American Bankruptcy Institute
Annual Spring Meeting

Sub V vs. Traditional 11? Confirmation and Other Key Plan Issues

Hon. Janet S. Baer
U.S. Bankruptcy Court (N.D. Ill.); Chicago

Eyal Berger
Akerman LLP; Fort Lauderdale, Fla.

Brandy M. Rapp
Whiteford, Taylor & Preston LLP; Roanoke, Va.

Ciara L. Rogers
Waldrep Wall Babcock & Bailey PLLC; Winston-Salem, N.C.

Donald L. Swanson
Koley Jessen; Omaha, Neb.

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"Sub V vs. Traditional 11? Confirmation and Other Key Plan Issues"

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Hon. Janet S. Baer, U.S Bankruptcy Judge, N.D. Illinois (Moderator)

Eyal Berger, Partner, Akerman LLP, Fort Lauderdale, FL

Brandy M. Rapp, Partner, Whiteford, Roanoke, VA

Don Swanson, Shareholder, Koley Jessen, Omaha, NE

Ciara Rogers, Partner, Waldrep Wall Babcock & Bailey, PLLC, Raleigh, NC

Key Statutory Distinctions in Plan Confirmation Between Subchapter V and Traditional Chapter 11 Cases

Hon. Janet S. Baer (Bankr. N.D. Ill.)

Subchapter V of chapter 11 is generally a streamlined, efficient, and cost-effective method by which small businesses can take advantage of the bankruptcy reorganization process. When it comes to proposing and confirming a plan, there are some key distinctions between the traditional chapter 11 statute and subchapter V which practitioners should keep in mind in deciding whether to elect sub V treatment. Likewise, a creditor may want to consider these distinctions in deciding whether to object to either the debtor's election under sub V or confirmation of the sub V plan.

Here is a summary of the key distinctions:

1. No Creditors' Committee. Unless the court for cause orders otherwise, there will be no creditors' committee in a sub V case. (§ 1181(b) and § 1102(a)(3).)

2. Property of the Estate. Section 1115, which addresses the inclusion of post-petition acquired property and earnings in traditional chapter 11 *individual* cases, does not apply in a sub V case. (§ 1181(a).) However, if a plan is confirmed under the sub V cramdown provision of § 1191(b), then, pursuant to § 1186(a), such post-petition property and earnings are property of the estate of *any* sub V debtor.

3. No Disclosure Statement Required. Section 1125, requiring disclosure statements and solicitation of acceptances or rejections of a plan, do not apply in sub V cases unless the court orders otherwise. (*See* § 1181(b).) A sub V plan must, however, include some of the information required in a disclosure statement, such as (i) a brief history of the business operations of the debtor; (ii) a liquidation analysis; and (iii) projections with respect to the debtor's ability to make payments. (§ 1190(1).)

4. Filing the Plan/Exclusivity. Subsections (b) and (d) of § 1121 do not set a deadline for filing a plan *per se* in a traditional chapter 11 case. Instead, only the debtor has 120 days to file a plan and 180 days to have that plan accepted. If these deadlines are not met or extended, then other parties in interest may file a plan. These provisions are all inapplicable in a sub V case. (*See* § 1181(a).) In a sub V case, *only the debtor* may file a plan pursuant to § 1189(a). Section 1189(b) requires debtor to file a plan within 90 days after the order for relief (unless the court extends the time), but does not contain a deadline for confirmation.

5. Disposable Income Requirements. Section 1123(a)(8) requires that in a traditional chapter 11 *individual* case, the plan must provide for payment to creditors of all or such portion of earnings or other future income of the debtor "as is necessary for the execution of the plan." In sub V, *all debtors* must submit all or such portion of their future earnings or other future income "as is necessary for the execution of the plan." (§ 1190(2).) However, if the debtor is seeking to confirm a plan under the sub V cramdown provision, § 1191(c)(2) requires, as a condition to confirmation, that the plan

provide that *all* of the debtor's "projected disposable income" for a three-year period, or up to five years as the court may fix, be applied to make payments under the plan.

6. Modifications Relating to Secured Debt on Principal Residence. Section 1123(b)(5) provides that a debtor in a traditional chapter 11 case may modify the rights of holders of secured claims *other than* those secured by interests in the debtor's principal residence. Under § 1190(3), however, a sub V plan may modify the rights of the holder of a claim secured by 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 principal residence and was used primarily in connection with the small business of the debtor.

7. Payment of Administrative Claims. Unlike traditional chapter 11 cases under § 1129(a)(9)(A), which requires payment in cash on or before the effective date of the plan of administrative claims under § 507(a)(2) such as professional fees and trustee fees, § 1191(e) permits these claims to be paid over time through the sub V plan.

8. No Requirement for Acceptance by One Impaired Class. The requirement under § 1129(a)(10) that at least one impaired class of creditors accept the plan is not applicable to cramdown under sub V. Rather, a sub V debtor may confirm a plan without the consent of *any* creditors as long as the plan does not unfairly discriminate and is "fair and equitable" as that term is defined in the Bankruptcy Code. (§ 1191(b).)

9. No Absolute Priority Rule. Pursuant to § 1181(a), the absolute priority rule set out in § 1129(b)(2)(B) does not apply in a sub V case. Instead, a plan is "fair and equitable" if: (i) § 1129(b)(2)(A), regarding secured claims, is satisfied; (ii) the plan provides that *all* disposable income for a three- to five-year period be applied to make plan payments; and (iii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan and the plan provides appropriate remedies to protect creditors if payments are not made.

10. Timing on Discharge. In a traditional chapter 11 case for a non-individual, discharge occurs at confirmation. For an individual, there is generally no discharge until completion of all plan payments. (§ 1141(a).) In a sub V case, if the plan is confirmed consensually, discharge will generally occur on confirmation regardless of whether the debtor is a corporation or an individual. However, if the sub V plan is confirmed under the § 1191(b) cramdown provision, under § 1192 the debtor is not entitled to a discharge until the debtor has completed payments under the plan for three years or such longer period as the court determines, but no longer than five years.

11. Dischargeability of Debts. The § 523(a) exceptions to the discharge of debts applies to an individual sub V debtor who would otherwise receive a discharge under § 1192. It is unclear, however, whether the exceptions apply under § 1192 to the discharge of a sub V debtor that is *not* an individual.

12. Plan Modifications. In a traditional chapter 11 case, the plan proponent may seek to modify a plan at any time before confirmation, and the plan proponent or reorganized debtor may seek to modify the plan after confirmation *but prior to* substantial confirmation. (§ 1127(b) & (c).) In a sub V case, only the debtor may modify a sub V plan – either pre-confirmation or post-confirmation but prior to substantial consummation. The debtor can also modify the plan after both confirmation and substantial consummation, at any time within three years or up to five years as fixed by the court, as long as the court finds that the circumstances warrant the modification and the modified plan meets the requirements of § 1191(b). (§ 1193(c).) A consensually confirmed plan may be modified only by consent. (§ 1193(b).)

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Brandy M. Rapp, Esq.

If a creditor does not vote on the plan, is the creditor deemed to have accepted the plan?

- *In re Olson,* Case No. 20-23408, 2020 Bankr. LEXIS 2439, at *4 (Bankr. D. Utah Sept. 16, 2020) – holders of impaired claims that did not vote were bound by the classes that accepted it; voting requirement under section 1129(a)(8) satisfied; plan confirmed pursuant to section 1191(a)(consensual)

    - Other bankruptcy courts in the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming and Utah) have reached the same result. *See In re The Lost Cajun Enterprises, LLC*, 634 B.R. 1063, 1073 (Bankr. D. Col. 2021)(Small Business Administration did not return ballot; plan confirmed under section 1191(b) because impaired unsecured creditor voted to reject plan); *In re Roundy,* Case No. 21-22878, 2021 WL 5428891, at *5 (Bankr. D. Utah Nov. 18, 2021)(two impaired classes did not return plan ballots; plan confirmed under section 1191(b) because impaired class voted to reject plan); *In re Robinson,* 632 B.R. 208, 217, 220-21 (Bankr. D. Kan. 2021)(no creditor, including Internal Revenue Service, in any class voted or returned a plan ballot; "Chapter 11 debtors should be mindful that the IRS has a historical practice of not voting on plan."; plan confirmed under section 1191(a))

- *In re Franco's Paving LLC,* 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023) – a creditor class in which no votes are cast will not be considered for purposes of 11 U.S.C. § 1129(a)(8); plan confirmed pursuant to section 1191(a) (consensual)

    - U.S. Small Business Administration and Internal Revenue Service did not return ballots

    - "From a practical perspective, a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection. The outcome should be no different, as the overarching policy of Subchapter V is satisfied." *Id.* at 110.

- *In re Hot'z Power Wash, Inc.*, 655 B.R. 107, 118 (Bankr. S.D. Tex. 2023) – when an impaired class of creditors fails to cast a ballot, that class will not be counted for purposes of whether section 1129(a)(8) is satisfied; plan confirmed pursuant to section 1191(a)(consensual)

    - Internal Revenue Service did not return ballot
        - Debtor has informed by the IRS that it has an internal policy of not voting on Chapter 11 Plans. *Id.* at 114.
        - "Allowing creditors' silence to force nonconsensual plans, especially as is the case here where a non-voting class is willfully withholding its vote, defeats the overarching policy preferences of Subchapter V." *Id.* at 119.

    - Debtor had notice on the face of the plan to deem non-voting creditors as having accepted the plan
        - Court held the notice violates Rule 3018(c) of the Federal Rules of Bankruptcy Procedure

- *In re Creason,* Case No. 22-00988-swd, 2023 WL 2190623, at *2-3 (Bankr. W.D. Mich. Feb. 23, 2023) – secured creditor in a class by itself did not return plan ballot; plan confirmed as a cram down under section 1191(b)

    - "[C]ourt 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 . . . to, in effect, 'cram down' confirmation under § 1191(b), where most of the creditors favor a consensual plan." *Id.* at *2.

    - Security interest of secured creditor that did not return ballot is subject to avoidance under section 544(a) as it its financing statement identified Debtor as an organization, not an individual
        - Treat the claim as unsecured
        - "Suffice it to say that treating as unsecured the holder of an inevitably avoidable security interest offers the 'indubitable equivalent' of its claim, as required for confirmation under § 1191(b)." *Id.* at *3.

Section 1111(b)(2) election

- Applicable when a secured creditor is undersecured

- When undersecured creditor makes the section 1111(b)(2) election, the creditor is entitled to receive payments with a face value equal to the amount of its claim, the present value of which must at least equal the value of the collateral.

    - *In re Topp's Mech.*, Case No. BK21-40038-TLS, 2021 Bankr. LEXIS 3235, at * 12 (Bankr. D. Neb. Nov. 23, 2021) – addressed the question of whether the interest payments made on the present value of the collateral count toward the total payments owed to the creditor making the section 1111(b) election
        - Interest component of a debtor's stream of payments may serve a dual purpose of satisfying the total allowed claim of the creditor and providing present value to the creditor. *Id.* at *15.
        - Held that the plan proposes to pay the secured creditor far more than it is entitled to receive as a result of its election of section 1111(b). *Id.* at *16.
        - Total amount of claim $3,763,611.81
            - Secured by real estate valued at $1,224.831.76 and personal property valued at $898,873.12
            - Unsecured balance of claim totaling $1,639,916.93
        - Under the plan, the creditor was to receive a total of $4,266.520.98 (principal and interest) and general unsecured creditors were to receive $26,019 over three years

- 11 U.S.C. § 1111(b)(2) – a secured creditor elects to have its entire claim treated as a secured claim

    - Two Exceptions
        - Encumbered property is sold under section 363 or is to be sold under the plan, assuming the secured creditor has the ability to credit bid the total amount of its claim
            - If the creditor has recourse against the debtor, the section 1111(b)(2) election is not available when the property is being sold
        - Undersecured creditor's interest in the encumbered property is not "inconsequential value"
            - *In re VP Williams Trans, LLC*, Case No. 20-10521-MEW, 2020 Bankr. LEXIS 2587, at *1-3 (Bankr. S.D.N.Y. Sept. 29, 2020) – taxi business that owned a single taxi medallion in which its only creditor held a security interest to secure a debt of $576,927; debtor contended that the value of the medallion was $90,000; creditor claimed it was worth $200,000; court concluded that creditor's

interest was not inconsequential and creditor could make section 1111(b) election

- Apply the plain meaning of the word "inconsequential" *Id.* at *7.
  - Irrelevant, of no significance, unimportant, able to be ignored
- Value of the asserted security interest should be compared to the overall value of the collateralized asset *Id.* at *9.
  - Junior security interest that is "almost completely out-of-the-money" has inconsequential value
- Compare the value of the security interest to the total dollar amount of the of the underlying secured claim *Id.* at *10.
  - Secured claim might have inconsequential value if the security interest is worth only a small fraction of the total claim
  - Court questioned application of this view when the value of the collateral is not small by itself but the creditor is significantly undersecured, so that the collateral value is significantly less than the amount of the total claim
- A secured claim may be deemed inconsequential if the section 1111(b)(2) election would give rise to a claim that could not as a practical matter be amortized fully under the cramdown confirmation standards in section 1129(b)(2)(A)(i) *Id.* at * 11.
  - A creditor's right to the section 1111(b)(2) election is conditioned on the debtor having a feasible way to deal with it
  - Court found nothing in the statute suggests that "feasibility from the debtor's perspective was intended to be a limit on a creditor's right to invoke section 1111(b)." *Id.* at *12.

- *In re Body Transit, Inc.*, 619 B.R. 816, 836 (Bankr. E.D. Pa. 2020) – value of collateral was $80,000, 8.2% of the amount of the secured debt, $970,233; Court concluded that the value of the creditor's interest was inconsequential and that it could not make the section 1111(b)(2) election
  - Court rules that the correct methodology is to compare the value of the creditor's lien position to the total amount of the claim *Id.* at 835.
  - Purpose of the section 1111(b)(2) election is to protect the creditor from determination of its secured claim at a time when the value of its collateral is temporarily depressed,

which could permit the debtor to realize a considerable gain upon its sale when the market rebounds *Id.* at 834.

- *In re Caribbean Motel Corp.*, Case No. 21-01831-EAG, 2022 Bankr. LEXIS 25, at *14 (D. P.R. Jan. 5, 2022) – creditor held a claim of about $3.1 million secured by collateral worth $550,000, about 15% of its claim
    - Court concluded that the value of the collateral was not inconsequential and creditor could make section 1111(b) election *Id.* at *16.

- Subchapter V issues to creditors contemplating making a section 1111(b) election

    - Declining the election to control the unsecured class and block confirmation is not an available strategy as subchapter V allows confirmation even if no classes have accepted the plan

    - No set deadline for creditors to make the section 1111(b) election in subchapter V.
        - In regular chapter 11, a secured creditor may make the election at any time before the conclusion of the hearing on the disclosure statement or any later date set by the bankruptcy court.
        - Bankruptcy Rule 3014 provides in subchapter V a secured creditor may make the section 1111(b) election not later than a date the court may fix.
        - *In re VP Williams Trans, LLC*, Case No. 20-10521-MEW, 2020 Bankr. LEXIS 2587, at *17 (Bankr. S.D.N.Y. Sept. 29, 2020) – Court rejected assertion that section 1111(b) election is require before a plan is filed; held that election made prior to solicitation of plan was timely

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Eyal Berger, Esq.

Pre-packaged Plans Special Considerations in Subchapter V

(a) What is a pre-packaged chapter 11 plan?

A pre-packaged Chapter 11 Plan is a plan that a debtor has fully or partially solicited for acceptance prior to the commencement of the Bankruptcy Case.

(b) Why would a debtor pursue a pre-packaged Chapter 11 Plan?

The primary purpose to pre-package a Chapter 11 Plan is to expedite the Chapter 11 process where the debtor has obtained the agreement from one or more classes of creditors as to a proposed plan and the debtor and the consenting creditors require a bankruptcy filing to achieve a bankruptcy remedy such as caping rejection damages or discharging indebtedness without a tax consequence.

(c) Subchapter V has unique procedural considerations for these types of cases arising from:

(i) Appointment of Subchapter V Trustee;
(ii) Subchapter V eligibility requirements;
(iii) Potential dischargeability issues; and
(iv) Requirement for a mandatory status conference .

(d) Potential solutions for pre-packaging a Subchapter V Plan:

Filing a first day motion that requests the following relief from the court:

- An expedited date certain for a Confirmation Hearing;
- Combining the status conference with the Confirmation Hearing;

- Approval of form of ballot and solicitation package for any continued post-petition solicitation of plan;
- shortening of deadlines for:
    1. Objections to Subchapter V eligibility;
    2. 1111(b) elections;
    3. 523 objections (where applicable);
    4. Filing Proofs of Claim;
    5. Filing claims to allow administrative expenses (including professional claims)
- Setting Meeting of Creditors at earlier date
- Setting discovery deadlines for the debtor to comply with any 2004 discovery requests.

(e) *In re BPI Sports, LLC*, Case No. 23-17463-SMG, Bankr. S.D. Fla. (J. Grossman)

The first known pre-packaged Subchapter V chapter 11 was a case where a subchapter v debtor filed a pre-packaged plan that had partial acceptances from a class of secured claims and a class of unsecured claims held by debtor's critical vendor.

The case was commenced on September 18, 2023 and confirmed on **October 20, 2023**.

The Plan contained certain general releases to debtor's insiders and was accepted by every class with approximately 96% of the aggregate debt against the debtor voting in favor of the Plan.

Judge Grossman granted debtor's motion to set confirmation in compliance with the pre-petition restructuring support agreement negotiated pre-petition by the debtor and its critical vendor.

However, Judge Grossman denied debtor's requests to deem the filing of a pre-packaged plan as sufficient cause to negate the potential for requiring the filing of a disclosure statement or the appointment of a committee at a later date in the case.

The meeting of creditors was held and concluded a day before confirmation and the debtor created a data room at the outset of the case to allow any interested parties to inspect all documents in debtor's possession related to the Schedules, SOFA, Plan, Restructuring Agreement, or any pre-petition transfers.

Unsecured Cramdown Considerations

(1) Subchapter V requires the debtor to fund at least 3 years, but not more than 5 years of their "disposable income" to cramdown unsecured creditors.

(2) As discussed earlier, traditional Chapter 11 cases require the satisfaction of the absolute priority rule typically in the form of a new value plan where the old equity holders fund the plan by providing funds that are approximately equal to the going concern value of the debtor.

In a "disposable income" plan the primary evidentiary disputes will center on the length of the plan and on the projections of income and expenses the debtor alleges. While in a "new value" plan the primary evidentiary dispute will be on the overall value of the debtor as a going concern.

Thus, when weighing which cramdown alternative provides the least financial burden on the debtor, an appraisal of both the debtor's going concern value and the debtor's projected disposable income must be analyzed.

If the debtor is unlikely to have a ready market for the acquisition of the debtor it is quite possible that a "new value" plan would require less funding than a 3-5 year "disposable income" plan. On the other hand, if the debtor is a startup entity that projects negative income for a substantial period of time, a "disposable income" plan might be achieved with a *de minimus* payment to general unsecured creditors. It should also be noted that at least two courts have opined that a plan proposing to pay projected "disposable income" for only 3 years satisfied the Subchapter V unsecured cramdown provision. *See In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985 (Bankr. E.D. Wi. December 20, 2021) (holding that a 3-year plan should be the default time period for satisfying the cramdown requirements in a subchapter V non-consensual plan); *In re Orange County Bail Bonds, Inc.,* 638 B.R. 137 (9th Cir. B.A.P. 2022)(holding that proposed payments that exceeded three years of projected disposable income was sufficient to satisfy cramdown require for non-consensual plan). Thus, a shorter time period could lead to an even lesser plan contribution than a "new value" plan would require.

Materials for Subchapter V Panel at ABI Annual Meeting 2024

By Donald L. Swanson

A Strategy to Solve the Absolute Priority Rule Problem for Confirming a Mid-Size Debtor's Plan in Regular Chapter 11

To begin with, a business would never use this strategy when Subchapter V is available. The strategy is only for a mid-size business that needs to reorganize in bankruptcy but can't qualify for Subchapter V (*e.g.*, has debts totaling >$7.5 million).

The biggest problem for a mid-size business in regular Chapter 11 is the absolute priority rule. Such rule is a plan confirmation standard that says this: if debtor's owners want to retain ***anything*** after confirmation (*e.g.,* their ownership interests), unsecured creditors must either be paid in full or agree to something less.[i]

As a young bankruptcy attorney in Nebraska, I saw the absolute priority rule in action, first-hand, during the 1980s Farm Crisis. And here's what I saw: farmers would not give up their ownership interests voluntarily, and creditors would rarely (if ever) agree to take less than 100%. The result: farmer Chapter 11 plans could not be confirmed. And because of that reality, Congress enacted Chapter 12, which jettisons the absolute priority rule.

For the same reason (*i.e.*, difficulty in getting plans confirmed, because of the absolute priority rule), Congress enacted a corresponding reorganization provision for non-farm small businesses: *i.e.,* Subchapter V, which also jettisons the absolute priority rule.

And both Chapter 12 and Subchapter V are working as intended—to reorganize farms and other small businesses. But the absolute priority rule problem remains for mid-size businesses that can't qualify for Chapter 12 or Subchapter V.

So, here's a solution for those mid-size businesses that are stuck with regular Chapter 11 and its absolute priority rule.

To understand the solution, let's start with a hypothetical. Consider this:

> You are the owner and operator of a business that has been successful for many years. But recent financial reverses are jeopardizing the future. You'd like to reorganize the business and discharge a bunch of debt, under Subchapter V, but you can't because the business has total debts of $7.6 million.
>
> You are concerned that reorganizing under regular Chapter 11 won't work because of the veto rights available to creditors under the absolute priority rule.

So . . . is there a solution? The answer is this: maybe.

I've utilized the following strategy successfully on several occasions (both to get regular Chapter

11 plans confirmed and as a basis for negotiating pre-bankruptcy settlements):

- the plan provides that, upon confirmation, an auction will be held of all ownership interests in the reorganized debtor, with an insider who isn't liable for debtor's debts presenting the opening bid.

The strategy solves the absolute priority rule problem by exposing ownership of the reorganized debtor to the market. Here's how:

- the absolute priority rule says an owner cannot "receive or retain . . . any property"; and
- by subjecting ownership interests to a public auction, the insiders are purchasing the ownership interests at market value, not receiving or retaining anything.

Additionally, the strategy is supported by this explanation from the U.S. Supreme Court on how old equity's attempt to retain an exclusive right to ownership of the reorganized debtor, without subjecting that right to the market, violates the absolute priority rule:

> the exclusiveness of the opportunity, with its protection against the market's scrutiny of the purchase price by means of competing bids . . . renders the partner's right a property interest extended "on account of" the old equity position and therefore subject to an unpaid senior creditor class's objection.

Bank of America National Trust and Savings Assn v. 203 North LaSalle Street Partnership, 526 U.S. 434, 456 (1999).

The strategy is tricky, of course. Some critical judgment calls need to be made before even attempting to utilize the strategy. Here are examples of questions that need to be asked to assess the strategy's risks:

1. What outsider might want to bid?
2. What might be the nature and strength of the outsider's interest in bidding, and what bidding resources does the outsider have?
3. Does the debtor own any unique or unusual assets that an outside bidder might want to buy at a premium price?
4. How does the total amount of debtor's reorganized debts compare to the total value of debtor's reorganized assets?
5. How much are insiders willing and able pay to purchase ownership of the reorganized debtor?

My experience is that the purchase price an insider must offer in the post-confirmation auction isn't all that much. That's because the amount of debt a reorganized debtor must pay to achieve plan confirmation in regular Chapter 11 is, typically, already a premium price that's beyond the value of the debtor's reorganized assets. Here's why:

- confirmation standards in regular Chapter 11 require that the total amount of reorganized debt must at least equal the value of assets retained—that's already a 100% debt-to-value ration;

- further, if debtor's assets are fully encumbered with liens, then the reorganized debts will substantially exceed the value of debtor's reorganized assets, because administrative and priority claims must also be paid; and
- in other words, whoever wins the auction for ownership of the reorganized debtor will be paying a premium price—at whatever the successful bid amount might be.

Put another way, there is no bargain here for outsiders.

But the risks for debtor and its insiders are real. Here are some circumstances where the strategy might not work:

- when debtor's reorganized assets include real estate, or other unique assets, that are in high demand;
- when debtor has one or more competitors that would pay dearly to put debtor out of business; or
- when all debtor's bridges with its primary lender are already burnt to the ground, and the lienholder will do anything to get debtor liquidated.

In most other circumstances, however, this strategy can work. The process will be nerve-wracking because, as the old adage says: "It ain't over until it's over." But the nervousness is commonly, in my experience, overblown.

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[i] The absolute priority rule is embodied in this language of 11 U.S.C. § 1129(b)(2)(B): "(B) With respect to a class of unsecured claims—(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, . . . "

Cramdown (and Other Plan Issues) in Small Business v. SubV

Ciara L. Rogers, Waldrep Wall Babcock & Bailey PLLC

Post-Confirmation Plan Modifications

The plan modification process varies between chapter 11 cases and Subchapter-V cases. In all circumstances, the modified plan must continue to comply with the requirements for a confirmable plan and include all mandatory plan components. In chapter 11 cases, after confirmation, but before a plan has been substantially consummated, the plan proponent or the reorganized debtor may modify the plan. Generally, substantial consummation of a plan occurs when the distributions provided for under the confirmed plan have begun to each class. 11 U.S.C. §1101(2)(C). Once substantial consummation[1] has occurred, a plan in a traditional or small business chapter 11 cannot be modified, regardless of the purpose and extent of the proposed modification. 11 U.S.C. § 1127(b).

The post-confirmation plan modification process for Subchapter-V cases varies depending on whether the plan was confirmed consensually or via cramdown; however, under all circumstances, only the debtor can modify its plan. Subsection 1193(b) governs post-confirmation modification after consensual confirmation. If the plan was confirmed consensually, the Subchapter-V debtor may modify a confirmed plan at any time after confirmation and before substantial consummation, similar to the process in chapter 11 or small business cases. There are two pre-requisites to the modification of the plan becoming effective: (i) the circumstances warrant modification; and (ii) after notice and a hearing, the bankruptcy court confirms the modified plan under 11 U.S.C. § 1191(a). 11 U.S.C. § 1193(b); see also *In re National Tractor Parts, Inc.*, 640 B.R. 916 (Bankr. N.D.Ill.) (Determining whether a Subchapter-V plan could be modified and analyzing the majority and minority view of substantial consummation. The court specifically found that the plain language of section 1101(2) does not require that distributions to every class have commenced for the plan to be substantially consummated.) Claimants and interest holders

[1] Substantial consummation is defined in 11 U.S.C. § 1101(2) as:

(2) "substantial consummation" means –

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by 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; and

(C) commencement of distribution under the plan.

that voted for the confirmed plan are deemed to vote the same way on the modified plan, unless they change their vote within the period set by the court. 11 U.S.C. § 1193(d).

Section 1193(c) governs modification after cramdown modification. A cramdown plan[2] may be modified within the three, but no more than five years after confirmation, so long as the modified plan meets the requirements of 11 U.S.C. § 1191(b). 11 U.S.C. § 1193(c). Like with the post-confirmation modification of consensual plans, modification of cramdown plans will only become effective if (i) the circumstances warrant modification; and (ii) after notice and a hearing, the bankruptcy court confirms the modified plan under 11 U.S.C. § 1191(b). *See In re Chesney*, 2023 WL 8855242, *5, Case No. 22-40109 (Bankr. W.D.N.C. Dec. 21, 2023) (Discussing modification of a cramdown plan and how to analyze whether circumstances are warranted for post-confirmation modification).

Discharge

Confirmation of a chapter 11 plan and small business cases, discharges debtors from all debts: (i) incurred before confirmation of the plan (11 U.S.C. § 1141(d)(1)(A); (ii) arising from the rejection of an executory contract (11 U.S.C. §§ 1141(d)(1)(A) and 502(g)); (iii) arising from the recovery of property pursuant to chapter 5 actions (11 U.S.C. §§ 1141(d)(1)(A) and 502(h)); and (iv) arising from the discharge of certain post-petition tax claims (11 U.S.C. §§ 1141(d)(1)(A) and 502(i)). However, confirmation does not discharge a corporate debtor from claims that arose after confirmation of the plan, any debt in liquidating plans (11 U.S.C. §§ 1141(d)(3)).

Subchapter-V cases have different rules for discharge depending on whether the plan is confirmed consensually or via cramdown. If a Subchapter-V case is confirmed consensually, then the Code provides for the debtor to be immediately discharged upon confirmation. Section 1141(d)(5) does not apply in Subchapter-V cases, so discharge is not delayed until the completion of plan payments.

In a Subchapter-V case with a cramdown plan, the debtor does not receive a discharge until it completes its payments under the plan within the three to five year period. 11 U.S.C. § 1192. Further, when the discharge is granted after a cramdown confirmation, debts where the last

[2] In a chapter 11 case and a small business case, a court may confirm a plan over the objection of an impaired rejecting class if the plan satisfies the cramdown provisions of section 1129(b) of the Bankruptcy Code. However in a Subchapter-V case, a court may disregard section 1129(a)(10) of the Bankruptcy Code and cram down a plan even no impaired class of claims accepts the plan.

payment is due after the three to five year payment period under the plan are not discharged; nor, are any of the debts specified in 11 U.S.C. § 523(a). See 11 U.S.C. § 1192(1) and (2).

In a cramdown confirmation, when section 1192 applies, there is a split of authority on whether debts described in section 523(a) are excepted from discharge for corporate debtors. The majority view, as set forth first in *Gaske v. Satellite Restaurants, Inc. (In re Satellite Restaurants Inv. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021), holds that notwithstanding section 1192, the court shall grant discharge following completion of plan payments of debts provided for in section 1141(d)(1)(A) "except any debt . . . of the kind specified in section 523(a) . . . ." Thus, Subchapter-V does not expand section 523(a) to apply to non-individual debtors. That position has been followed by nearly all courts except the Fourth Circuit Court of Appeals. *See Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. 2022). In analyzing the issue of whether corporate debtors could discharge debts specified in section 523, the Fourth Circuit opined that section 1192's use of the term "debtor" was broader than section 523(a)'s use of the term "individual debtor." Further, the court went on to hold that section 1192 was the "more specific" provision between 523 and 1192 because 1192 is limited to Subchapter-V discharges, while section 523(a) referenced the exceptions to several kinds of bankruptcy discharges. The Fourth Circuit noted that its interpretation of the interplay between sections 523(a) and 1192 was consistent with court decisions addressing the scope of the chapter 12 corporate discharge and the language between 1192 and 1228(a) was virtually identical. Therefore, in the Fourth Circuit, section 1192(2) does not discharge any of the types of debt described in section 523(a).

For all chapter 11 cases, including Subchapter-V cases, debts are discharged regardless of whether a proof of claims is filed, the claim was allowed, or the holder of the claim accepted the plan. 11 U.S.C. § 1141(d)(1)(A)(i)-(iii). Debts discharged in a chapter 11 case are not terminated, but claimants are limited to the terms of the plan for repayment.

Faculty

Hon. Janet S. Baer is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on March 5, 2012. She also acts on a regular basis as the presiding judge in the Northern District of Illinois for naturalization ceremonies. Previously, Judge Baer was a restructuring lawyer for more than 25 years and was involved in some of the most significant chapter 11 bankruptcy cases in the country. The majority of her practice focused on the representation of large, publicly held debtors in both restructuring and chapter 11 matters, and she also represented companies in commercial litigation matters, including lender liability, fraud, breach of contract and breach of fiduciary duty. Prior to forming her own firm in 2009, Judge Baer was a partner at Kirkland & Ellis LLP, Winston & Strawn and Schwartz, Cooper, Greenberger & Krauss. She is a member of the ABI Board of Directors, the CARE National and Chicago Advisory Boards, and the Chicago IWIRC Network Board, as well as several committees. She also is chair of the NCBJ 2023 Education Committee and a frequent speaker for ABI, TMA, the Chicago Bar Association, IWIRC and NCBJ. Judge Baer received her B.A. from the University of Wisconsin - Madison and her J.D. from DePaul College of Law.

Eyal Berger is a partner with Akerman LLP in its Bankruptcy and Reorganization Department in Fort Lauderdale, Fla., where he focuses his practice on complex business reorganizations, out-of-court debt restructuring, the representation of creditors' committees, assignments for the benefit of creditors, corporate dissolutions, Article 9 transactions and the enforcement of creditors' rights. He also protects the interests of financial institutions and lessors as secured and unsecured creditors in myriad insolvency proceedings by assisting them in preserving, liquidating or repossessing their collateral. He has nearly 20 years of experience as an insolvency professional representing debtors-in-possession, trustees, assignees and receivers. Previously, Mr. Berger served as judicial clerk extern to Bankruptcy Judge Michael G. Williamson and Chief Bankruptcy Judge Paul M. Glenn in the Middle District of Florida. In addition, he was a member of NCBJ-NextGeneration, for which he served on its Organizing Committee from 2014-19, and is a member of NCBJ's NextGeneration Class of 2012. Mr. Berger recently assisted a subchapter V debtor client in confirming a prepackaged subchapter V plan in 33 days. He is admitted to practice in all bankruptcy and district courts in Florida, as well as the Eleventh Circuit Court of Appeals. He also is listed in *Chambers USA* for 2020-23, ranked in Florida (South Florida) for Bankruptcy/Restructuring in *The Best Lawyers in America* for 2020-24, listed in Florida for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and Litigation – Bankruptcy, listed in *The Best Lawyers in America* in 2022 as "Lawyer of the Year" for Litigation - Bankruptcy in Fort Lauderdale, named a "Top Lawyer in Broward County" for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in 2022 in *Fort Lauderdale Illustrated*, listed in *Super Lawyers* magazine from 2009-19 as a Florida "Rising Star" for Bankruptcy & Creditor/Debtor Rights, and named an "Up & Comer" in 2013 in *Florida Trend*'s Legal Elite. In addition, he received a book award in civil procedure. Mr. Berger received his B.A. in criminology and his B.S. in psychology, both *cum laude*, in 1999 from the University of Florida, and his J.D. *magna cum laude* in 2004 from the University of Florida Levin College of Law, where he was admitted to the Order of the Coif.

Brandy M. Rapp is a partner in Whiteford, Taylor & Preston LLP's Roanoke, Va., office, where she concentrates her practice on bankruptcy and restructuring matters. She has a diverse practice repre-

senting debtors, trustees, receivers, liquidation trusts, creditors' committees, secured creditors, lessors and unsecured creditors in bankruptcy cases, business transactions and out-of-court restructurings. Ms. Rapp has substantial experience within the mining, health care and construction industries. She is licensed to practice law in Virginia and West Virginia. Prior to entering private practice, Ms. Rapp clerked for Hon. William F. Stone, Jr. in the U.S. Bankruptcy Court for the Western District of Virginia. She is an adjunct professor at Washington & Lee University School of Law, where she currently teaches a chapter 11 bankruptcy practicum. Ms. Rapp is a 2019 ABI 40 Under 40 honoree and currently serves as a member of the Board of Governors of the Bankruptcy Law Section for the Virginia State Bar. She has routinely been listed in *Super Lawyers*, selected as a member of Legal Elite and listed in *The Best Lawyers of America* in the bankruptcy and creditors' rights practice areas. Mr. Rapp received her B.A. in chemistry with a minor in business administration *summa cum laude* from West Virginia Wesleyan College, and her J.D. *magna cum laude* from the University of Richmond School of Law, where she served as the managing editor of its law review and was a member of the McNeill Law Society.

Ciara L. Rogers is a partner with Waldrep Wall Babcock & Bailey PLLC in Winston-Salem, N.C., where her practice focuses on debtors' and creditors' rights, chapter 11 bankruptcy, representing chapter 11 and chapter 7 bankruptcy trustees, serving as a subchapter V trustee, and litigating adversary proceedings. Previously, she was an attorney with the Law Offices of Oliver & Cheek and clerked for Hon. J. Rich Leonard and Hon. Randy D. Doub of the Eastern District of North Carolina Bankruptcy Court. During law school, Ms. Rogers interned with the Bankruptcy Administrator's Office in the Eastern District of North Carolina. In 2018, she was selected as the director of the Stubbs Bankruptcy Clinic at Campbell University School of Law. In that capacity, she supervises second- and third-year law students in providing *pro bono* bankruptcy representation to low-wealth individuals in the Eastern District of North Carolina. She has also taught the foundations of bankruptcy law course at Campbell University School of Law and speaks at conferences on various bankruptcy related topics. Ms. Rogers is a member of the North Carolina and Virginia State Bars and the North Carolina Bar Association. She also is certified as a specialist in business bankruptcy by the North Carolina State Bar, and has been listed in the 2024 edition of *The Best Lawyers in America*, the 2021-23 editions of *Super Lawyers* as a "Rising Star," and the 2021-22 editions of *Business North Carolina* magazine's "Legal Elite in Bankruptcy Law." In 2014, Ms. Rogers was recognized by the National Conference of Bankruptcy Judges (NCBJ) as an Honorable Cornelius Blackshear Fellow, and in 2019, she was selected as a participant in the NCBJ's NextGen program. In 2023, Ms. Rogers was honored as one of ABI's 40 Under 40. She received dual B.S degrees in history and political science from Averett University and her J.D. from North Carolina Central University School of Law.

Donald L. Swanson is a shareholder with Koley Jessen P.C., L.L.O. in Omaha, Neb., and has been practicing bankruptcy law since 1980. He grew up on a livestock farm in Nebraska's Sandhills, became Nebraska State FFA President (1973-74), and achieved FFA's "American Farmer Degree." During the 1980s farm crisis, Mr. Swanson represented debtors in more than 40 chapter 12 cases, achieving a confirmed plan and discharge in all but one. In Delaware's $1.5 billion ethanol bankruptcy (*In re VeraSun*), he held an *ex officio* seat on the creditors' committee as counsel for the ad hoc committee of grain suppliers. Mr. Swanson is a subchapter V trustee in the District of Nebraska and serves on ABI's Subchapter V Task Force, and he is a court-approved mediator for both the U.S. District and the U.S. Bankruptcy courts of Nebraska He also is a member of the Nebraska Delegation to the Uniform Law Commission and serves on its Drafting Committee for a uniform law on assign-

ments for benefit of creditors, is a court-approved mediator in both the U.S. District and Bankruptcy Courts of Nebraska, and is Board Certified in Business Bankruptcy Law by the American Board of Certification. Mr. Swanson publishes a blog on bankruptcy and mediation topics at https://mediat-bankry.com, and he is rated AV-Preeminent by Martindale-Hubbell. In addition, he is a Fellow of the Nebraska State Bar Foundation, and he has served on the board for Legal Aid of Nebraska, providing free legal services to low-income Nebraskans, and on the board for Global Partners in Hope, which provides clean drinking water and medical centers in West Africa. In 2022, as a commissioner on the Uniform Law Commission (ULC), Mr. Swanson proposed that ULC study the need for a uniform law on assignments for benefit of creditors. That proposal was accepted, and he now serves on the ULC's Drafting Committee on Assignments for Benefit of Creditors. Mr. Swanson has been recognized in *The Best Lawyers in America* and *Super Lawyers*. He received his A.A. from Grace University in 1976, his B.S. in political science from the University of Nebraska - Omaha in 1977, and his J.D. from the University of Nebraska - Lincoln in 1980, where he was an associate editor of the *Nebraska Law Review*.