Central States
Bankruptcy Workshop

Business Track

Subchapter V: What We Know and Don't Know After Three Years

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1. Sub V Eligibility Issues

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2. The Role of the Subchapter V Trustee

Subchapter V Trustee as Debtor in Possession

A debtor in possession may be removed for cause. 11 U.S.C. Section 1185(a).

This includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case." 11 U.S. Code § 1104(a)(1).

- Examples of the Court removing a debtor in possession for cause:
  - *In re Corinthian Commc'ns, Inc.,* 642 B.R. 224 (Bankr. S.D.N.Y. 2022)
  - *In re Dani Transport Service, Inc.,* No.6:20-bk-11234. Order at 2 (C.D. Cal. Feb. 23, 2021).
    - Both involved dishonesty in relation to and misuse of PPP loans.

If the debtor in possession is removed, the Subchapter V trustee steps into the shoes of the debtor, takes possession of the property of the estate and operates the debtor's business.

The Subchapter V trustee becomes a "fiduciary with an obligation of fairness to all parties in the case." U.S. Dep't of Justice, Handbook for Small Business Chapter 11 Subchapter V Trustees.

If the debtor ceases to be a debtor in possession, the Subchapter V trustee's duties include:

- Being accountable for all property received Section 704(a)(2);
- Examine proofs of claim and object to improper claims 704(a)(5);
- Unless the court orders otherwise, provide information regarding the estate as requested to parties in interest 704(a)(7);
- File reports of operations if the debtor is authorized to be operated 704(a)(8);
- Make a final report and file a final account of the administration of the estate 704(a)(9);
- Provide notice of the debtor's domestic support obligation 704(a)(10);
- Administer any employee benefit plan 704(a)(11);
- If debtor is a health care business, take reasonable steps to transfer patients704(a)(12).
- File the list, schedules and statements required under section 521(1).
- For any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information.

- If there is a claim for domestic support obligation, provide the applicable notice to the holder of the claim and appropriate State child support enforcement agency, as set forth in § 704(c).
- Facilitate the development of a consensual plan of reorganization § 1183(b)(7).

U.S. Dep't of Justice, Handbook for Small Business Chapter 11 Subchapter V Trustees. *See also,*11 U.S.C. §§1106(a)(1) and 1106(a)(2), § 1106(a)(6), §1183(b)(6), §1183(b)(7).

Practical points:

- A Subchapter V trustee must follow certain banking and accounting practices;
- Must obtain a trustee bond;
- Must preserve certain business records;
- More involvement with creditor to reach a consensual plan;
- Must protect estate assets; and
- Must consult with the debtor and its employees to operate the business.

Discussion:

- Removal of the debtor-in-possession.
- Operating the debtor's business.

Subchapter V Trustee as Mediator

Is the Subchapter V trustee an adversary, neutral party, mediator or something else?

The Subchapter V trustee is not a true mediator, but rather is a facilitator.

- Communication with parties.
- Suggest alternative solutions or ideas.
- Assist the parties in analyzing issues in the case.
- Encourage and facilitate settlement negotiations between the parties.
- Assist in providing explanations to creditors or interested parties.
- Engage in private communications between adversarial parties to try to reach a resolution.
- Assist in keeping order of the case.

How does the Subchapter V trustee facilitate the development of a consensual plan?

A Subchapter V trustee must be a "disinterested person" within the meaning of § 101(14).

- The Subchapter V trustee must submit a verified statement of disinterestedness to the U.S. Trustee prior to appointment in a case.

Under 11 U.S. Code §101(14):
(14) The term "disinterested person" means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

The Subchapter V trustee is also a party in interest, with standing to take positions on issues.

Under 11 U.S. Code § 1109(b):
(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

Such issues may include:

- Eligibility for Subchapter V relief;
- First day motions;
- Employment of professionals;
- Motions for adequate protection and relief from stay;
- Asset sales plan confirmation;
- Valuation of property;
- Objections to claims;
- Objection to discharge; and
- Dismissal, among other disputed issues in the case.

Discussion:

- How does the Subchapter V trustee's role as facilitator change if they take a position on an issue?
- What levels of Subchapter V trustee involvement as a facilitator have been successful/helpful?

Scope of Duties: Statutory and General Duties of a Sub V Trustee

- Statutory duties of a Subchapter V trustee are set forth in § 1183(b).
- Facilitation of the development of a consensual plan or reorganization is the role of the Subchapter v trustee.
- Trustee has a fiduciary responsibility to the bankruptcy estate.
- The Subchapter V's duties are largely supervisory unless the Court expands the Subchapter V's powers or the debtor-in-possession is removed.

Statutory Duties 11 U.S. Code § 1183(b):

1. Being accountable for all property received. §704(a)(2).
2. Examine proofs of claims and object if necessary. §704(a)(5).
3. Oppose the discharge of the debtor if warranted. § 704(a)(6).

4. Furnish such information concerning the estate and the estate's administration as is requested by a party in interest. §704(a)(7).
5. Make a final report and file a final account of the administration of the estate with the United States Trustee and the court. §704(a)(9).
6. Perform the duties specified in §1106(a)(3) and §1106(a)(4) of this title if the court, for cause and on request of a party in interest, the trustee, or the United States Trustee, so orders. Pursuant to this provision, the trustee is required to:
    a. Investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan §1106(a)(3); and
    b. once the investigation is completed, file a statement of the investigation. § 1106(a)(4)(A).
7. File post-confirmation reports to the extent necessary. §1106(a)(7).
8. Appear and be heard at the status conference under §1188 and any hearing that concerns:
    a. The value of property subject to a lien;
    b. Confirmation of a plan filed under Subchapter V;
    c. Modification of the plan after confirmation; or
    d. The sale of property of the estate.

    §1183(b)(3).
9. Ensure that the debtor commences making timely payments required by a confirmed plan. §1183(b)(4).
10. If the debtor is no longer the debtor in possession, perform certain duties under § 704(a)(8) and § 1106(a) and be authorized to operate the business of the debtor. §1183(b)(5).
11. In regards to a domestic support obligation, perform the duties under § 704(c). §1183(b)(6).
12. Facilitate the development of the consensual plan. §1183(b)(7).

Practical Duties of the Subchapter V trustee:

- The Subchapter V trustee has the unique duty to facilitate the development of a consensual plan of reorganization.
- Assess the financial viability of the debtor.
- Communicate with the parties to make progress.
- Ensure the debtor meets filing requirements.
- Prepare and participate in Court hearings.
- Meet and confer with the debtor, creditors or U.S. Trustee when necessary.

Costs of Subchapter V Trustee involvement

Considerations:

- Hourly rate.
- Level of trustee involvement.
- Trustee background and professional expertise.

Ways to Maximize Efficiency:

- Provide the Subchapter V trustee an overview of the case early on in the case.
- Communicate the case goals, the players, and the big picture of the plan of reorganization to the Subchapter V trustee.
- Provide adequate financial documentation.
- Communicate regarding issues with plan confirmation, creditor objections or adversary proceedings.
- Do not ignore the Subchapter V trustee's emails, calls and basic requests.
- Keep the Subchapter V trustee updated.

11 U.S.C. § 330: Compensation
(a)(1)After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

Discussion: What approaches to case efficiency have worked for you?

What approaches to payment of subchapter V trustee fees has worked for you?

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3. Discharge Exceptions

Issue: Nondischargeability of Corporations?

11 USC § 1192 states:

> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor 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, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt-
>
> (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) of this title.

BenShot, LLC v. 2 Monkey Trading, LLC (2 Monkey Trading, LLC), 2023 Bankr. LEXIS 1147 (Bankr. MD Fla. April 28, 2023)

> Based on Judge Burgess's decision in *Hall* [*Nutrien Ag Solutions, Inc. v. Hall, et al. (In re Hall), Ch. 11 Case No. 3:22-bk-01326-BAJ, Ch. 11 Case No. 3:22-bk-01341-BAJ, Adv. No. 3:22-AP-00062-BAJ, 2023 Bankr. LEXIS 1008, 2023 WL 2927164 (Bankr. M.D. Fla. Apr. 13, 2023)*] and the same conclusions reached by other bankruptcy courts, the Court agrees with Defendants that the Amended Complaint must be dismissed. *See GFS Indus., 647 B.R. at 344* ("[T]he statutory language along with the broader Chapter 11 statutory scheme mandate this **[*5]** Court's holding that corporate debtors proceeding under Subchapter V cannot be made defendants in *§ 523* dischargeability actions."); *Lapeer Aviation, No. 21-31500-JDA, 2022 Bankr. LEXIS 1032, 2022 WL 1110072, at *2* (holding that because a corporate defendant proceeding under Subchapter V is "not an individual debtor, actions under *§ 523(a)* are not applicable to it[]"); *Rtech Fabrications, 635 B.R. at 566*

(finding "that *§ 523(a)*'s discharge exceptions only apply to an individual debtor and *§ 1192(2)*'s reference to *§ 523(a)* does not expand its applicability to entity debtors[]"); *Satellite Rests., 626 B.R. at 873* (holding that *§ 523(a)* applies only to individuals, and not to corporations proceeding under Subchapter V).

In re Hall, 2023 Bankr.Lexis 1008 (MD Fla. April 13, 2023)

Although the Court finds that the Fourth Circuit's decision is well-written, the Court disagrees with the Fourth Circuit's reasoning and conclusion in ***Cleary Packaging, LLC***. Instead, the Court agrees with the five bankruptcy courts that have addressed this issue. Those courts concluded that the exceptions to discharge under *§ 523(a)* do not apply to corporate debtors receiving a discharge under *§ 1192*. *Avion Funding, 647 B.R. at 351-52*; *Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.), Adv. No. 22-03002, 2022 Bankr. LEXIS 1032, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022)*; *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC), 635 B.R. 559 (Bankr. D. Idaho 2021)*; *Cantell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging, LLC), 630 B.R. 466 (Bankr. D. Md. 2021)*, rev'd ***36 F.4th 509 (4th Cir. 2022)***; *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.), 626 B.R. 871 (Bankr. D. Md. 2021).*

The Court reaches this conclusion primarily because the SBRA amended the language of *§ 523(a)* to add a reference to *§ 1192*. If Congress intended for *§ 523(a)* exceptions to apply to corporations receiving a discharge under *§ 1192*, then this addition was unnecessary. See *Avion Funding, 647 B.R. at 343*.

Synergetic Oil Tools, Inc. v. Relevant Holdings LLC (In re Relevant Holdings LLC), 2023 US Dist.LEXIS 53042 (D. Colo 2023)

Bankruptcy Court dismissed nondischargeability action against corporate debtor, but relied entirely on two decisions from the Maryland Bankruptcy Court, one of which was Cleary, which was subsequently reversed by the 4th Circuit.

District Court found that because the Bankruptcy Court's decision relied solely upon decisions from the United States Bankruptcy Court for the District of Maryland to determine that the limitations identified in *11 U.S.C. § 1192(2)* (i.e., the kind of debt specified within *§ 523(a)*) are only applicable to individual Subchapter V debtors, there has now been an intervening change

in the law, which warrants reanalysis by the Bankruptcy Court. The Court finds the Fourth Circuit's analysis persuasive and reverses and remands the case back to the Bankruptcy Court to reanalyze the issue in light of ***In re Cleary Packaging, LLC, 36 F.4th 509, 518 (4th Cir. 2022)***.

Avion Funding, LLC v GFS Industries, LLC (In re GFS Industries, LLC), 647 BR 337 (Bankr. WD Tex. 2022)

For the reasons stated below, the Court determines that the interplay between *§§* ***1192(2)*** and *523(a)* compels the conclusion that in the Subchapter V context, only individuals, not corporations, can be subject to *§ 523(a)* dischargeability actions.

First, *§* ***1192(2)***'s reference to *§ 523(a)* only incorporates the list of nondischargeable debts, without expanding it. In other words, the language of *§* ***1192(2)*** does not intend to except from discharge any debts that *§ 523(a)* does not already except. Because *§ 523(a)* unequivocally applies only to individuals, the language of *§* ***1192(2)*** does not empower *§ 523(a)* to cast a wider net than the text of *§ 523(a)* permits. Had Congress included a phrase in *§* ***1192(2)*** explicitly stating that the list found in *§ 523(a)* applies to all debtors proceeding in Subchapter V, then the interpretation would be straightforward. Congress's choice not to insert this language is instructive.

Second, the inclusion of *§ 1192* in *§ 523(a)* would be rendered meaningless under any other interpretation. When Subchapter V was passed, Congress also amended *§ 523(a)* to add the newly enacted *§ 1192* to the list of discharge provisions incorporated in the scope of *§ 523(a)*'s discharge exceptions. *§ 523(a)* now reads, "[a] discharge under *section....1192....*does not discharge an individual debtor...." (emphasis added). *Section 1192*'s addition is vital to the analysis because it evinces Congress's intent. *Section* ***1192(2)*** as written makes *§ 523* discharge exceptions applicable to "debtors" without regard to whether the debtor is an individual or a corporation. Critically though, had Congress intended *§ 523(a)* exceptions to apply to entities as well, it would be unnecessary to add *§ 1192* to a statute that plainly applies to individual debtors only. The fact that Congress added *§ 1192* into *§ 523* demonstrates that Congress intended *§* ***1192(2)*** to limit the *§ 523* exceptions in Subchapter V to individuals only.

> Third, corporate debtors proceeding under Chapter 11 historically have been immune to dischargeability actions under *§ 523(a)*. It is well-settled law in this circuit that the *§ 523* exceptions to discharge apply only to individuals, not to corporations.

More compelling, the provisions governing Chapter 11 discharge imply that *§ 523(a)* should not apply to corporate debtors. *Section 1141(d)(2)* states, "[a] discharge under this chapter does not discharge a debtor *who is an individual* from any debt excepted from discharge under *section 523* of this title." (emphasis added). Had Congress intended that corporate debtors also be held to the provisions of *§ 523(a)*, then clarifying that only individuals under Chapter 11 are liable for *§ 523* exceptions to dischargeability makes little sense.

To date, four bankruptcy courts have decided this precise issue. All four bankruptcy courts have held that the *§ 523(a)* exceptions to discharge are applicable only to individuals, not corporations in Subchapter V. ***Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.)**, Adv. No. 22-03002, 2022 Bankr. LEXIS 1032, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022)*; ***Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC)**, 635 B.R. 559 (Bankr. D. Idaho 2021)*; ***Cantell-Cleary Co., Inc., v. Cleary Packaging (In re Cleary Packaging, LLC)**, 630 B.R. 466 (Bankr. D. Md. 2021), rev'd 36 F.4th 509 (4th Cir. 2022)*; ***Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)**, 626 B.R. 871 (Bankr. D. Md. 2021)*. All four decisions granted motions to dismiss under *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted. The Court agrees with the rationales of the courts as explained below.

In re Lapeer Aviation, Inc., 2022 Bankr. LEXIS 1032; 2022 WL 1110072, 71 Bankr. Ct. Dec. 112 (April 13, 2022) (J. Applebaum)

> Although neither Plaintiff nor Defendant addressed the statutory language, the first sentence of § 523(a) clearly limits the denial of discharge to "an individual debtor." Because Defendant LAI is a corporation and not an individual debtor, actions under § 523(a) are not applicable to it. There are innumerable pre-SBRA cases which support this finding. *See, In re MF Glob. Holdings, Ltd.*, No. 11-15059(MG), 2012 WL 734175, at *3 (Bankr. S.D.N.Y. Mar. 6, 2012) (citing *Adam Glass Serv., Inc. v. Federated Dep't Stores*, Inc., 173 B.R. 840, 842 (E.D.N.Y. 1994)) (finding that § 523(a) "only applies to individual debtors" and "is not applicable to corporate debtors"); *Savoy Records Inc. v. Trafalgar Assocs. (In re Trafalgar Assocs.)*, 53 B.R. 693, 696 (Bankr. S.D.N.Y. 1985) (holding that § 523(a) "on its face applies only to

> individual debtors"); *Williams v. Sears Holding Co.*, No. 06-PWG-455-M, 2008 WL 11424255, at *4 (N.D. Ala. Mar. 28, 2008) ("The discharge exception of 11 U.S.C. § 523(a)(2)(A) which applies only to an individual debtor, does not apply to Kmart, a corporate debtor."); *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 812 (5th Cir. 1990) ("Moreover, the 'willful and malicious injury' exception to discharge, like all of the exceptions to discharge found in section 523(a), applies only to individual, not corporate, debtors.").

Since the enactment of the SBRA, several courts that have considered the applicability of § 523(a) in the context of Subchapter V's discharge provisions governing non-consensual plans, 11 U.S.C. § 1192, have also found that § 523(a) does not apply to non-individual debtors. *In re Satellite Restaurants Inc. Crabcake Factory USA*, 626 B.R. 871 (Bankr. D. Md. 2021); *In re Cleary Packaging, LLC*, 630 B.R. 466 (Bankr. D. Md. 2021); *In re Rtech Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021). This Court finds the reasoning in these opinions entirely persuasive and adopts and incorporates them here.

Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022)

> Fourth Circuit reversed and remanded bankruptcy court's dismissal of nondischargeability action against corporate debtor, ruling § 523 is applicable to corporate debtors.

*Section **1192(2)*** excepts from discharge "any *debt . . . of the kind* specified in *section 523(a)*." *11 U.S.C. § **1192(2)*** (emphasis added). The section's use of the word "debt" is, we believe, decisive, as it does not lend itself to encompass the "kind" of *debtors* discussed in the language of *§ 523(a)*. This is confirmed yet more clearly by the phrase modifying "debt"—i.e., "of the kind." Thus, the combination of the terms "debt" and "of the kind" indicates that Congress intended to reference only the *list of non-dischargeable debts* found in *§ 523(a)*. As the U.S. Government's amicus brief notes, this interpretation of "of the kind" is in line "with the ordinary meaning of the word 'kind' as 'category' or 'sort.'" (Citing American Heritage Dictionary of the English Language (online ed.) ("'[a] group of individuals or instances sharing common traits; a category or sort'"); Merriam-Webster Dictionary (online ed.) ("'a group united by common traits or interests: CATEGORY'")). In short, while *§ 523(a)* does provide that discharges under various sections, including *§ 1192* discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, *§ **1192(2)***'s cross-reference to *§ 523(a)* does not refer to any *kind of debtor* addressed by *§ 523(a)* but rather to a *kind of debt* listed in *§ 523(a)*. By referring to the *kind of*

debt listed in *§ 523(a)*, Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of ***§ 1192(2)*** — i.e., both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in *§ 523(a)*.

Interpretation of ***§ 1192(2)*** in Subchapter V makes particular sense when considering that subchapter's juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter. Congress enacted Subchapter V as part of the Small Business Reorganization Act of 2019 with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses. To do so, Congress deliberately altered the general provisions of traditional Chapter 11 proceedings by, among other things, eliminating the absolute priority rule and limiting the applicability of *§ 1141(d)* to Subchapter V proceedings. *Section 1141(d)*, in particular, sets forth debts that are eligible for discharge in a traditional Chapter 11 proceeding, making distinctions between individual debtors and corporate debtors. *See Breezy Ridge Farms, 2009 Bankr. LEXIS 1396, 2009 WL 1514671, at *2*; *cf. JRB Consol., 188 B.R. at 374*. In contrast, *§ 1192* provides benefits to small business debtors, regardless of whether they are individuals or corporations. Thus, an important purpose for Subchapter V would be frustrated were we to adopt Cleary Packaging's interpretation of ***§§ 1192(2)*** and *523(a)*, which would treat individuals and corporations differently.

And as to fairness and equity, it should be recognized that a Subchapter V proceeding involves a non-consensual plan — i.e., a "cram-down" proceeding — in which stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule. Under a Subchapter V plan, owners of a debtor can retain ownership interests to continue conducting the reorganization at the expense of and over the objection of creditors. Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor. To this end, *all Subchapter V debtors* are textually subject to the discharge limitations described in *§ 523(a)*, not just *individual* Subchapter V debtors. To make a distinction between individuals and corporations for how Subchapter V is applied would not only undermine that balance, but would also make no sense and indeed would create perverse incentives. But most importantly, it would violate the text of ***§ 1192(2)***.

At bottom, while we recognize that the relationship between *§ 523(a)* and *§ 1192* might be a bit discordant — or perhaps more accurately, clumsy — we find more harmony from following a close textual analysis and contextual review of *§ **1192(2)*** and thus conclude that it provides discharges to small business debtors, *whether they are individuals or corporations*, except with respect to the 21 kinds of debts listed in *§ 523(a)*.
In re Rtech Fabrications, LLC, 635 BR 559 (Bankr. D. Idaho 2021)

> § 523 nondichargeability provisions determined not applicable to corporate debtors. Court relied heavily on the Bankruptcy Court's decision in *Cleary Packaging,* which was later overturned by the 4th Circuit on appeal.

4. Plan Confirmation Issues

> **Issue: What constitutes "acceptance" of Sub V plan, and more specifically, is "deemed acceptance" sufficient?**

If the Subchapter V debtor obtains full consent for the plan (all impaired classes of claims or interests accept the plan), the plan is confirmed under § 1191(a).

If the Subchapter V debtor cannot obtain full consent for the plan (i.e. one or more impaired classes of claims or interests rejects the plan), then § 1191(b) states that the court shall confirm a Subchapter V plan that satisfies the confirmation requirements, other than the requirements of § 1129(a)(8) (providing that all classes vote to accept the plan or not be impaired by the plan), § 1129(a)(10) (requiring at least one impaired class to accept the plan), and § 1129(a)(15) (requiring payment of unsecured creditors in full or devoting allocated projected disposable income to the plan), so long as the plan does not discriminate unfairly against any impaired, non-consenting class and is fair and equitable regarding each class of impaired claims or interests that has rejected the plan.

In re Robinson, 632 BR 208 (Bankr. D. Kan. 2021)

> UST's second objection to confirmation, primarily based on Debtor's pre- and post-filing gambling. No creditor in any class returned a ballot on the amended plan. Court overruled UST Objections and confirmed as a consensual plan.

Section 1126(a) provides that a holder of an allowed claim *may* vote to accept or reject a plan of reorganization. Nothing in the Code requires the holder of an allowed

claim to vote. *Subsection (c)* addresses acceptance of the plan and applies in a subchapter V case. It applies the two-thirds in amount and more than one-half in number of allowed claims criteria for acceptance by a class of claims.

Chapter 11 debtors should be mindful that the IRS has a historical practice of not voting on plans. In Robinson's case, the IRS is the largest secured and largest priority creditor. Nothing in this Court's current review of the Internal Revenue Manual suggests that its policy has recently changed with respect to priority tax claims; for secured and general unsecured claims the IRS recognizes its "opportunity to vote to accept or reject a plan," and that authority is delegated to the Secretary of the Treasury.

Bankruptcy Rule 3018(c) governs the procedure and form for accepting or rejecting a plan. It provides, in relevant part: "An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor . . . or an authorized agent, and conform to the appropriate Official Form." An objection to confirmation is distinct from casting a ballot to accept or reject the plan. Thus, an objection to confirmation does not constitute a vote to reject the plan and the lack of an objection to confirmation does not constitute a vote to accept the plan. *Rule 3018* suggests that the affirmative act of voting to accept or reject the plan (returning a completed ballot) is required in order for the vote to be counted. So, what is the effect if no creditor in any class casts a ballot as in the instant case?

Pre-SBRA case law holds that the failure to return a ballot cannot be deemed an acceptance of the plan. The bankruptcy court in *Trenton Ridge* recognized exceptions to the general rule. One exception is where the plan includes a provision that impaired classes in which no votes are cast are presumed to accept the plan. Thus, *Trenton Ridge* suggests a debtor may protect its plan from nonvoting creditors, by including language in the plan to the effect that failure to vote will be deemed an acceptance of the plan. No such language is included in Robinson's amended plan before the Court.

Adhering to *Sweetwater's* binding precedent that a nonobjecting and nonvoting creditor is deemed to have accepted a chapter 11 plan under *§ 1129(a)(8)*, I conclude that all of Robinson's creditors and all classes of creditors in this subchapter V case, none of whom voted, objected to confirmation, or appeared at the confirmation hearing, have accepted the amended plan. Therefore, all impaired classes have accepted the plan under *§ 1129(a)(8)* and the amended plan can and

must be confirmed as a consensual plan under *§ 1191(a)*, if all other confirmation requirements are satisfied.

In re Jaramillo, 2022 Bankr. LEXIS 2620; 2022 WL 4389292 (Bankr. D. NM September 22, 2022)

> The Court took the order under advisement to determine whether, under Tenth Circuit law, a ***subchapter V*** plan can be confirmed as a consensual plan if some classes of creditors do not vote. The Court concludes that it can.

Recent cases have held that *Ruti-Sweetwater's* "***deemed acceptance***" rule for *§ 1129(a)(8)* applies in ***subchapter V***. *See, e.g., In re Robinson, 632 B.R. 208, 220 (Bankr. D. Kan. 2021)* (cited and applied "*Sweetwater's* binding precedent that a nonobjecting and nonvoting creditor is deemed to have accepted a chapter 11 plan under *§ 1129(a)(8)*"); *In re Olson*, 2020 WL 10111637, at *2 (Bankr. Utah) (same); and *In re Desert Lake Group, LLC*, no. 20-22496, doc. 114 (Bankr. D. Utah Sept. 30, 2020) (unpublished) (same). Here, an impaired class (Ms. Trei) voted to accept the plan, satisfying *§ 1129(a)(10)*. Under *Ruti-Sweetwater*, any remaining classes that did not vote are deemed to have accepted the plan. The plan therefore can be confirmed as a consensual plan under *§ 1191(a)* if the other plan confirmation requirements have been met.

Applying *Ruti-Sweetwater's* ***deemed acceptance*** rule to ***subchapter V*** cases is consistent with the realities of modern bankruptcy practice for individuals and small businesses, where many general unsecured creditors (e.g., credit card companies) do not vote. There is nothing wrong with not voting, but the confirmation process should not be derailed as a result.

In re Creason, 2023 Bankr. LEXIS 478; 2023 WL 2190623 (Bankr. WD Mich, February 23, 2023)(J. Dales).

> Parties requested confirmation as a consensual plan under § 1191(a). Court confirmed as a non-consensual plan under § 1191(b). Judge Dales' rationale:
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> Congress provided a precise statutory definition of what constitutes acceptance in this area, complete with a dollar amount and numerosity requirement, but perhaps neglected to address what happens when a class of creditors fails to participate in balloting. Perceiving a gap, some courts adopt the concept of "***deemed acceptance***," a convenient though extra-statutory

response to the problem. *See, e.g., In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988)*. Here, because Dr. Creason put Everest Business Funding ("Everest") in its own class (Class III), and because Everest did not return its ballot, Class III did not formally accept the plan. In an effort to demonstrate compliance with *§ 1129(a)(8)*, Dr. Creason's counsel cites *Ruti-Sweetwater* and another case within the Tenth Circuit that, naturally, followed that circuit's "***deemed acceptance***" precedent. This court is not persuaded.

1. Although no interested party balked at counsel's citation **[*3]** to *Ruti-Sweetwater* and the concept of "***deemed acceptance***" by Everest — including Everest — the court is constrained by its independent duty to ensure that a debtor meets all statutory requirements as a condition of confirming a plan. *Cf. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 277 n.14, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)* ("*Section 1325(a)* does more than codify this principle [that "courts have the discretion, but not the obligation, to raise on their own initiative certain nonjurisdictional barriers"]; it *requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.") (original emphasis). The similarities in the language of *§ 1325(a)* at issue in *Espinosa* and *§ 1191(a)* at issue here, and the Supreme Court's relaxation of the principle of party presentation in the face of such language, are too hard to ignore.

2. *Ruti-Sweetwater* is an out-of-circuit case representing the minority position. Indeed, a leading bankruptcy commentator has described it as "an unfortunate decision...." 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2022). In the thirty-five years since the Tenth Circuit rendered that decision, no reported decision within our circuit relied on the "***deemed acceptance***" holding, as far as this court's own research revealed.

3. *Ruti-Sweetwater* is an out-of-circuit case representing the minority position. Indeed, a leading bankruptcy commentator has described it as "an unfortunate decision...." 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2022). In the thirty-five years since the Tenth Circuit rendered that decision, no reported decision within our circuit relied on the "***deemed acceptance***" holding, as far as this court's own research revealed.

4. regarding Everest's non-acceptance, the court recognizes that today's approach vests considerable power in the hands of a non-participating creditor with control over an entire class. As a policy matter, it is probably unwise to allow a creditor such as Everest to, in effect, "cram down" on a debtor the consequences of a "cram down" confirmation under *§ 1191(b)*, where most of the creditors favor a consensual plan. Although the court might favor the Tenth Circuit's approach were it free to do so (especially in the small business (***subchapter V***) setting), "courts do not sit to assess the relative merits of different approaches to various bankruptcy problems." (citations omitted).

Faculty

Hon. Mina Nami Khorrami is a U.S. Bankruptcy Judge for the Southern District of Ohio in Columbus and was appointed on Sept. 10, 2021, by the U.S. Court of Appeals for the Sixth Circuit. She began her career in St. Louis, Mo., where she practiced bankruptcy law and litigation as an associate with the firms of Vogler & Associates and then with Compton, Wells & Hamburg. While she practiced in St. Louis, she successfully argued a case before the U.S. Court of Appeals for the Eighth Circuit. In 1991, Judge Nami Khorrami relocated to Columbus to open her own firm. Her practice focused on more complex chapter 7 and 13 bankruptcies, including arguing before the Bankruptcy Appellate Panel of the U.S. Court of Appeals for the Sixth Circuit. She also handled general civil litigation, foreclosure defense, and issues relevant to small businesses. Prior to her appointment to the bench, she also served as a chapter 7 panel trustee. Judge Nami Khorrami has served on numerous committees of the Columbus Bankruptcy Bar and was a frequent speaker at CLE programs. She has long been committed to bankruptcy *pro bono* service in the Columbus community, and in 2013 she received the Columbus Bar Association and Foundation Award for her involvement in the implementation of the chapter 7 bankruptcy *pro bono* project in Columbus. Judge Nami Khorrami also served as vice-chair of the court's Attorney Advisory Committee and as co-chair of its Consumer/Small Business subcommittee. She is a past co-chair of the Columbus chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC) and a past co-chair of the Bankruptcy Law Institute's (BLI's) Planning Committee. She also served on the board of trustees for the Credit Education Coalition (CEC) and was a member of the Chapter 13 Liaison Committee. Judge Nami Khorrami received her B.S. in business administration from the University of Missouri-St. Louis and her J.D. from Valparaiso University School of Law.

Jennifer M. Schank is a shareholder with Fuhrman & Dodge, S.C. in Middleton, Wis., where she focuses her practice on debtor/creditor rights, bankruptcy, collections, litigation and real estate matters. Her practice includes representation of individuals and businesses in a wide variety of financial disputes. Ms. Schank has represented clients in state and federal courts in chapters 7, 11, 12 and 13, and in challenges to bankruptcy discharge, fraudulent transfers and various adversary proceedings. She is a member of the State Bar of Wisconsin, the Western District Bankruptcy Bar Association, and the Bankruptcy, Insolvency, and Creditors' Rights Section of the State Bar of Wisconsin. Ms. Schank received her B.S. from the University of Wisconsin – Eau Claire and her J.D. from the University of Wisconsin.

Mark H. Shapiro is an attorney with Steinberg Shapiro & Clark in Southfield, Mich. He was appointed a chapter 7 panel trustee for the U.S. Bankruptcy Court for the Eastern District of Michigan, as well as a subchapter V trustee. Mr. Shapiro is admitted to practice before the the U.S. District Courts for the Eastern and Western Districts of Michigan, and the U.S. Court of Appeals for the Sixth Circuit. He is a member of the Federal Bar Association, the State Bar of Michigan, ABI and the National Association of Bankruptcy Trustees, and he is a board member of the Consumer Bankruptcy Association. He is also a frequent speaker and a contributing author to ICLE's *Handling Consumer and Small Business Bankruptcies in Michigan*. Mr. Shapiro received his B.A. in 1986 from Kalamazoo College and his J.D. in 1989 from Wayne State University Law School.