to offer a declarant's former testimony under Rule 804(b)(2) (statement under belief of impending death), (b)(3) (statement against interest), or (b)(4) (personal or family history), the declarant is not deemed unavailable under Rule 804(a)(5)—and the evidence therefore is not admissible—if the party offering the evidence had an opportunity to depose the declarant but refused to do so.[119]

5. A transcript of a debtor's section 341 examination is not admissible as the debtor's former testimony because the party against whom the transcript is offered

[119] FED. R. EVID. 804(a)(5) (unavailability includes a witness who "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), (4), *the declarant's attendance or testimony*) by process or other reasonable means") (emphasis added); *United States v. Gabriel*, 715 F.2d 1447, 1450-51 (10th Cir. 1983) (explaining that the parenthetical added in Rule 804(a)(5) was "'designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable'") (citing H.R. Rep. No. 650, *reprinted in* 1974 U.S.C.C.AN. 7051, 7075, 7088).

ordinarily would not have had a similar motive to develop the testimony by direct or cross examination.[120] That transcript, however, may be admissible against the debtor as a statement by an opposing party (Rule 801(d)(2)) or under another hearsay exception depending on the facts of the particular case.[121]

VII. Judicial Notice.

A. Defined.

"A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact <the trial court took judicial notice of the fact that water freezes at 32 degrees Fahrenheit>."[122]

B. Applicable Rule

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

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[120] *Salven v. Mendez (In re Mendez)*, 2008 WL 597280, *7 (Bankr. E.D. Cal. Feb. 29, 2008).
[121] *Id.* (admitting debtor's section 341 transcript under Rule 807's residual hearsay exception).
[122] BLACK'S LAW DICTIONARY 863-64 (8th ed. 2004) (also termed "judicial cognizance" or "judicial knowledge").

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

C. Adjudicative Facts.

1. As state in Federal Rule of Evidence 201(a)("Scope"), the Rule governs judicial notice of an adjudicative fact only, not a legislative fact.

2. Adjudicative Facts. "When a court…finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court…is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts."[123]

3. Legislative Facts. "When a court…develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the [court's] legislative judgment are called legislative facts."[124]

D. Procedure.

1. Judicial notice may be taken at any stage of a proceeding[125] including appeal.[126]

2. However, a party is entitled to be heard with respect to the propriety of taking judicial notice and the nature of the fact to be noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.[127] Thus, for example, if a bankruptcy court implicitly took judicial notice, *sua sponte*, in considering the debtor's schedules in arriving at a ruling, on appeal, the matter may be remanded to allow the disadvantaged party to be afforded notice and opportunity to respond.[128]

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[123] Kenneth Culp Davis, *Judicial Notice,* 55 Columbia L. Rev. 945, 952 (1955).
[124] *Id.*
[125] FED. R. EVID. 201(f).
[126] *Nantucket Inv. II v. Cal. Fed. Bank (In re Indian Palms Assocs.)*, 61 F.3d 197, 204 (3d Cir. 1995).
[127] FED. R. EVID. 201(e).
[128] *Annis v. First State Bank of Joplin*, 96 B.R. 917, 920 (W.D. Mo. 1988).

3. Where judicial notice is taken without prior notice, the burden is on the disadvantaged party to make a request for a hearing to challenge the propriety of taking judicial notice.[129]

E. Scope—Adjudicative Facts.

1. Judicial notice is limited to adjudicative facts. Adjudicative facts are ones that are not subject to reasonable dispute because they are either:

a) Generally known with the territorial jurisdiction of the trial court, or

b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

F. Judicial Notice Categories.

1. *Varco v. Lee*[130] Category of Facts.[131]

a) In *Varco v. Lee,* the California Supreme Court took judicial notice for the first time in the case that Mission Street in San Francisco between Twentieth and Twenty-Second Streets was a business district.

b) As explained by the court, this judicial notice of this fact was properly subject to judicial notice because:

(1) The fact was one of "**common** and general **knowledge**";

(2) The fact was "well established and authoritatively settled, … practically **indisputable**"; and

(3) "This common, general, and certain **knowledge exists in the particular jurisdiction**."[132]

2. Almanac Type Facts.[133]

a) Almanac type facts are facts that are typically found in almanacs such as calendar, astronomical, and historical facts.

b) A good example of the use of almanac type facts was the cross examination of the key prosecution witness by then defense attorney Abraham

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[129] *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).
[130] *Varco v. Lee*, 181 P. 223, 225-26 (Cal. 1919).
[131] OLIPHANT, *Younger*, supra note 24, at 5-7.
[132] *Varco,* 181 P. at 226 (emphasis added).
[133] *Younger,* at 5-6.

Lincoln in the case of *People v. Armstrong*. Through the use of an almanac, young Lincoln was able to show that at the time that the critical prosecution eyewitness saw the shooting "by the light of the moon," the moon had already set.

3. Scientific Basis of Technical Concepts.[134]

a) When scientific concepts or devices first form the basis for testimony in a courtroom, their scientific basis must be shown by expert testimony.

b) At some point, however, appellate courts conclude that there is general agreement among the experts that there is a valid scientific basis in the laws of nature supporting the concept or device.

c) Examples: radar,[135] breathalyzer,[136] and blood grouping.[137]

4. Courts Records.

a) Generally. Requests for judicial notice of court records typically fall into one of three categories:

(1) Establishing the genuineness of the documents without going through the steps normally needed to authenticate documents. This is the equivalent of a certificate regarding custody by a judge of a court of record of the district in which the record is kept.[138] The fact the document is genuine does not mean that the court can automatically accept as true the facts contained in such documents. Statements in the documents must be otherwise admissible under the Federal Rules of Evidence, for example, as an evidential admission offered against a party.[139]

(2) Taking as true the recording of the judicial acts contained in the record. Commentators suggest that the better practice is to admit the record under the official records exception to the hearsay rule so that evidence of any inaccuracy in the record may be established.[140]

(3) The third, "and widely criticized," use of judicial notice of court records is to take as conclusively established the facts that are set forth in the

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[134] *Younger,* at 6-7.
[135] *State v. Graham,* 322 S.W.2d 188, 195-97 (Mo. 1959).
[136] *McKay v. State,* 235 S.W.2d 173, 175 (Tex. 1950).
[137] *State v. Damm,* 266 N.W. 667, 668-69 (S.D. 1936).
[138] *In re Bestway Prods., Inc.*, 151 B.R. 530, 540 (Bankr. E.D. Cal. 1993).
[139] *Id.*; FED. R. EVID. 801(d)(2).
[140] *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33 (citing 21 WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5106 (1992 Supp.)).

records.[141] A previously filed court document will generally not be competent evidence of the truth of the matters asserted therein solely because the court has taken judicial notice of its existence.[142]

(4) That is, there is a crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth or falsity of contents of any such document for the purposes of making a finding of fact.[143] Accordingly, while a bankruptcy court may take judicial notice of its own records, it may not "infer the truth of facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court."[144]

b) Examples:

(1) Plan Votes. To establish whether the plan has received the votes needed to confirm the court may take judicial notice of the proofs of claim and the presence in the schedules of amounts due to other claimants who have not filed proofs of claim.[145]

(2) Omissions from Schedules. The court may take judicial notice of the debtor's statement of affairs and schedules as not listing certain assets alleged not to be disclosed in an action under Bankruptcy Code § 727(a)(4).[146]

(3) Absence of Pending Adversary. The court may take judicial notice of the failure of a Chapter 7 trustee to have filed an action to set aside a fraudulent conveyance.[147]

(4) Docket Sheets. The court may take judicial notice of the docket sheets in an adversary proceeding and the debtor's main case.[148]

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[141] *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33.
[142] *Nantucket Inv. II v. Cal. Fed. Bank (In re Indian Palms Assocs.)*, 61 F.3d 197, 204 (3d Cir. 1995).
[143] *In re Earl*, 140 B.R. 728, 731 n.2 (Bankr. N.D. Ind. 1992).
[144] *Staten Island Sav. Bank v. Scarpinito (In re Scarpinito)*, 196 B.R. 257, 267 (Bankr. E.D.N.Y. 1996) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.5 (1995)).
[145] *In re Am. Solar King Corp.*, 90 B.R. 808, 829 n.41 (Bankr. W.D. Tex. 1988) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL, § 201. 5 (2007) ("Whether the information contained in the schedules is true is immaterial to this inquiry.").
[146] *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990) ("In this case, the bankruptcy court, consistent with Rule 201(b)(2), simply took judicial notice of the contents of . . . [the debtor's] Statement of Affairs and Schedule B-1 and not the truthfulness of the assertions therein.").
[147] *Pruit v. Gramatan Inv. Corp. (In re Pruitt),* 72 B.R. 436, 440 (Bankr. E.D.N.Y. 1987).
[148] *Muzquiz v. Weissfisch*, 122 B.R. 56, 58 (Bankr. S.D. Tex. 1990).

(5) Debtor's Insolvency. Several opinions have held that a court may take judicial notice of the debtor's schedules in order to determine if the debtor was insolvent on the date of an alleged preferential transfer.[149] The better view, however, is that the contents of the schedules when used against a third party are hearsay and inadmissible to prove the truth of the matters asserted therein. In addition, the schedules may not be used for that purpose since the schedules are reflective of the debtor's financial condition on the date of the petition and not on the date of the transfers.[150]

VIII. Admissions.

A. Generally.

There are two types of admissions. The first type is an opposing party statement. This type is also discussed in Section II above in the context of hearsay. These types of admissions are commonly called evidentiary admissions. The second type of admission is a judicial admission.

B. Evidentiary Admissions.

1. Applicable Rule.

Rule 801(d)(2). Definitions that Apply to this Article; Exclusions from Hearsay

(d) Statements that are not Hearsay.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

[149] *See, e.g.*, *In re Trans Air, Inc.*, 103 B.R. 322, 325 (Bankr. S.D. Fla. 1988); *In re Claxton*, 32 B.R. 219, 222 (Bankr. E.D. Va. 1983); *In re Blue Point Carpet, Inc.*, 102 B.R. 311, 320 (Bankr. E.D.N.Y. 1989).

[150] *In re Strickland*, 230 B.R. 276, 282 (Bankr. E.D. Va. 1999) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.8 (1988)).

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

2. Rule 801(d)(2) classifies an opposing party's statement or evidentiary admission (formerly known as admissions by a party opponent) as not hearsay. This is so even though they are out-of-court statements offered to prove the truth of the matter asserted and would otherwise fall squarely within the definition of hearsay.[151]

3. Simply stated, an evidentiary admission is a statement of a party or a party's agent offered against the party by an opposing party. It does not have to be "against interest" and is not to be confused with a "declaration against interest" which is an exception to the hearsay rule for statements made by unavailable witnesses.[152]

4. Even if a prior statement by a party is determined not to be a judicial admission and, therefore, not conclusive, it may still operate as an "adverse evidentiary admission" properly before the court in its resolution of the factual issue.[153] However, as evidentiary admissions, they may be controverted or explained by the party against whom they are being offered.[154]

5. Statements made by a debtor are admissible as admissions by a party opponent (or an opposing party's statement) against a chapter 7 trustee or liquidating trustee where the trustee stands in the shoes of the debtor when bringing the action.[155] After all, a trustee is "generally bound by the bankruptcy waivers, estoppels, and admissions" of a debtor.[156] But a debtor's statements may not be admissible against the trustee as an admission if the trustee is not standing

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[151] FED. R. EVID. 801(c).
[152] FED. R. EVID. 804(b)(3).
[153] *White v. Arco/Polymers, Inc.*, 728 F.2d 1391, 1396 (5th Cir. 1983).
[154] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.22 (2007).
[155] *In re Bayonne Medical Ctr.*, 2011 WL 5900960, at *11 & n.41 (Bankr. D.N.J. Nov. 1, 2011) (explaining that the "liquidating trustee, plaintiff here, cannot avoid the [debtor's] admission given that he stands in the place instead of [the Debtor] and the action . . . is derived directly from [the Debtor]").
[156] *In re Dancer*, 2 F. Supp. 634, 635 (D.C.N.J. 1932) (citing 4 Remington on Bankruptcy § 1419 (3d ed.)).

in the shoes of the debtor but instead is bringing the action on behalf of creditors of the estate, such as a fraudulent transfer action.[157]

C. Judicial Admissions.

1. Defined.

"A formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it."[158]

2. Effect.

A judicial admission is an admission made by a party in pleadings, stipulations, and the like and do not have to be proven in the litigation in which they are made.[159] It is conclusively binding upon the party making the admission for purposes of the case in which made, provided that the admission is unequivocal.[160]

3. Scope.

Judicial admissions are restricted in scope to matters of fact which otherwise would require evidentiary proof.[161] Conclusions of law—e.g., that a party was negligent or caused an injury, do not lie within the scope of the doctrine of judicial admission.[162] For example, the admission that an agreement is a "true lease" is a conclusion of law and cannot constitute a judicial admission.[163]

4. Examples of Assertions That Are Judicial Admissions.

a) Factual assertions in pleadings.[164]

b) Contents of court orders.[165]

c) Statements in proofs of claim and in an objection to a proof of claim in a contested matter objecting to the claim are judicial admissions.[166]

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[157] *Bayonne Medical Ctr.*, 2011 WL 5900960, at *11 & n.41.
[158] BLACK'S LAW DICTIONARY 51 (8th ed. 2004) (also termed "solemn admission"; "admission injudicio"; "true admission").
[159] *Gianne v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956).
[160] *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972).
[161] *Id*.
[162] *Gianne*, 238 F.2d at 547.
[163] *In re Pittsburgh Sports Assocs. Holding Co.*, 239 B.R. 75, 81 (Bankr. W.D. Penn. 1999).
[164] *Myers v. Manchester Ins. & Indem. Co.*, 572 F.2d 134, 134 (5th Cir. 1978).
[165] *In re Camp*, 170 B.R. 610, 612 (Bankr. N.D. Ohio 1994).
[166] *Jenkins v. Tomlinson (In re Basin Resources Corp.)*, 182 B.R. 489, 493 (N.D. Tex. 1995).

d) Matters set out in the debtor's schedules may constitute judicial admissions. Thus by failing to qualify the schedule's description so as to include the term "disputed," the debtor may have waived the right to contest a debt's existence.[167] On the other hand, because schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter, they may simply be considered evidential admissions rather than judicial admissions.[168] As evidential admissions, they would not be conclusive.[169]

e) Statements of counsel, although not evidence, may be judicial admissions.[170]

f) Concessions made by counsel in open court are binding as judicial admissions.[171]

g) Contents of requests for admissions where no response is filed by the opposing party.[172]

5. Examples of Assertions That Are Not Judicial Admissions.

a) Admissions made in another proceeding are not conclusive and binding judicial admissions.[173] This includes admissions made in other motions or adversary proceedings, which were conducted in the same bankruptcy case. While these may be admissible as an admission of a party-opponent, they are not judicial admissions with conclusive effect because they were not made in the same proceeding.[174]

b) Admissions made in superseded pleadings are as a general rule considered to lose their binding force, and to have value only as evidentiary

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[167] *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 812 (N.D. Ga. 1995).
[168] *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr. N.D. Ill. 1985).
[169] *Id.*; *contra Larson v. Groos Banks*, 204 B.R. 500, 502 (W.D. Tex. 1996) (court granted summary judgment against the former Chapter 7 debtor in an action against a bank for violating the Fair Credit Reporting Act on the basis that the debtor's listing as "None" in response to the schedule category under which the debtor was required to list "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims" constituted a judicial admission that he had suffered no damages in the case).
[170] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.20 (2007); *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997).
[171] I*n re Menell*, 160 B.R. 524, 525 n.3 (Bankr. D.N.J. 1993); BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.22 (2007).
[172] *In re Tabar*, 220 B.R. 701, 703 (Bankr. M.D. Fla. 1998).
[173] *Universal Am. Barge Corp. v. J. Chen., Inc.*, 946 F.2d 1131, 1142 (5th Cir. 1991).
[174] *Jenkins v. Tomlinson (In re Basin Resources Corp.)*, 182 B.R. 489, 491 (N.D. Tex. 1995); *see also In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr. N.D. Ill. 1985) (schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter and, accordingly, are evidential admissions as opposed to judicial admissions).

admissions.[175] However, where the amendment only adds allegations, deleting nothing stated in prior pleadings, admissions made in the prior pleadings continue to have conclusive effect.[176]

c) Statements of value in schedules relate to value and are matters of opinion as opposed to fact. Thus, they do not constitute judicial admissions but only evidential admissions.[177]

IX. Expert Opinion Testimony.

A. *Daubert*[178]

1. Opinion testimony arises in bankruptcy courts in numerous circumstances ranging from a chapter 13 debtor's testimony on the value of the debtor's furniture and appliances in a contested plan confirmation hearing to an accountant's testimony on the sufficiency of a fund to cover future personal injury claims in the context of confirmation of a chapter 11 plan of reorganization resolving mass tort claims.

2. One of the most important tools available to bankruptcy practitioners faced with the introduction of such opinion testimony is an objection under *Daubert*, as implemented through Rule 702 of the Federal Rules of Evidence. Unfortunately, this tool is often neglected based on a misconception that it has little application to the routine types of opinion testimony that regularly occur within the context of a bankruptcy case.

3. *Daubert* rejected the notion that the Federal Rules of Evidence placed "no limits on the admissibility of purportedly scientific evidence."[179] It established the trial judge as the "gatekeeper" in determining whether the expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand the issue. As a gatekeeper, the trial court's inquiry must be "solely on principles and methodology, not on the conclusions they generate."[180]

B. Applicable Rules.

Rule 701. Opinion Testimony by Lay Witness

[175] *Borel v. United States Casualty Co.*, 233 F.2d 385, 387-88 (5th Cir. 1956).
[176] *Dussour v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5th Cir. 1981).
[177] *In re Cobb*, 56 B.R. at 442 n. 3 (citing *Fairbanks v. Yellow Cab. Co.*, 346 F.2d 256 (7th Cir. 1965)).
[178] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).
[179] *Id*. at 589.
[180] *Id*. at 595.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross- examination.

FED. R. CIV. P. 26(a)(2)—Disclosure of Expert Testimony.

(A) In General. [A] party must disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Witnesses Who Must Provide a Written Report. [U]nless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report prepared and signed by the witness…. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

C. Application of Rule 702.

1. In determining whether a proffered expert is qualified under Rule 702, trial courts must consider whether:

a) the expert is qualified to testify competently regarding the matters he intends to address;

b) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and

c) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.[181]

2. But "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."[182]

3. The reliability requirements of Rule 702(b), (c), and (d) are the following:

a) the testimony is based upon sufficient facts or data,

b) the testimony is the product of reliable principles and methods, and

[181] *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).
[182] *Id*. at 1261 (emphasis omitted).

c) the witness has applied the principles and methods reliably to the facts of the case.

4. Thus, Rule 702 requires that a witness who is qualified as an expert by knowledge, skill, experience, training or education may give opinion testimony provided the testimony satisfies three criteria. These criteria are:

a) The testimony must be based on sufficient facts or data. This is a quantitative rather than qualitative test—i.e., the issue is sufficiency of data relied upon by the expert. For example, what data in the form of comparable sales did the automobile appraiser rely upon?

b) The testimony must be the product of reliable principles and methods. This is a qualitative analysis. The principles must be reliable. Turning to the common example of an automobile appraiser—the principle generally relied upon by such appraisers is that comparable sales are a good predictor of what a willing buyer will pay a willing seller, thereby indicating the fair market value of an automobile.

c) Finally, the witness must have applied the principles and methods reliably to the facts of the case. This is also a qualitative analysis. That is, the principles must not only be reliable, but also they must have been reliably applied to the particular facts relied upon by the expert. For example, just because the witness has reviewed numerous other sales in determining the value does not mean the principle has been reliably applied. For example, are the other sales really comparable? What were the dates of the other sales? Is the condition of the subject automobile similar to the comparables? What market changes have occurred post-petition that make recent comparables invalid as predictors of value as of the date of the petition?

D. Expert Qualification Not *Daubert* Focus.

1. While clearly only qualified witnesses may give expert opinion testimony under Rule 702, the focus of *Daubert* is on the judge's role as a gatekeeper for the admission of the opinion rather than on the judge's role in passing on the qualification of the expert. As aptly put by the Seventh Circuit in *Rosen v. Ciba-Geigy Corp.*,[183] "[u]nder the regime of *Daubert* . . . a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."[184] Put

[183] *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir. 1996).
[184] *Id.* at 318.

another way, "[j]udges should not be buffaloed by unreasoned expert opinions,"[185] even from the most qualified of experts.

2. In fact, the qualification of the experts in *Daubert* and *Kumho Tire Company v. Carmichael*,[186] was not at issue. In *Daubert*, the Supreme Court noted that all the experts "possessed impressive credentials."[187] In *Kumho*, the Supreme Court noted that the district court, which excluded the expert's testimony, "did not doubt [the expert's] qualifications . . . ."[188]

E. *Daubert* in Practice.

1. The following is an all too common example of the direct examination of an expert on automobile value. (The context is the debtor's motion to determine the secured status of a creditor's claim that is secured by a lien on the debtor's automobile.) Here's how the testimony goes:

Debtor's Counsel: "Your Honor, I call Joseph Perrilli to the witness stand."

Debtor's Counsel: "Mr. Perrilli, what experience do you have in the valuation of automobiles?"

Witness: "I've been in the car business for 40 years. During that time, I've bought and sold in the neighborhood of 10,000 cars."

Debtor's Counsel: "At my request, did you perform an appraisal of the Debtor's 1997 Ford Taurus?"

Witness: "Yes, I did."

Debtor's Counsel: "Based on your years of experience in buying and selling automobiles, were you able to form an opinion as to its value?"

Witness: "Yes, I was. In my opinion it has a fair market value of $9,700."

Debtor's Counsel: "Thank you, Mr. Pirrelli. Your Honor, no further questions."

2. This scenario unfortunately arises frequently in bankruptcy courts. It is clear, however, that no matter how qualified Mr. Perrilli is, the testimony he has given fails to meet the criteria of Rule 702. Specifically, there is no evidence as to the types of data Mr. Perrilli relied upon for his opinion. Examples of such data may

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[185] *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989) (citing Paul Meier, *Damned Liars and Expert Witnesses,* 81 J. Am. Statistical Ass'n 269 (1986)).
[186] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (U.S. 1999).
[187] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 583 (1993).
[188] *Kumho,* 526 U.S. at 153.

include: anecdotal experience of the witness or others that the witness has consulted with concerning sales of similar automobiles,[189] market reports and commercial publications generally used and relied upon by the persons in the business of buying and selling used cars,[190] local auto auction reports, and advertisements.

F. *Daubert's* Application in Florida state courts.

1. In 2013, the Florida Legislature amended Fla. R. Evid. 90.702 to incorporate Daubert. Since July 1, 2013, Fla. R. Evid. 90.702 has stated:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

2. Since July 1, 2013, Fla. R. Evid. 90.704 (entitled "Basis of opinion testimony by experts") has stated:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

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[189] These examples may be derived by the expert from discussions with other dealers:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted . . . .

FED. R. EVID. 703

[190] FED. R. EVID. 803(17) excludes from the hearsay rule market reports and commercial publications generally used and relied upon by the public or by persons in particular occupations (*e.g.*, N.A.D.A., Kelley Blue Book, Edmunds.com).

3. In 2017, the Florida Supreme Court declined to decide whether the Daubert amendments to sections 90.702 and 90.704 were constitutional and declined to adopt the amendments as part of the Florida Evidence Code.[191]

4. Soon thereafter, the Second District Court of Appeal explained that the Florida Supreme Court's rules decision declining to adopt a statutory amendment to the extent it is procedural does 'not vitiate or overturn the statute' and 'the statute remains the law in Florida.'"[192]

5. On October 15, 2018, the Florida Supreme Court resolved the question of whether *Frye* or *Daubert* would control on the admissibility of expert testimony in the Florida state courts in the case of *Delisle v Crane Co.*[193] The Court held: "*Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges to determine the significance of the methodology used. With our decision today, we reaffirm that *Frye*, not *Daubert*, is the appropriate test in Florida courts."[194]

G. Lay Opinion Testimony.

1. FED. R. EVID. 701 makes it clear that lay opinion testimony does not include opinions based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2. Traditional Lay Opinions. The Rule 701 amendment was not intended to change the law concerning the traditional types of testimony properly offered as lay opinion. Most often this would be an owner testifying as to value.[195]

3. FED. R. CIV. PRO. 26(a)(2). The mandatory disclosure rules relating to expert witnesses do not apply to lay opinion testimony. Thus, the amendment to FED. R. EVID. 701 is designed to ensure that "lay opinion" testimony which nevertheless deals with scientific, technical or other specialized knowledge will not qualify as lay opinion testimony for purposes of the rules.

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[191] *In re Amendments to Fla. Evid. Code*, 210 So. 3d 1231, 1239–40 (Fla. 2017)("The Committee recommends the Court not adopt the Daubert Amendment, to the extent it is procedural. . . . [W]e [the Florida Supreme Court] decline to adopt the Daubert Amendment to the extent that it is procedural, due to the constitutional concerns raised, which must be left for a proper case or controversy.").

[192] *Clare v. Lynch*, 220 So. 3d 1258, 1262 (Fla. 2d DCA 2017) (citing *Bivins v. Rogers*, 207 F. Supp. 3d 1321, 1326 (S.D. Fla. 2016)).

[193] *Delisle v. Crane Co.*, No. SC16-2182 (Fla. October 15, 2018).

[194] *Id.* at 18.

[195] *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

4. In bankruptcy court, oftentimes, it is the owner that gives the opinion of value. It is generally accepted that an owner is competent to give opinion testimony about the value of the owner's property.[196]

5. Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

6. The advisory committee note to Rule 702 references that the types of witnesses who may provide expert testimony under Rule 702 are not limited to experts in the "strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."[197]

7. Alternatively, an owner may testify as to value as a lay witness under Rule 701. If testifying under Rule 701, the owner "may merely give his opinion based on his personal familiarity of the property, often based to a great extent on what he paid for the property."[198] Such testimony will be given little, if any, weight. On the other hand, if the owner truly has "knowledge, skill, experience, training or education" that would qualify the owner as an expert, then it is appropriate to require that the owner's testimony otherwise comply with Rule 702 and be based on reliable principles applied to sufficient data. As noted in the *Brown* case regarding such testimony, "Even though [the debtor's] testimony as to valuation is admissible, it should be subject to the same type of critical analysis as would the testimony of an independent 'expert.'" [199]

8. In *Brown*, the owner did not testify as to any specific values that she had found at "yard sales" for items similar in quality and condition to her property. In the court's view, her conclusion that her personal property had a value of $1,500 "was a figure just pulled out of the air."

9. In light of the 2000 amendments to Rule 702, it appears appropriate to determine whether the testimony of an owner is being offered as the opinion

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[196] *In re Brown*, 244 B.R. 603, 611 (Bankr. W.D. Va. 2000); BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).
[197] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).
[198] *Id.*
[199] *Brown*, 244 B.R. at 612.

testimony of a lay witness or is being offered as a "skilled witness."[200] In the first instance, the testimony would be admissible but may receive little weight.[201] In the latter instance, where the owner is testifying as an expert and given greater weight, the plain meaning of Rule 702 requires that the testimony should be subject to the rigors of a showing of reliability under Rule 702.

X. Attorney-Client Privilege.

A. Defined.

"The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."[202]

B. Wigmore's Essential Elements.[203]

1. Where legal advice of any kind is sought,

2. From a professional legal adviser in his capacity as such,

3. The communications relating to that purpose,

4. Made in confidence,

5. By the client,

6. Are at his instance permanently protected,

7. From disclosure by himself or by the legal adviser, and

8. Except the privilege be waived.

C. Purpose of the Privilege

1. "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and

[200] Advisory Committee Note to Rule 702.
[201] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007) (explaining that "if [the owner] has very little or no real expertise, the testimony will be given little if any weight").
[202] BLACK'S LAW DICTIONARY 1235 (8th ed. 2004) ("privilege—*attorney-client privilege*").
[203] 8 JOHN HENRY WIGMORE, EVIDENCE § 2292 (1961).

skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[204]

2. "The attorney client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[205]

D. Characteristics.

1. Ownership. "[T]he privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets."[206]

2. Waiver. "And if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."[207]

3. Termination. The privilege survives the death of the client.[208]

4. Burden. "The party invoking the attorney client privilege has the burden of proving that an attorney client relationship existed and that the particular communications were confidential."[209]

E. What does the Privilege Cover?

1. Confidential Communications by Client.

a) "The attorney-client privilege applies to 'confidential communications between an attorney and his client . . . .'" [210]

b) "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: [T]he protection of the privilege extent only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did

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[204] *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).
[205] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[206] *Hunt*, 128 U.S. at 470.
[207] *Id*.
[208] *Swindler & Berlin v. United States*, 524 U.S. 399, 406-07 (1998) (holding there is generally an exception in the area of testamentary disclosures based on a theory of implied waiver).
[209] *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003).
[210] *Miccosukee Tribe of Indians v. U.S.*, 516 F.3d 1235, 1262 (2008) (internal citation omitted).

you say or write to the attorney' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[211]

2. Relating to Legal Advice.

a) The attorney-client privilege is limited to communications ". . . relating to a legal matter for which the client has sought professional advice."[212]

b) "The attorney-client privilege attaches only to communications made in confidence to an attorney by that attorney's client for the purposes of securing legal advice or assistance. . . . Courts generally have held that the preparation of tax returns does not constitute legal advice within the scope of that privilege. . . . Admittedly, the preparation of a tax return requires some knowledge of the law . . . [but a] taxpayer should not be able to invoke a privilege simply because he hires an attorney to prepare his tax returns."[213]

F. Narrow Construction.

1. Courts have construed the privilege narrowly because it renders relevant information undiscoverable. As a result, it applies "only where necessary to achieve its purpose."[214]

2. The burden of establishing the applicability of the privilege rests with the party invoking it.[215]

G. Crime Fraud Exception. "The attorney-client privilege is limited to confidential communications between the lawyer and the client made for the purpose of securing legal advice, not for the purpose of committing a crime or a tort."[216]

H. *Weintraub* and the Corporate Debtor.

1. In *Commodity Futures Trading Commission v. Weintraub,*[217] the issue of who controls the attorney-client privilege in a chapter 7 case. In considering the

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[211] *Upjohn Co.*, 449 U.S. at 395-96 (internal citation omitted).
[212] *Miccosukee Tribe of Indians*, 516 F.3d at 1262.
[213] *In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987).
[214] *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1976).
[215] *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir.2000); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL–CIO,* 119 F.3d 210, 214 (2d Cir.1997).
[216] *In re Grand Jury Proceedings*, 689 F.2d 1352, 1352 (11th Cir. 1982) (commonly referred to as the "crime-fraud exception").
[217] 471 U.S. 343, 348–49 (1985).

issue, the Supreme Court first recognized that as a general proposition, the authority to act on behalf of a corporation belongs to the officers and directors. And in a chapter 7, a trustee is most analogous to management.

2. As a result, the court concluded that when a corporation files a chapter 7, the trustee controls the privilege.[218]

I. Co-Client Exception.

1. The co-client exception to the attorney-client privilege provides that where a lawyer represents two clients in the same case, communications between the lawyer and one client are not confidential as to the other client.[219]

2. The co-client exception applies regardless of whether both parties are present when the communication is made.[220] The rationale behind the co-client exception is that co-clients have no expectation that their confidences concerning a joint matter will be kept secret.[221]

J. Common Interest doctrine.

1. The common interest doctrine—like the co-client exception—is typically referred to as an exception to the attorney-client privilege waiver rule rather than a privilege itself.[222] The "need to protect the free flow of information from attorney to client logically exists whenever multiple clients share a common interest about a legal matter."[223] The common interest doctrine protects that free flow of information by providing that "clients and their respective attorneys sharing common litigation interests may exchange information freely among themselves without fear that by their exchange they will forfeit the protection of the [attorney-client] privilege."[224]

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[218] Id. *See also In re Fundamental Long Term Care, Inc.,* No. 8:11-BK-22258-MGW, 2012 WL 4815321, at *9 (Bankr. M.D. Fla. Oct. 9, 2012).
[219] *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451, 463 (2013)(citing *In re Ginn–LA St. Lucie, Ltd.*, 439 B.R. 801 (Bankr. S.D. Fla. 2010)). *See also Transmark, USA, Inc., v. State of Florida*, 631 So. 2d 1112, 1116 ("Sections 90.502(4)(e) and 90.5055(4)(c) provide an exception to the attorney-client and accountant-client privileges…when a communication is relevant to a matter of common interest and made to a lawyer or accountant retained or consulted in common.").
[220] *Transmark, USA, Inc. v. State Dep't of Ins.*, 631 So. 2d 1112, 1116–17 (Fla. 1st DCA 1994). *Ashcraft & Gerel v. Shaw*, 126 Md. App. 325, 728 A.2d 798, 812–13 (1999).
[221] *See, e.g., In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801, 806-07 (Bankr. S.D. Fla. 2010) (citing *Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del.*), 285 B.R. 601, 612 (D. Del. 2002)).
[222] *United States v. Gumbaytay,* 276 F.R.D. 671, 673–74 (M.D. Ala. 2011).
[223] *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir.2003).
[224] *In re Indiantown Realty Partners Ltd. P'ship*, 270 B.R. 532 (Bankr. S.D. Fla. 2001) (*quoting Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987)).

2. The general rule is that parties that share information under the common interest doctrine cannot invoke the attorney-client privilege in subsequent adverse litigation between them; if there are multiple members that share information, and only two become adverse, the party seeking communications is entitled to all communications between members with common interests—not just communications with the adverse party.[225]

XI. "Work Product" Rule.

A. "Work Product" Defined.

> "Tangible material or its intangible equivalent—in unwritten or oral form—that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress. . . . The term is also used to describe the products of a party's investigation or communications concerning the subject matter of a lawsuit if made (1) to assist in the prosecution or defense of a pending suit, or (2) in reasonable anticipation of litigation."[226]

B. Applicable Rule.

FED. R. CIV. P. 26(b)(3) Trial Preparation: Materials.

[A] party may obtain discovery of documents and tangible . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

C. Historical Basis—Hickman v. Taylor

1. When the Federal Rules of Civil Procedure originally took effect in 1938, Rule 26 did not contain the Work Product Exception now found in FED. R. CIV. PROC. 26(b)(3). Whether the work product of an attorney was discoverable under the new rules engendered a great deal of divergence among the lower federal courts

[225] *In re Fundamental Long Term Care, Inc.,* 489 B.R. 451, 470 (Bankr. M.D. Fla. 2013)(*citing Ohio–Sealy Mattress Mfg. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980).
[226] BLACK'S LAW DICTIONARY 1638 (8th ed. 2004).

dealing with the issue. In light of this, the Supreme Court granted certiorari to deal with the issue in the case of *Hickman v. Taylor*.[227]

2. The "basic question" before the court was whether any of new discovery devices could be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation.[228]The type of information dealt with in *Hickman v. Taylor* were the memoranda, statements and mental impressions of counsel that fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. That is, the "protective cloak" of the attorney client privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.[229]

3. Notwithstanding the non-privileged and relevant nature of the information sought, the Supreme Court was concerned about "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties."[230] This work is reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals as the 'Work product of the lawyer.'"[231]

4. Accordingly, *Hickman v. Taylor* established that although absent from the literal terms of the Federal Rules as initially implemented, the general policy against invading the privacy of an attorney's course of preparation was "so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted."[232]

D. Disclosure of Expert Testimony.

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[227] *Hickman v. Taylor*, 329 U.S. 495, 500 (U.S. 1947).
[228] *Id*. at 505.
[229] *Id*. at 508.
[230] *Id*. at 509-510.
[231] *Id*. at 511 (citing *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945)).
[232] *Id*. at 512.

1. A party **in an adversary**[233] is required by Fed. R. Civ. P. 26(a)(2)[234] to disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

2. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—that contains:

a) a complete statement of all opinions the witness will express and the basis and reasons for them;

b) the facts or data considered by the witness in forming them;

c) any exhibits that will be used to summarize or support them;

d) the witness's qualifications, including a list of all publications authored in the previous 10 years;

e) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

f) a statement of the compensation to be paid for the study and testimony in the case.

3. A party **in a contested matter** [235] is not required to provide the disclosures and expert report regarding expert testimony required by Fed. R. Civ. P. 26(a)(2)[236] for adversary proceedings.

E. Protecting Your Work Product

1. Material prepared by an attorney in preparation for trial falls within the Work Product Rule.[237]

2. The Work Product Rule applies only to documents created primarily to prepare for and assist in the defense or prosecution of an identifiable, specific

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[233] As discussed below, there is no requirement to disclose expert testimony in advance of a hearing on a contested matter governed by Fed. R. Bankr. P. 9014.
[234] Made applicable to adversary proceedings by FED. R. BANKR. P. 7026.
[235] As discussed below, there is no requirement to disclose expert testimony in advance of a hearing on a contested matter governed by Fed. R. Bankr. P. 9014.
[236] Made applicable to adversary proceedings by FED. R. BANKR. P. 7026.
[237] *United States v. Nobles*, 422 U.S. 225, 238-39 (1975); *In re Southwest Florida Telecomms.*, 195 B.R. 504, 506 (Bankr. M.D. Fla. 1996) (Paskay, C.B.J.) (holding that documents prepared by investigator in anticipation of bankruptcy court litigation are protected).

lawsuit or contested matter which is either pending or threatened.[238] Documents that are prepared when no litigation is pending or impending at the time of their preparation is not considered within the Work Product Rule.[239]

3. The Attorney-Client Privilege or Work Product Rule can also attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put into usable form as part of legal advice by attorney to the client.[240] However, where the information is turned over to the third party for reasons unrelated to seeking or rendering legal advice, the Attorney-Client Privilege is waived.[241]

4. In adversary proceedings, drafts of any reports required under Fed. R. Civ. P. 26(a)(2) are protected under the Work Product Rule. Communication between a party's attorney and any witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B) are likewise protected from disclosure under the Work Product Rule, except to the extent that the communications:

a) relate to compensation for the expert's study or testimony;

b) identify facts or data that the party's attorney provided and were considered in forming the expert's opinions to be expressed; or

c) identify assumptions the expert relied upon in forming the opinions to be expressed that were provided by the party's attorney.[242]

5. The requirements for disclosure of expert testimony and preparation of a report by the expert only extends to reports required under Fed. R. Civ. P. 26(a)(2) in adversary proceedings. Because Fed. R. Civ. P. 26(a)(2) does not apply in contested matters under Fed. R. Bankr. P. 9014, there is no requirement to provide a report or disclose the identity of an expert witness in advance of trial on the contested matter absent order of the court.

6. However, in a contested matter, should an expert witness nevertheless prepare a report for the use at trial, there is no protection for such report under the Work Product Rule. This is because the work product protections extended to expert reports under Fed. R. Civ. P. 26(b)(4) for draft reports and communications between

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[238] *In re Hillsborough Holdings Corp.*, 132 B.R. 479, 481 (Bankr. M.D. Fla. 1991) (citing *In re Hillsborough Holdings Corp.*, 118 B.R. 866, 870 (Bankr. M.D. Fla. 1990); *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296-97 (Temp. Emer. Ct. App. 1985); *S. Film Extruders, Inc. v. Coca-Cola*, 117 F.R.D. 559, 562 (M.D.N.C. 1987).
[239] *Id.*
[240] *United States v. Kovel*, 296 F.2d 918, 920-21 (2nd Cir. 1961).
[241] *Eglin Fed. Credit Union v. Cantor*, 91 F.R.D. 414, 418 (N.D. Ga. 1981).
[242] FED. R. CIV. P. 26(b)(4)(C).

a party's attorney and the expert witness, only apply with respect to reports required to be furnished under Fed. R. Civ. P. 26(a)(2).[243]

7. Facts or opinions held by an expert specially employed or retained in anticipation of litigation or in preparation for trial and who is not expected to be called as a witness are not discoverable, except:

a) as provided under Rule 35(b)(dealing with physical and mental examinations); or

b) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.[244]

8. A party who inadvertently produced information in discovery subject to the protection of a claim of privilege or as trial-preparation material has the right to have the information returned, sequestered, or destroyed upon notifying the part that received the information of the claim and the basis for it. After being notified, a party must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.[245]

XII. Practice Pointers on Drafting Motions.

A. Simplify, Simplify, Simplify. Your job as an advocate is to explain your position in simple terms. Toward that end, supply the court with aids that will assist the judge in understanding your position. I suggest you prepare an expendable hearing booklet containing these aids to distribute to the judge and all parties at the commencement of my argument. Examples of aids that might be included in this booklet are the following:

1. List of Players. It is difficult to keep track of the names of numerous parties and other players that are involved in the event or transaction that gives rise to your claim or defense. So list these parties out with their affiliations and an explanation of their role in the case.

2. Timeline of events. A chronology of the dates of events and transactions is helpful in understanding the whole story.

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[243] Jeffrey W. Linstrom, *Expert Witness Reports: Get The Draft?*, Am. Bankr. Inst. J. 52 (March, 2011).
[244] FED. R. CIV. P. 26(b)(4)(D).
[245] FED. R. CIV. P. 26(b)(5)(B).

3. List of Acronyms and Industry Specific Terms. While generally the use of acronyms is to be avoided, in some cases they are an integral part of a business. If so, prepare a list of the acronyms and their definitions.

4. Excerpts from Key Exhibits. In commercial cases, documents are often lengthy and complex. While you will generally have to introduce the whole document into evidence, it is often helpful if you excerpt as a demonstrative aid the portions of the document that you will be referencing during trial.

5. Key Cases. While your motion may contain a number of cases, as a practical matter you most likely will be discussing a small portion of those during oral argument. Put copies of those in your booklet with the portions that you are relying on in bold.

6. Charts. It is often helpful in understanding complicated transactions to use a chart depicting the key transactions. For example, "before and after" charts depicting a complex corporate transaction that forms the basis of an alter ego or successor liability case is helpful.

B. Keep it Short. Few motions need to exceed three pages. Even if it is a really complex matter, try to keep the page count down to 10 pages. The more succinctly your writing, the better. Don't drag your motion out to the maximum page limit if you have nothing left to say. In the words of Chief Justice Roberts, "I've yet to put down a brief and say,'I wish that were longer.'"

C. Preview Relief Sought. Explain in the introductory paragraphs the relief you are seeking, and as simply as possible, factual and legal bases for the relief requested.

D. Avoid Legalese. Plain language is easier to understand. As Justice Scalia once said, "A good test is, if you use the word at a cocktail party, will people look at you funny?"

E. Avoid Minutiae. When drafting your motion, first ask yourself what the court needs to know, then include that information in the motion. You need to communicate the big picture in a fashion that it can be understood quickly by the reader. Avoid minutiae. For example, a tedious recitation of every document in the loan file is neither needed nor helpful. In a similar vein, do not cut and paste the identical case history and introductory paragraphs from earlier motions into later ones.

F. Avoid Excessive Case Citations. If there is a novel legal issue, cite a case or two that supports your position. One or two cases is ordinarily sufficient. Avoid long string cites unless you are trying to make a point. Also, citation of well-settled law

is not helpful. For example, taking two pages to review the standards for summary judgment is a waste of space.

G. Never Disparage Your Opponent. As Justice Ginsburg once said, "You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side." Using words such as "outrageous," "disingenuous," and the like reflects poorly on you.

H. Be Intellectually Honest. If you have weaknesses in your position, “pull the teeth” by addressing them in your motion explaining that while you concede that these weaknesses exist, they should not compel a different result. Similarly, address your opponent’s best argument in your motion.

I. Provide Copies of Cases. Many judges welcome the filing of cases that will be relied on at the hearing so long as the cases are furnished to opposing counsel. Depending on a judge’s practice, it is often useful to highlight the portions of the cases that you will be relying upon. Include those highlights in the cases you provide to opposing counsel.

J. Footnotes. Footnotes for citations generally makes for a motion that is easier to read. However, don't put substantive portions of your argument in footnotes. If it's substantively important, then it should be included in the text of your motion.

K. File Your Memo of Law Well Before Hearing. When you do file briefs or cases, they are of very little use to the court unless they are filed in a timely manner so as to allow sufficient opportunity for their review in advance of the hearing (delivery to chambers at the end of business hours on the eve of a hearing or on the day of the hearing is not timely). You should assume that the judge will rule from the bench, and briefs or cases filed at or immediately before the hearing will not be reviewed prior to the court’s making its ruling.

XIII. Trial Advocacy Tips.

A. General Trial Preparation.

1. Review the Pleadings. Pull the Complaint and Answer. List out on a pad of paper the causes of action that are at issue. Below each, list the elements of each cause of action. Do the same for the affirmative defenses contained in the answer.

2. List Witnesses. Next to each element of each cause of action list the names of the witnesses who will be called to give evidence relevant to each element.

3. List Documents. Next to each element of each cause of action, list the documents that will be introduced to support the element and, if necessary, the witness that will be used to authenticate the document.

4. Order of Witnesses. Once you have listed the elements that you need to prove in the witnesses and documents that would support your proof, decide on the order of the witnesses that you will call. Consider calling the opposing party as your first witness to establish facts that are undisputed or that have been established in the party's deposition.

5. Order of Documents. Put the documents in the general order in which you plan to introduce them. Make sure that you and your paralegal are familiar with the judge's particular practice when it comes to exhibits. Typically, an exhibit list should be prepared. Exhibits should each have a cover page or exhibit tag. If there are more than 10 exhibits, the exhibits should be put into binders for ease of access. Binders should be available for the witness on the stand, opposing counsel, the courtroom deputy, and the judge as well as for you and your client. Don't use oversized binders as they are difficult to manage in the courtroom. Label each binder both on the front cover and on the bookend with the designation of plaintiff or defendant and the numbered exhibits contained within that binder.

B. Witness Preparation.

1. Preparing and Reviewing Direct Examination. Go through direct testimony prior to trial as if your client were on the stand. Ask the questions the way you plan to at trial. Have the witness answer them. Listen to the answers.

2. Review of Deposition Testimony. Have your client read his or her deposition before coming to your office for the pre-trial preparation. You should also review your client's deposition before trial and highlight the areas that you can anticipate some cross-examination on. Review these areas with your client and role-play how the questions from the opposing side might be framed and have the client answer the questions.

C. Develop a Theme.

1. Concept—Presenting your case in a thematic package is more effective than any other approach. It gets your message across in 30 seconds. It takes a complicated case and by relating it to a recognizable theme, you make your position instantly recognizable.

2. Examples:

a) "This is a case about a debtor who bought a car two and a half months before the petition date and now says he could have bought the same car on the petition date for three thousand dollars less."

b) Cash collateral hearing representing the Bank: "This case is about our collateral being rapidly depleted by a hopelessly insolvent debtor that is still losing money and has no game plan to turn things around."

c) Cash collateral hearing representing the Debtor: "This is a case about what Chapter 11 was meant to be—a place where temporarily distressed but fundamentally strong companies can save their business to the benefit of hundreds of employees, a local community, and numerous trade creditors that continue to do business with the debtor."

D. Invoke the "Rule." See Exclusion of Witnesses, Section III.D. above.

E. Try Your Case.

Don't fall into the trap of trying the other person's case. Many times I've seen all of the energy in trying the weaker side's case. Then if they prove that case, they win. Counter a theme with a theme and try that case.

F. Things to Avoid.

1. Don't make disparaging remarks about opposing counsel or the opposing party. If the opposing counsel makes disparaging remarks about you or your client avoid responding in kind. Keep the high road. Two wrongs do not make a right. Avoid the word "disingenuous." It is almost always used in a disparaging manner.

2. Don't say, "With all due respect" to the judge. What the judge hears is, "With all due contempt."

3. Avoid expressions such as, "To tell you the truth" or "In all candor." It may raise the inference that the evidence that preceded was less than truthful.

4. Don't turn around and engage in a whispered conversation with co-counsel or your client while the judge or opposing counsel is speaking. It is rude. You also may miss something that's important. If you need to speak with co-counsel or your client, ask for permission.

5. Be careful about using such terms as, "My client's position is…." The judge may infer that you don't really believe competent substantial evidence supports your client's position or believe that your client's position is reasonable.

6. Don't say, "We would argue…." Just make your argument.

7. Don't use acronyms. Using acronyms sometimes conveys a sense of superiority by the attorney using the acronyms. More often than not, the witness, opposing counsel, or the judge will not know what the acronym means. This then

puts the judge in a position of having to admit openly his or her lack of "in the know" status by asking counsel to explain what the acronym means. If acronyms are unavoidable, prepare of list with definitions to hand out or include in your expendable trial booklet (see above, “Practice Pointers on Drafting Motions”).

8. Don’t use pronouns. Remember: a courtroom is a Pronoun Free Zone. Pronouns are often confusing to the listener and their use often results in misunderstandings.

9. Don’t cross-examine. This is discussed in Section II.B. in more detail. At least don’t cross examine unless you have some clearly achievable objectives such as bringing out a prior inconsistent statement or showing the witness’s bias. Explain this to your client because your client has seen lawyers on television and they always cross examine the witness.

Faculty

Vincent F. Alexander, CFE is a partner in the Fort Lauderdale, Fla., office of Lewis Brisbois Bisgaard & Smith LLP and a member of its Bankruptcy & Insolvency and Complex Business & Commercial Litigation practices. He has extensive experience in bankruptcy reorganizations and liquidations, out-of-court restructurings, asset sales, and bankruptcy- and insolvency-related litigation. Mr. Alexander regularly represents debtors, equitholders, chapter 7 and liquidating trustees, and unsecured creditors' committees, as well as other creditors, in bankruptcy proceedings and related litigation. He also has experience successfully representing clients in complex litigation matters, including fraud, trade secret and restrictive covenants, breach of contract, unfair and deceptive trade practices, fiduciary issues, and sports and entertainment. Before becoming a lawyer, Mr. Alexander was a linebacker in the NFL with the New York Jets and Arizona Cardinals, and was a mortgage banker for a large national lender. He received his B.A. in economics and commerce in 2003 from the University of Pennsylvania and his J.D. *cum laude* in 2009 from the University of Miami School of Law.

Hon. Jeffery W. Cavender is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, sworn in on March 2, 2018. Prior to his appointment to the bench, he was a partner in the financial restructuring practice of Troutman Sanders LLP, where he primarily represented corporate debtors and secured lenders in chapter 11 cases and mortgage servicers in consumer-related litigation and bankruptcy matters. Judge Cavender previously was a partner in the bankruptcy group of McKenna Long & Aldridge LLP (n/k/a Dentons LLP) and served as the general counsel for a national mortgage company. He chaired the Bankruptcy Section for the Atlanta Bar Association from 2017-18 and was a member of its board of directors from 2012-18. During Judge Cavender's tenure as chair, the Atlanta Bar Bankruptcy Section was named the national CARE chapter of the year and received the Pro Bono Award for Excellence and the Small Section of the Year Award from the Atlanta Bar. He is an active member of ABI, having previously served on the advisory committee for its Southeast Bankruptcy Workshop. He currently serves as the chair of the Membership Services Committee for the National Conference of Bankruptcy Judges and as an adjunct professor at Mercer University School of Law. Judge Cavender received his undergraduate degree in history *summa cum laude* in 1990 from Berry College, and his J.D. *cum laude* from the University of Georgia School of Law in 1993, where he was a member of the *Georgia Law Review* and was inducted into the Order of the Coif.

Denise D. Dell-Powell is the chair of Dean Mead's Bankruptcy and Creditors' Rights Practice Group in Orlando. She has more than 25 years of experience in bankruptcy and creditors' rights, as well as distressed property, including CMBS foreclosures, workouts and bankruptcy matters. She has represented secured and unsecured creditors, debtors, chapter 11 trustees, chapter 7 trustees and unsecured creditors' committees. In addition to a focus on banking and financial institutions, her career also includes representation in the hospitality, restaurant, health care and agricultural industries. In Ms. Dell-Powell's business litigation practice, she has represented parties in federal and state court and has experience trying both jury and nonjury trials. Her litigation practice involves representing clients in a broad range of matters, including those involving real estate, mortgage foreclosure, receiverships, lender liability, commercial evictions, partnership disputes and other real estate-based litigation. Ms. Dell-Powell is a Fellow of the American College of Bankruptcy and a frequent lecturer, presenter and author on bankruptcy, restructuring and related issues. She has presented at conferences and seminars

sponsored by the American Bar Association, ABI, Trigild, The Florida Bar, The Bankruptcy/UCC Section of The Florida Bar, the Florida Bankers Association, the Jacksonville Bankruptcy Bar Association, the Central Florida Bankruptcy Law Association and Lorman Education Series. Ms. Dell-Powell received her B.S. from Florida State University and her J.D. from Mercer University School of Law.

Karim Guirguis, PMP, CAE is chief strategy and innovation officer of the American Bankruptcy Institute in Alexandria, Va., the nation's largest association of bankruptcy professionals, comprised of 11,000 members in multidisciplinary roles, including attorneys, bankers, judges, lenders, turnaround specialists and others. Mr. Guirguis provides vision and leadership in transforming and conducting the company's internal and external IT plans. He joined the ABI staff in 2002 after several positions in website architecture and computer animation, most recently with Disney MGM Studios in Florida. Mr. Guirguis's work has earned several awards from his peers, including an Oscar for his work on Finding Nemo, the prestigious Horizon Award for ABI's video honoring its founders, as well as the Webby Award for his work with Tiffany Inc. and Polo.com. He is a regular presenter on cutting-edge technology issues for professional educators such as the American Society of Association Executives, for which he serves on its technology board. Mr. Guirguis received his B.S. in electrical engineering from Cambridge University in England, his Master's in multimedia and animation from George Mason University, and his M.B.A. from Harvard Business School.

Jordi Guso is a partner with Berger Singerman, LLP in Miami in its Business Reorganization practice, where he concentrates his practice in commercial bankruptcy, workouts, financial restructuring and commercial litigation. He represents financially distressed businesses in court-supervised and out-of-court restructurings in a variety of industries, including aviation, hospitality, retail, casual dining and real estate. He also advises official committees, secured creditors and purchasers in the areas of bankruptcy, insolvency and § 363 asset sales. Mr. Guso has been listed in *The Best Lawyers in America* (2006-19), *Chambers & Partners USA*: *America's Leading Business Lawyers* (2004-18), *Florida Trend* magazine's "Legal Elite" (2004-18) and "Legal Elite Hall of Fame" (2015-18), as one of the top 1.6 percent of attorneys in Florida, *The South Florida Legal Guide*'s "Top Lawyer" (2005-18), *Florida's Super Lawyers* (2006-18), *Who's Who Legal*, Florida (2008-17) and *Who's Who Legal* (2008-17), and he is AV Preeminent-rated by Martindale-Hubbell. He is a Fellow of the American College of Bankruptcy and an ABI member, and he has served on the board of the Bankruptcy Bar Association for the Southern District of Florida and on the advisory board of ABI's Alexander L. Paskay Memorial Bankruptcy Seminar. Mr. Guso is admitted to practice in Florida, the Eleventh Circuit U.S. Court of Appeals, and the U.S. District and Bankruptcy Courts for the Southern, Middle and Northern Districts of Florida. He clerked for Hon. Sidney M. Weaver, former Chief U.S. Bankruptcy Judge of the U.S. Bankruptcy Court for the Southern District of Florida, from 1990-92. Mr. Guso received his B.S. in political science from Spring Hill College and his J.D. from the University of Miami School of Law.

Amy Denton Harris, CPA is a shareholder with Stichter, Riedel, Blain & Prosser, P.A. in Tampa, Fla., where she regularly represents debtors, committees, creditors, trustees, purchasers and other parties in bankruptcy cases, assignments for the benefit of creditors and out-of-court workouts. She is also active in the firm's representation of borrowers and guarantors in state court litigation initiated by lenders. Ms. Harris has been particularly active in the representation of independent and franchised

restaurants in chapter 11 cases. She has also been active in the representation of doctors, real estate developers and other individual chapter 11 debtors. Ms. Harris has been appointed a subchapter V trustee and is past chair of the Accounting Circle at the University of South Florida. She is Board Certified in Business Bankruptcy Law by the American Board of Certification, is rated AV-Preeminent by Martindale-Hubbell, and a 2019 ABI "40 Under 40" honoree. She also was named among the 500 Leading U.S. Bankruptcy & Restructuring Lawyers in the 2020 edition of *Lawdragon*, listed in *The Best Lawyers in America* in the area of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law for 2020, listed among Florida's Legal Elite by *Florida Trend Magazine* for 2020, and listed as a "Super Lawyer" in Bankruptcy/Insolvency practice by "Florida Super Lawyers" from 2009-17. Ms. Harris received her J.D. with honors in 2002 from the University of Florida and interned for Hon. Paul M. Glenn and Hon. Michael G. Williamson.

Hon. Erik P. Kimball is a U.S. Bankruptcy Judge for the Southern District of Florida in West Palm Beach, appointed in 2008. Prior to his appointment to the bench, he was a member of the Commercial Law and Bankruptcy Department at Hale and Dorr (now WilmerHale) in the firm's Boston office, where he specialized in corporate bankruptcy, workouts and debt restructuring, and spent considerable time on pro bono representation of individual debtors. Judge Kimball left Hale and Dorr to become a vice president at Colonial Management Associates Inc., a Boston-based mutual fund advisor, where he oversaw all fixed-income defaults for the firm's municipal department. Thereafter, he was a shareholder with the Florida firm Nabors, Giblin & Nickerson, P.A., where his practice focused on representing institutional investors and indenture trustees in connection with defaults of publicly traded debt securities. He later returned to Boston as a vice president in the Investment Department at Columbia Management Advisors, an affiliate of Bank of America, where he supervised all fixed-income defaults and assisted in the management of its Municipal Department. From 2003 until his judicial appointment in 2008, Judge Kimball was a shareholder at Akerman Senterfitt in the firm's Orlando office, where he represented secured creditors, indenture trustees, institutional investors, corporate debtors and other parties in bankruptcy, receivership and debt-restructuring matters. Prior to his appointment, Judge Kimball was a member of the Board of Governors and a member of the Executive Committee of the National Federation of Municipal Analysts, an organization of more than 2,000 municipal credit analysts whose primary goal is to provide educational programs for municipal finance professionals. During his long association with the NFMA, he assisted in writing and presenting on numerous topics relevant to municipal finance. Judge Kimball is a recipient of the Denis Maguire Pro Bono Award of the Boston Bar Association. He received his his B.A. from the University of Massachusetts at Amherst in 1987 and his J.D. from Boston College Law School in 1990.

Chad P. Pugatch is a member with Lorium PLLC in Fort Lauderdale, Fla., and leads its Bankruptcy, Insolvency and Restructuring practice. He has been practicing since 1976. Previously, Mr. Pugatch practiced with several Fort Lauderdale firms, including his own private practice, where he focused on commercial litigation, bankruptcy and insolvency law. He has extensive experience in state and federal courts, having represented debtors, trustees, committees and creditors, among many others. Rated AV-Preeminient by Martindale-Hubbell, Mr. Pugatch is a member of ABI, the American and Broward County Bar Associations, and the Bankruptcy Bar Association of the Southern District of Florida. He received his B.A. in 1973 from the University of Miami and his J.D. in 1976 with honors from the University of Florida Levin College of Law.

Charles M. Tatelbaum is an attorney with Tripp Scott in Fort Lauderdale, Fla., and chairs its creditors' rights and bankruptcy practice group. For more than 50 years, he has focused his practice on bankruptcy and creditors' rights issues, complex business litigation, UCC transactions, lender-liability litigation and other types of secured transactions, as well as domestic and international letters of credit. Mr. Tatelbaum regularly represents secured and unsecured creditors in transactions and insolvency situations, creditors' committees, business clients in complex business litigation, and provides defense of lender-liability claims, all types of bankruptcy proceedings and product-liability defenses based on warranties. He also represents secured and unsecured creditors in distressed business transactions and litigation, and he has represented clients in chapter 9 municipal bankruptcy proceedings and chapter 15 foreign bankruptcy proceedings. Mr. Tatelbaum is well-versed in dealing with all aspects of domestic and international letters of credit, from the transactional stage through litigation. A founding ABI member, he has served on its Board of Directors and as an editor of the *ABI Journal*, and he served as chairman of the Task Force on Mass Torts and on the advisory board of the *ABI Law Review*. 1992-1997. For seven years, Mr. Tatelbaum was an adjunct professor at the University of Maryland School of Law, teaching courses in creditors' rights and the Uniform Commercial Code, and now serves as an Emeritus member on the Board of Visitors of the Francis King Carey School of Law at the University of Maryland. For several years, he was hired by the Federal Judicial Center to provide training to bankruptcy judges throughout the country at their annual educational retreats. He also authored a number of the provisions of the bankruptcy law changes that were signed into law in April 2005. Mr. Tatelbaum regularly represents Fortune 150 companies and has been featured as a consultant on "60 Minutes" and "Good Morning America," as well as on NPR's "All Things Considered" and "Morning Edition." Additionally, he is a frequent guest on news radio programs throughout the United States speaking on current developments involving bankruptcy and creditors' rights. Mr. Tatelbaum received his B.A. in 1963 from the University of Maryland and his J.D. in 1966 from the University of Maryland School of Law, where he was a member of the editorial board of the *Maryland Law Review* and vice president of the Student Bar Association.

Scott A. Underwood is an attorney with Underwood Murray PA in Tampa and has experience in some of the most complex bankruptcy cases and distressed business situations. He has represented distressed businesses, chapter 11 debtors, secured and unsecured creditors, bankruptcy trustees, creditors' committees, landlords, liquidating trustees and parties acquiring and selling assets from bankruptcy cases. Mr. Underwood's debtor-side representative experience crosses many industries. He has represented chapter 11 debtors in the health care industry, hospitality, real estate, utilities, waste-management, technology and manufacturing. In addition to representing debtors, he has represented large secured creditors, asset-purchasers, bondholders, debtor-in-possession lenders, trustees, business owners, creditors' committees and professional fiduciaries. His representative and transactional bankruptcy experience measures in the billions of dollars. Beyond core chapter 11 matters, Mr. Underwood represents clients in various high-stakes insolvency related litigation matters. He has been involved in substantial director and officer litigation, bond disputes, technology products liability litigation and other commercial disputes. He also brings substantial experience with assignments for the benefit of creditors, having represented assignees, assignors, asset-purchasers and creditors in such proceedings throughout Florida. Mr. Underwood is a member of, among other organizations, ABI (for which he is a past chair of its Real Estate Committee) and the Tampa Bay Bankruptcy Bar Association, Bankruptcy Bar Association for the Southern District of Florida and Business Law Section of the Florida Bar, where he is an active member of its Bankruptcy/UCC Committee and its study groups. A frequent speaker on bankruptcy topics, he has been listed in *Chambers USA* since 2012,

in *Florida Super Lawyers* since 2009, as one of the Top 50 Lawyers in Tampa in 2019, and as one of *Florida Trend Magazine*'s Legal Elite since 2013. He was also selected for inclusion in *The Best Lawyers in America* (2018, 2019 and 2020 editions) in Bankruptcy & Creditor Debtor Rights and Insolvency & Reorganization Law, and is rated AV-Preeminent by Martindale-Hubbell. Mr. Underwood received his B.A. in 1998 from the University of Florida and his J.D. *magna cum laude* from the University of Florida Levin College of Law in 2003.

Hon. Michael G. Williamson is a U.S. Bankruptcy Judge for the Middle District of Florida in Tampa, initially appointed as bankruptcy judge in March 2000 and as chief judge from 2015-19. He currently serves as co-author of *West's Bankruptcy Law Manual* and as an adjunct professor at Stetson University College of Law, where he teaches bankruptcy law. Judge Williamson began his bankruptcy practice serving as a chapter 7 panel trustee from 1977-79. For the next 20 years, he represented numerous chapter 11 corporate debtors, creditors' committees and trustees in bankruptcy cases pending throughout the state of Florida until his appointment to the bankruptcy bench in 2000. Judge Williamson is past chair of the Committee on Creditors' Rights, Section of Litigation of the American Bar Association, past chair of the Business Law Section of The Florida Bar and that section's Bankruptcy/UCC Committee, and a Fellow of the American College of Bankruptcy. He received his undergraduate degree from Duke University in 1973 and his J.D. from Georgetown University Law Center in 1976.