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Subchapter V: Plan Confirmations by the Numbers

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CONCURRENT SESSION

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ABI MATERIALS

Subchapter V – Confirmation by the Numbers

I. Subchapter V Trustee's role

The subchapter V trustee's duties include only a subset of the duties of chapter 7 and "standard" chapter 11 trustees. The following table illustrates the differences:

		Sub V	Chap 11	Chap 7
§704(a)		§1183	§1106	§704
1	Liquidate Property			YES
2	Accountable for property	YES	YES	YES
3	Ensure debtor informs court of intentions with respect to property			YES
4	Investigate financial affairs			YES
5	Examine / object to POCs (if a purpose would be served)	YES	YES	YES
6	Oppose discharge (if advisable)	YES		YES
7	Furnish information upon request		YES	YES
8	File operating reports and tax returns		YES	YES
9	Make a final report and account	YES	YES	YES
10	Provide notice of DSO		YES	YES
11	Assume responsibility for any ERISA plan		YES	YES
12	Transfer patients from health care business if it is closing		YES	YES

However, the subchapter V trustee's role can be expanded to include some specific duties applicable to "standard" chapter 11 trustees if the court so orders it "for cause and on request of a party in interest, the trustee or the United States Trustee." The following table illustrates those potential additional duties:

		Sub V	**Chap 11**
§1106(a)		§1183	§1106
3	Investigate the acts and financial condition of the debtor, and the desirability of the continuance of the business	IF ORDERED	YES
4	File statement of investigation including fraud, dishonesty, incompetence, misconduct, mismanagement or irregularities, transmit to creditors / court	IF ORDERED	YES
7	File post-confirmation reports	IF ORDERED	YES

In addition to taking on these duties, Subchapter V trustees must quickly familiarize themselves with the debtor's statements and schedules, attend the Initial Debtor Interview in partnership with the United States Trustee's office, attend the 341 meeting and take on the following:

§1183(b)	**S**
3	Appear and be heard at the Sec 1188 Status Conference
3(A)	Appear and be heard at any hearing that concerns the value of property subject to a lien
3(B)	Appear and be heard at confirmation hearing
3(C)	Appear and be heard at any hearing concerning a modified plan
3(D)	Appear and be heard at any hearing concerning a sale of property
4	Ensure that the debtor commences making timely confirmed plan payments
5	If debtor is removed as DIP, operate the business, file operating reports and tax returns per §704(a)(8), assume the 704(a) duties required of "standard" chapter 11 trustees (see table above), file Creditor list, SOFA and furnish information to tax authorities
6	Provide written notice of DSO claim per §704(c)
7	**Facilitate the development of a consensual plan of reorganization**

The duty to "facilitate the development of a consensual plan of reorganization" in §1183(b)(7) is new, and specifically not included in the duties of other trustees under chapter 7, 12, 13 or standard Chapter 11

cases. Subchapter V trustees are therefore more uniquely tasked with ASSISTING the debtor's efforts to reorganize, by mediating between parties to achieve agreed terms and a consensual plan of reorganization. contested confirmation hearings.

II. Subchapter V trustees – Sample Investigations Performed for Parties in Interest

a. Comparative Salary Investigation (Rising Phoenix Investments LLC 20-15711 EEB CO)

Principal of the debtor proposes to compensate herself with a salary for running a liquor store, creditors disagree. Judge requests a comparative salary investigation from Subchapter V trustee. Subchapter V trustee undertakes independent researching drawing on market and Bureau of Labor Statistics data to define a "reasonable" salary for the plan.

b. Wage Claim Investigation (Let's Go Aero, Inc. 20-17582 MER CO)

Principal of the debtor has claim for accrued but unpaid wages from debtor entity, creditors disagree. Second amended plan calls for an independent report on the accuracy of the claim. Subchapter V reviews the debtor's financial records and tax returns and produces a report for the parties.

c. Deep Dive on Projections / Assumptions (case by case)

Sample the numbers, test assumptions. Are forecasts realistic? Have all expenses been captured? Sanity check and mediate between the parties, advocate for adjustments to facilitate agreement.

III. Make the most out of your Subchapter V trustee

Practice Tip: Make sure you vet your client at the beginning of the case

a. Is this a confirmable case, or highly unlikely to succeed from the outset?
b. Does the Debtor have sufficient cash flow or assets to get to confirmation?
c. Can the headwinds occurring prebankruptcy or obstacles be overcome or minimized post-bankruptcy?
d. Is the Debtor considering all revenue streams and costs in determining whether the entity is profitable and can survive?
e. How sophisticated is management and accounting personnel?
f. Does the Debtor have an accounting system and reliable financial information to make future operating decisions?
g. Consider creating a 13-week cash flow analysis as a mechanism to truly evaluate cash flow and operations going forward.
h. Does this case qualify for Sub V (UST has been really keeping a close eye on this issue)?

Practice Tip: Help identify key areas of conflict and anticipated confirmation issues

Who are the key creditors? Two-party dispute, or multi-party? How can the Subchapter V trustee get involved early to get ahead of issues to facilitate a consensual plan?

Practice Tip: Explain the Subchapter V trustee role to the debtor

Educate your debtors about the role of the Subchapter V trustee, and in particular their unique role of "facilitating a plan of reorganization." More so than any other type of trustee under the bankruptcy code, the Subchapter V trustee is tasked with HELPING the debtor develop a consensual plan of reorganization. Debtors should regard their Subchapter V trustee as a reputable and valuable resource to assist with their reorganization efforts.

Practice Tip: Utilize the Subchapter V trustee as a Mediator

Debtors may not have an open line of communication with their Creditors, and/or negotiation may be easier to undertake with the help of an independent third party. Utilize your Subchapter V trustee to open a line of communication with your Creditors, and to educate them about the Subchapter V plan confirmation process. Help the Subchapter V trustee understand the leverage points for both parties so that he/she can successfully negotiate towards mutually agreed solutions.

Practice Tip: Include Subchapter V trustee when providing documents to the United States Trustee

The United States Trustee sometimes requests documents that may not be filed on the court docket, for example prior tax returns. Include the Subchapter V trustee when responding to these requests so that the trustee has all available information when working with the parties towards consensual confirmation.

Practice Tip: Allow time for the Subchapter V trustee to review reorganization plans

Debtors must file their plan of reorganization within 90 days of the petition date and the deadlines can be tight for debtors and their attorneys. Allow time for the Subchapter V trustee to review proposed plans of reorganization to avoid questions or potential objections later.

Practice Tip: Leverage the Subchapter V trustee's expertise, contacts and experience

Trustees have unique credentials and experience, and not all trustees within regional pools are the same. Get to know your trustee's strengths and leverage those strengths to help your client achieve consensual confirmation.

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Subchapter V – Confirmation by the Numbers - Debtors

I. Plan Confirmation – Best Practices for Debtors

Section 1191 governs confirmation of a Plan under Subchapter V. There are two pathways to confirmation: Under 1191(a) which is with consent of the creditors; and 1191(b), without consent but where the Plan is fair and equitable. It goes without saying that "getting consent of creditors" is the best practice pointer a debtor can receive. But where consent cannot be obtained, the Plan must be "fair and equitable."

Section 1191(b) states "Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

Section 1191(c) tells us what "fair and equitable" means. First, it treats secured creditors as required by Section 1129(b)(2)(A); and second, the Plan provides for either the projected disposable income to be paid to creditors; or the value of property distributed under the Plan is not less than the projected disposable income. Put another way, a Plan is fair and equitable if it proposes the greater of projected disposable income or the value of the debtor's assts.

Debtors' attorneys have long needed to file projections and a liquidation analysis along with their plan. But it is worth looking at these staples of Chapter 11 in a new light under Subchapter V.

a. The Projections

Subchapter V demands a plan be filed within the first 90-days of the case. Thus, there is no time to waste in getting the projections put together.

Practice Tip: Hire an Accountant.

If projections are challenged, a debtor needs to be ready to put on testimony regarding the projections to show the plan, not only is fair and equitable, but also that the Plan is feasible. That means if you go to a contested confirmation hearing, the projections are going to be put on trial.

Subchapter V necessarily attracts smaller cases because of debt limits. There is a temptation to cut costs where you can. This is not the place to cut costs. If an attorney decides they can put together their own projections, they risk becoming a witness at the contested confirmation hearing. If a debtor decides to put together their own projections, they risk having their financial credibility and the objectiveness of the numbers put on trial.

What are you looking for in an accountant? In an ideal world, you are looking for someone who is both familiar with the business and familiar with bankruptcy. In a traditional 11, an attorney might prioritize familiarity with bankruptcy because the accountant has time to get up to speed on the business. Because

of the time constraints, the scales tend to tip toward familiarity with the business. You need someone who can quickly put together projections for the business, and a familiarity with that business helps. It is likely easier to train an accountant on what the Court is looking for than it is to train an accountant on the history of a business.

As a final point here, however, issue spot whether the accountant is disinterested. Section 1195 states a professional in a subchapter V is not "disinterested" so long as it holds a pre-petition claim for less than $10,000.00. While Subchapter V is more forgiving on the question of disinterest, make sure you know the facts before you get too far down the road with the accountant.

Practice Tip: While you are at it, hire the accountant early.

In an ideal world, the debtor realizes their financial trouble early and you are retained with time to plan the filing. In that ideal world, get the accountant involved early on. It ensures the debtor is not scrambling to put together projections on the 80th day of the case.

The world, however, is not often ideal. As a result, the debtor's counsel is often confronted with a case that needs to be filed within days of getting hired. And early in the case, there is simply a lot which needs to be done. The attorney needs to have their employment and retainer approved, and deal with first day motions like using cash and paying employees. Do not let the need to onboard the accountant get lost in the shuffle – both in terms of finding the right accountant for the case, and in terms of getting court approval for their employment. Keep the accountant on your client's radar, and make sure they are hired early in the case.

Practice Tip: Make sure the accountant knows the deadlines.

Section 1189(b) says "the debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable."

When the accountant is brought onboard, make sure they know two deadlines from the outset: first, the deadline to file the plan; and second, the date when you need the projections in order to make sure the plan is timely filed. Section 1189(b) leaves the Court with a fair amount of discretion regarding extending the plan deadline, but the accountant did not get the projections done would be a tough argument for an extension of that 90-day deadline.

Practice Tip: Vet the projections.

This is where the attorney takes an active role in the projections. What assumptions did the accountant use and are they reliable? Do the line items make sense?

Remember that Subchapter V does not eliminate the requirement that the Plan is feasible. If your projections are going to come under attack, it will be on that basis – the projections are not reliable, and the plan is not feasible. Giving the projections a critical review on the front end will leave you in a better position in the event the projections draw any objections.

Practice Tip: When vetting the projections, make sure you are familiar with the historic operations of the business.

The easiest way to show projections are reliable is to be able to tie them to the historic operation of the business. If you are familiar with the recent history of the business, you can evaluate the projections with a critical eye. If they differ from historic financials significantly, find out what has changed and why so you can evaluate the reliability of the projections.

Practice Tip: Evaluating the projections after an objection is filed.

Section 1193(a) provides the debtor may modify the pan at any time prior to confirmation. This provides the debtor with some leeway to amend the projections after the plan has been filed in the event any objections have been drawn. Make sure the accountant in your case knows the deadlines after the Plan has been filed as well. When is the Objection deadline; when is the confirmation hearing; etc. In the District of Colorado, those deadlines fall right on top of each other. Making sure the accountant is available to discuss and address any objection to the projections is critical to the debtor's ability to respond to objections.

b. Liquidation Analysis

The Liquidation Analysis has always been a critical component of Chapter 11. The fair and equitable test, however, means early in the case, an attorney for debtors needs to evaluate the value of the business if liquidated against the value of the company as a going concern.

Practice Tip: Be on top of value early in the case.

Much like with projections, a debtor's attorney needs to have a sense of the value of the assets in the case from the start of the case. If the debtor is asset rich but cash flow poor, that impacts case strategy and how you can position the debtor to confirm a plan and exit the case. Valuation is liquidation value, so if there is any question on value, bringing in an auctioneer to give the debtor a valuation is useful.

Practice Tip: The liquidation analysis is more than just the value of the asset.

When you are putting together the liquidation analysis, the debtor gets to account for costs of sale when arriving at the liquidation value. In an individual case, the debtor also gets to account for the value of the exemption.

For costs of sale, understand this is not just a set number. Cost of sale for selling a house is not the same as the cost of selling a vehicle. Make sure you have a basis for the cost of selling an asset.

Once you reach the collective value of the assets, the liquidation analysis is not over. The debtor gets to subtract

(a) The Chapter 7 Trustee's statutory commission on the value of the assets. The statutory commission is found in Section 326 of the Code. Additionally, the commission accounts for the entire gross sale price of the asset – not just the net;
(b) Any priority tax debt or other priority or administrative claims which would be paid in the Chapter 7 case. This includes attorney fees and other professional fees incurred in the Chapter 11 estate; and
(c) An estimate of the attorney fees which might be incurred in the hypothetical Chapter 7 estate. What issues are there which might require a Chapter 7 trustee to hire counsel, and how involved are those issues.

Practice Tip: Putting a value on litigation claims.

Litigation claims – like preferences or fraudulent transfer claims against insiders – might be something the debtor has no interest in pursuing. When putting a value on litigation claims, if the value is zero, be prepared to explain *why* the value is zero. Would attorney fees incurred in taking the matter to trial exceed the best day in court?

Practice Tip: Valuing Accounts Receivable.

Accounts receivable have an obvious gross value – the amount of the receivables on the debtor's books. But the actual value to the estate varies quite a bit by industry. A construction case and a medical case could have the same gross number on a/r, but an entirely different liquidation value. Make sure you understand the industry your debtor operates in and the debtor's historic recovery level.

Practice Tip: Drop footnotes

When I draft a liquidation analysis, I drop frequent footnotes so that any party-in-interest can understand what assumptions I have made, and why. Why did cost of sale differ between the sale of the house and the car? Why is the liquidation value of the a/r randomly different from the gross value? Just as your projections will have certain assumptions imbedded in them, the liquidation analysis will as well.

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OBJECTING TO SUBCHAPTER V PLANS

1. 1111(b) Election.

   a. The default rule in a bankruptcy case is that an undersecured claim is divided into its "secured" and "unsecured" components. 11 U.S.C. § 506(a)(1).

   b. Section 1111(b)(2) provides that if a "class" of claims so elects, then "notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed." If a class of secured claims makes the election under section 1111(b)(2) then the full amount of each such claim, and not just an amount that is equal to the value of the respective underlying collateral, must be treated as a "secured" claim under a plan of reorganization.

   c. An election under section 1111(b)(2) affects a debtor's ability to confirm a plan of reorganization over the objection of a secured creditor. A plan cannot be confirmed over the objection of a secured creditor in a subchapter V case unless the plan is "fair and equitable" with respect to its secured claims. See 11 U.S.C. § 1191(b). This, in turn, requires that the treatment of the relevant secured claims comply with the requirements of section 1129(b)(2)(A) of the Bankruptcy Code. See 11 U.S.C. §§ 1191(c)(1). Section 1129(b)(2)(A) provides that a plan is "fair and equitable" as to non-consenting secured creditor claims if the plan meets one of three tests:

      i. (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

      ii. (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the

plan, of at least the value of such holder's interest in the estate's interest in such property;

iii. (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

iv. (iii) for the realization by such holders of the indubitable equivalent of such claims.

d. Thus, when the 1111(b) election is made, and absent a sale, the plan must provide to pay the value of the allowed secured claim over the life of the plan, which is three to five years. The total amount of payments must equal the allowed claim however the actual discounted present value of the proposed deferred payments would only need to be equal to the current value of the underlying collateral. Thus for example if the collateral is worth $250,000 but the total claim is $500,000, the plan payments need to provide for a total payment of $500,000 with a present value of $250,000.

e. In essence, the election allows an undersecured creditor to opt out of the lien-stripping found in § 1129 in exchange for relinquishing its deficiency claim, retaining its lien for the full/amount of its claim, and receiving payments totalling the entire allowed claim and having a present value equal to the secured amount. *In re 680 Fifth Avenue Associates,* 156 B.R. 726 (Bankr. S.D.N.Y. 1993).

f. Under conventional plans, payments to meet the requirements of the 1111(b) election might be made over many years to meet the formula. However the life of a sub. V plan is three to five years and payment arguably may not be stretched beyond that timetable. In many instances, this will render the plan unfeasible.

g. Under conventional plans, payments to meet the requirements of the 1111(b) election might be made over many years to meet the formula. However the life of a sub. V plan is three to five years and payment arguably may not be stretched beyond that timetable. In many instances, this will render the plan unfeasible. *In re 680 Fifth Avenue Associates,* 156 B.R. 726 (Bankr. S.D.N.Y. 1993)

h. Dealing with the election:

i. Plan can provide for a sale of the collateral? At any time during the plan? Does the plan require a present sale? Last second sale?

ii. Time Bar: Usually the elections must be made by the time of the disclosure statement hearing or as otherwise provided by the Court.

No disclosure statement hearing in small business, subchapter V cases. Thus, Court imposed deadline governs?

iii. Some jurisdictions may now set the 1111(b) bar date as part of the initial scheduling notice. Could run as early as some time after the filing of the initial plan.

iv. De minimus value. An election under section 1111(b) is not available if the interest of the claimholders in the relevant collateral is "inconsequential." 11 U.S.C. § 1111(b)(1)(B)(i)

(1) *In re V.P. Williams* 2020 WL 5806507 (Bankr. S.D.N.Y. 2020) – adopting the common meaning of inconsequential and whether the collateral was worth $90,000 or $250,000, the value was not inconsequential. Id at *3.

(2) But See *In re Body Transit, Inc.*, 619 B.R. 816, 836-37 (Bankr. E.D. Pa. 2020)(finding an $80,000 valuation of collateral on a $1,000,000 debt to be inconsequential.

2. Qualification Subchapter V – Does the Debtor Qualify?

a. *11 U.S.C. § 1182(1)(A)*... means a person engaged in commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor

b. Person engaged in commercial or business activities

i. Most courts say "currently" involved – thus, a defunct or non-operating business may not comply. *In re Rickerson*, Memorandum Decision, attached hereto. The court finds that the physician debtor is ineligible to proceed under Subchapter V. The court noting a split in authority, finds that a Subchapter V debtor must be presently engaged in commercial or business activities to be eligible. Noting another split of authority, the court finds that a mere employee relationship is insufficient:

ii. "In their Motions the Movants raise two arguments as to why the Debtor in this case does not qualify under this definition. First, they argue that she is not "a person engaged in commercial or business activities" within the meaning of the statute, pointing out that her previous business ventures related to the medical practice all terminated and ceased any operations a number of years ago, and that since then she has been only a W-2 employee of OPTUM, a company which she neither owns nor manages. Second, they

argue that she cannot show that at least 50% of her debt arose from her commercial or business activities.

* * *

[T]he Court agrees with Johnson and concludes that in order to be eligible to proceed under Subchapter V a debtor must be presently engaged in commercial or business activities. . . . . In so finding, the Court is aware that there is some contrary caselaw holding that past commercial or business activity by the debtor is sufficient to meet the Subchapter V eligibility requirement. The Court does not find these cases persuasive on the point and rejects them."

iii. The *Rickerson* court discusses but does not reach a conclusion on the meaning of "commercial or business activity."

iv. Debtors do not qualify if debt exceeds the statutory limit – currently approximately 7.5 million dollars. How does a court deal with contingent debt? Debt which may or may not be forgiven under PPP program? How about disputed debt – concept of a bona fide dispute?

3. Feasibility and Projected Disposable Income

a. Feasibility – same standard as other chapter 11 cases

b. Projected Disposable Income – May be the major battleground for feasibility analysis.

c. Is there a minimum distribution requirement?

i. Case law from chapter 13

ii. In re Urgent Care suggests no duty to extend plan to 5 years even if unsecured creditors receive only minimum distributions;

iii. *In re Urgent Care Physicians. Ltd.*, Bankr. E.D.Wisc., Confirmation Decision attached hereto. The court confirms an urgent care clinic's 3-year Subchapter V plan, which is premised on eventual receipt of funds from an Economic Injury Disaster Loan. The plan provides for no recovery by unsecured creditors:

iv. "I conclude that the debtor's failure to propose a five-year plan rather than a three-year plan does not demonstrate a lack of good faith in the circumstances. As one bankruptcy court has explained, the good faith doctrine is a narrow one, and for good reason.

* * *

> The debtor's decision not to voluntarily extend the plan term another two years to pay general unsecured creditors even more than the Code requires is not misconduct or egregious behavior that warrants a finding of bad faith.
>
> * * *
>
> Congress's recognition that small businesses typically have shorter lifespans than large businesses suggests that a plan term of three years is more reasonable, generally speaking (or as a default), than a five-year term, absent unusual circumstances. And Congress's concern for not only small business owners, but small business employees, customers, and others, who rely on such businesses, reflects an intent to balance the shorter life-span planning of small businesses and timely cost-effective benefits to debtors, against the benefits to creditors.
>
> In this case, a three-year term achieves that balance, by recognizing that this small business that provides outpatient health care for urgent needs, has deferred partial salary payments to its insiders, has deferred some healthcare equipment payments, and has committed to paying at least its projected disposable income. Imposing a plan term of five years would tip that balance potentially unevenly toward creditors, because it would further defer repayments and full salary restoration to key staff."
>
> *Id* at. Page 5 et seq.

v. Is it a bad faith plan to not provide any distribution to unsecured creditors?

4. Liquidation Analysis

a. Must propose under Plan distributions that would at least equal a chapter 7 distribution – "Best Interests Test Applies."

b. Has Debtor undervalued its business? Valuations methods may make a significant difference. Should business always be valued as ongoing business for subchapter V purposes?

Faculty

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