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A Discussion of Critical Issues and Practical Tips for the Subchapter V Trustee and Practitioner

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- I. Legislative update on reviving the increased debt limit
- II. *ABI Subchapter V Task Force Final Report*
- III. Relevant Legal Issues
 - a. Prepackaged Subchapter V case
 - b. Eligibility
 - i. Determined “as of” the petition date.
 - 1. *In re Hillman*, 2023 WL 3804195, at *3 (Bankr. N.D.N.Y. June 2, 2023) (“Debtor must demonstrate she was presently engaged in commercial or business activities as of the Petition Date.”)
 - 2. *In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020) (Under “§ 1182(1)(A) of the Bankruptcy Code, ‘engaged in’ is written not in the past or future but in the present tense.”)
 - 3. *In re Ikalowych*, 629 B.R. 261, 281 (Bankr. D. Colo. Apr. 15, 2021) (“[T]he ‘engaged in’ phrase is used throughout the Bankruptcy Code, and it always means the same thing: that a person or entity is presently doing something.”)
 - ii. Court can consider eligibility *sua sponte* at any time.
 - 1. *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445, at *3 (Bankr. D.P.R. Oct. 27, 2023) (court “may *sua sponte* revoke the Subchapter V designation made by a debtor in its petition under the Bankruptcy Code” even though no party objected to the designation and the deadline had passed more than a year before).
 - iii. Contingent liabilities – how are they considered?
 - 1. *In re Parking Mgmt., Inc.*, 620 B.R. 544, 555 (Bankr. D. Md. 2020) (“[L]ease rejection claims were contingent as of the date of filing and are not considered in the debt limitation determination.”)
 - 2. *In re Macedon Consulting, Inc.*, 652 B.R. 480, 486 (Bankr. E.D. Va. 2023) (court held that full future liability under commercial leases must be considered noncontingent and liquidated for purposes of calculating noncontingent liquidated debts)
 - iv. Is the debtor engaged in commercial or business activities?
 - 1. *In re Fam. Friendly Contracting LLC*, 2021 WL 5540887, at *3 (Bankr. D. Md. Oct. 26, 2021) (“Virtually all have applied a liberal construction of

the phrase in keeping with the SBRA's purpose and the language of § 1182(1)(A).”)

2. *In re Ikalowych*, 629 B.R. 261, 276 (Bankr. D. Colo. 2021) (“[T]he plain or ordinary meaning (i.e., the meaning understood by a typical speaker of the English language) of the phrase ‘commercial or business activities’ is exceptionally broad.”)
 3. *In re Hillman*, Case No. 22-10175, 2023 WL 3804195 (Bankr. N.D.N.Y. June 2, 2023) (finding that the debtor’s defense of a state court action involving a defaulted commercial lease agreement by an entity in which the debtor had a 50% interest and the debtor’s personal guaranty of such agreement was sufficient “winding down activity” for the debtor to satisfy the “engaged in commercial or business activities” requirement).
 4. *In re Robinson*, 2023 WL 2975630 (Bankr. S.D. Miss. Apr. 17, 2023) (finding that the debtor was eligible for subchapter V because he was engaged in commercial or business activities by winding down his poultry farming business which involved managing his farm assets, actively seeking buyers for the farm and its assets, and maintaining and inspecting the improvements on his property).
- v. “[N]ot less than 50 percent” of the debtor’s debt must have “ar[isen] from the commercial or business activities of the debtor.” 11 U.S.C. § 1182(1)(A).
1. *In re Hillman*, 2023 WL 3804195, at *3 (Bankr. N.D.N.Y. June 2, 2023) (holding that a debtor must meet a “nexus requirement” by showing that at least fifty percent debtor’s aggregate debt arose from the same “commercial or business” activity as that considered for subchapter V eligibility).
 2. *In re Reis*, 2023 WL 3215833 (Bankr. D. Idaho May 2, 2023) (“By employing the verbiage it did, Congress left open the possibility that the commercial or business activities which gave rise to the debt might be different from the commercial or business activities the debtor was engaged in on the day the petition was filed”).
- c. Plan term – Three v. Five years
- i. “Three Years Is the ‘Default’ Duration for a Subchapter V Plan, Judge Robinson Says,” Rochelle’s Daily Wire (June 7, 2024); see *In re Trinity Fam. Prac. & Urgent Care PLLC*, 2024 WL 2704056, at *1 (Bankr. W.D. Tex. May 24, 2024).

d. Feasibility for confirmation

IV. Subchapter V Trustee

a. Role and mandate

- b. Getting paid
 - i. Carveouts
 - ii. Local practice – requirement to pay certain amount per month
- c. Retention of counsel
- d. Level of involvement and hearing attendance
- V. Post-Confirmation issues
 - a. Reporting by Subchapter V debtor – varies by Region
 - i. Local court requirements
 - ii. When someone other than the trustee makes payments to creditors, 11 U.S.C. §1194(b) under a nonconsensual plan
 - b. Debtor default
 - c. Standing of Subchapter V trustee to pursue litigation

Rochelle's Daily Wire on Subchapter V cases

I. *Three Years Is the 'Default' Duration for a Subchapter V Plan, Judge Robinson Says*

The Code doesn't contain any rules specifying when a Subchapter V plan should have a five-year duration rather than three years.

Three Years Is the 'Default' Duration for a Subchapter V Plan, Judge Robinson Says

In re Trinity Fam. & Urgent Care PLLC, 2024 WL 2704056, at *1 (Bankr. W.D. Tex. May 24, 2024)

II. *Sub V Trustee Lacks Standing to Pursue an Adversary Proceeding for the Debtor*

Bankruptcy Judge Eduardo Rodriguez of Houston opined on the limited powers of a Subchapter V trustee.

Sub V Trustee Lacks Standing to Pursue an Adversary Proceeding for the Debtor

Singh v. Price (In re Turkey Leg Hut & Co. LLC), 659 B.R. 539 (Bankr. S.D. Tex. 2024)

III. *Fifth and Fourth Circuits Hold that Debts in Sub V Can Be Nondischargeable*

Differing with eight lower courts, the Fifth Circuit sided with the Fourth Circuit by holding that debts of corporate debtors in Subchapter V can be nondischargeable in nonconsensual plans.

Fifth and Fourth Circuits Hold that Debts in Sub V Can Be Nondischargeable

See Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC), 36 F.4th 509 (4th Cir. June 7, 2022); and *Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC)*, 99 F.4th 223 (5th Cir. April 17, 2024).

IV. *Two Judges Agree: A Class with No Votes Isn't Considered in Confirming a Sub V Plan*

One month apart, two Houston bankruptcy judges held that a non-voting class is not deemed to have voted against a plan.

Two Judges Agree: A Class with No Votes Isn't Considered in Confirming a Sub V Plan

In re Hot'z Power Wash, Inc., 655 B.R. 107 (Bankr. S. D. Tex. 2023); *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. Oct. 4, 2023).

V. *Courts Are Now Split on Ignoring Nonvoting Classes in Subchapter V Plans*

Disagreeing with two bankruptcy courts in Houston, Miami's Judge Isicoff holds that a Sub V plan with a nonvoting class can be confirmed only as a nonconsensual plan.

Courts Are Now Split on Ignoring Nonvoting Classes in Subchapter V Plans

In re: M.V.J. Auto World, Inc., 2024 WL 3153327, at *3 (Bankr. S.D. Fla. June 24, 2024)

Attachments

ABI Subchapter V Task Force Final Report - <https://www.abi.org/newsroom/press-releases/abi-subchapter-v-task-force-final-report-provides-key-recommendations-to>

UST Blog post - [U.S. Trustee Program | Small Business Reorganization Act: Implementation and Trends \(justice.gov\)](#)

Prepacks and Subchapter V: An Uneasy Fit, by Richard Drew, Assistant United States Trustee, Western District of Louisiana and Denise J. Penn, Trial Attorney, Executive Office for United States Trustees (upcoming publication)

Guide to Subchapter V of the U.S. Bankruptcy Code by Hon. Paul W. Bonapfel (with 2022 and 2024 Supplements) - <https://www.ganb.uscourts.gov/content/honorable-paul-w-bonapfel>

A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

Revised June 2022

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

This June 2022 compilation of *A Guide to the Small Business Reorganization Act of 2019* merges the July 2021 compilation of the *Guide* with material in the May-June 2022 Supplement and incorporates revisions in a May 2022 compilation. The earlier compilations and this one update the original version published at 93 Amer. Bankr. L. J. 571 (2019).

The May-June 2022 Supplement is in two parts. The first part supplements the July 2021 compilation with revisions and new material as of May 2022. The second part adds additional revisions and materials as of June 2022. This June 2022 compilation includes all of the revisions in both supplements.

The reader who is not familiar with the July 2021 compilation may consult only this June 2022 compilation, because it includes all the material in both of the supplements.

The reader who is familiar with the July 2021 compilation may consult only the May-June 2022 Supplement to review new material added to the July 2021 compilation. The reader who is also familiar with the May 2022 Supplement may consult only the June part of the May-June 2022 Supplement to review new material.

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A Guide to the Small Business Reorganization Act of 2019

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

I. Introduction

The Small Business Reorganization Act of 2019 (the “SBRA”)¹ enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and made conforming amendments to several sections of the Bankruptcy Code and statutes dealing with appointment and compensation of trustees in title 28.² SBRA also revised the definitions of “small business case” and “small business debtor” in § 101(51C) and § 101(51D), respectively.³ It took effect on February 19, 2020, 180 days after its enactment on August 23, 2019.

Subchapter V applies in cases in which a qualifying debtor elects its application. As originally enacted, SBRA provided that a “small business debtor,” as defined in revised § 101(51D), could make the election. In the absence of the election, a small business debtor would be in a “small business case,” which revised § 101(51C) defines as the case of a small business debtor that does not elect subchapter V. SBRA did not change the pre-SBRA

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

² Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code.

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

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

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than \$ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was \$ 13,650. As of April 1, 2022, the adjusted amount under § 104 is \$ 27,750.

³ SBRA § 4(1)(A)-(B).

provisions of chapter 11 that govern a small business case with one exception. SBRA amended § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in a small business case unless the court orders otherwise.⁴

A debtor is a small business debtor under § 101(51D) only if, among other things, its debts (with some exceptions) are within a specified debt limit. The debt limit at the time of SBRA's enactment was \$ 2,725,625; on April 1, 2022, the debt limit was increased pursuant to § 104 to \$ 3,024,725.

As Section III(B) discusses in detail, later legislation expanded the availability of subchapter V on a temporary basis to debtors whose debts do not exceed \$ 7.5 million if they otherwise qualify as a small business debtor.⁵ Under this legislation, § 1182(1) defines eligibility for subchapter V, with the same language that defines a “small business debtor” in § 101(51D), except for the debt limit. On June 21, 2024, the provisions expire, and § 101(51D) will again govern eligibility for subchapter V.

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

The purpose of SBRA is “to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs.”⁶ A sponsor of the legislation stated that it

⁴ SBRA, § 4(a)(11), 133 Stat. 1079, 1086.

⁵ Between March 27, 2022 and June 20, 2022, a debtor had to be a small business debtor as defined in § 101(51D), and the debt limit was, therefore, \$3,024,725. The change on June 21, 2022, was retroactive. See Section 3(B)(1); Part XIII.

⁶ H.R. REP. NO. 116-171, at 1 (2019), *available at* <https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf>.

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

Amendments to the Bankruptcy Code in 1994 permitted a qualifying small business debtor to elect small business treatment. As amended, § 1121(e) provided that, in a small business case, only the debtor could file a plan for 100 days after the order for relief and that all plans had to be filed within 160 days. In addition, amended § 1125(f) permitted parties to solicit acceptances or rejections of a plan based on a conditionally approved disclosure

allows small business debtors “to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business,” which “not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.”⁷ Courts have taken the legislative purpose of SBRA into account in their application of the new law.⁸

SBRA has had a significant impact. A preliminary estimate was that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would have qualified as a subchapter V debtor and that about 25 percent of individuals in chapter 11 cases

statement and permitted a final hearing on the disclosure statement to be combined with the hearing on confirmation.

The Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (“BAPCPA”) significantly changed the small business provisions. Importantly, it eliminated the debtor’s option to choose small business treatment. As such, a business that qualifies as a small business debtor became subject to all of the provisions governing small business cases.

BAPCPA replaced both § 1121(e) and § 1125(f).

BAPCPA’s § 1121(e)(1) extended the exclusive time for the debtor to file a plan to 180 days and imposed a new 300-day deadline for the filing of a plan. BAPCPA also added § 1129(c) to require confirmation of a plan in a small business case within 45 days of its filing, unless the court extended the time.

BAPCPA’s § 1125(f) added a provision that permitted the court to determine that the plan provided adequate information such that a separate disclosure statement was not required.

BAPCPA also added § 1116 to prescribe additional filing, reporting, disclosure, and operating duties applicable only to small business debtors.

Although some of BAPCPA’s small business provisions facilitated chapter 11 reorganization for a small business debtor, others appeared to reflect skepticism about the prospects for success of a small business debtor in a chapter 11 case and specific, more intensive supervision of the administration of their cases. In practice, reporting and confirmation requirements applicable to small business debtors remained burdensome or unworkable for many small businesses. *See, e.g., Amer. Bankr. Inst. Comm’n to Study the Reform of Chapter 11: 2012-14 Final Report & Recommendations*, 23 AMER. BANKR. INST. L. REV. 1, 324 (2015) (For many small or medium-sized businesses, “the common result of plan confirmation extinguishing pre-petition equity interests in their entirety [are] unsatisfactory or completely unworkable.”).

Because SBRA did not repeal SBRA’s provisions relating to a “small business debtor,” a small business debtor that does not elect subchapter V is in a small business case and subject to the provisions that BAPCPA added. ⁷ H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. Blackmon, *Revising the Debt Limit for “Small Business Debtors”*: *The Legislative Half-Measure of the Small Business Reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339, 344-45 (2020).

⁸ *E.g., In re Ventura*, 615 B.R. 1, 6, 12-13 (Bankr. E.D.N.Y. 2020), *rev’d on other grounds sub nom. Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020).

would qualify.⁹ Subchapter V thus changes the chapter 11 environment for both debtors and creditors.¹⁰ A study of 438 cases filed between subchapter V's effective date of February 19, 2020 and December 31, 2020 indicates that it is working as intended.¹¹

Subchapter V resembles chapter 12¹² and chapter 13¹³ in some respects. As in subchapter V cases, both chapters 12 and 13 provide for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee in all of the cases has

⁹ Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 5-6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?*, CREDIT SLIPS (Sept. 14, 2019), <http://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html>). Professor Brubaker points out that the percentage may ultimately be higher because pre-SBRA law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under pre-SBRA law because of its obstacles might now do so. The estimate does not take into account the increase in the debt limit that the CARES Act temporarily made.

¹⁰ For a discussion of strategies for creditors in view of the enactment of subchapter V, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251 (2020).

¹¹ Michelle M. Harner, Emily Lamasa, and Kinberly Goodwin-Maigetter, *Subchapter V Cases By the Numbers*, 40-Oct Am. Bankr. Inst. J. 12 (Oct. 2021). Of the 438 cases filed in the period, 117 (27 percent) were individual cases, of which 52 were jointly administered. As of June 30, 2021, confirmation had occurred in 221 cases, the debtor had filed a plan that had not yet been confirmed in 105 cases, and the court had dismissed 82 cases. *Id.* at 59. Thus, the debtor was able to confirm a plan in more than 62 percent of the cases not dismissed and in more than half of all of the cases in the study.

Id.

In 130 of the 221 cases with confirmed plans, confirmation was consensual under § 1191(a) in 130 of them (69 percent). In the 91 cases where cramdown confirmation occurred, 40 involved at least one class of creditors voting against the plan and 51 had impaired classes that did not vote. *Id.*

The average number of days between filing of the case and confirmation was 184 days, and the median was 168. *Id.*

The authors concluded, *id.* at 60:

Overall, subchapter V appears to be working as intended. Small businesses are using the subchapter with some regularity. The businesses also are, for the most part, confirming reorganization plans at a relatively high rate in a relatively short period of time. Although more data is needed to fully understand the impact of invoking the subchapter on both the short- and longer-term prospects of financially distressed small businesses, the initial results are promising. Small businesses appear now to have a restructuring tool that is both affordable and effective for addressing their financial needs.

¹² As the court observed in *In re Trepetin*, 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020):

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

¹³ See *In re Louis*, 2022 WL 2055290 at *14 (Bankr. C.D. Ill. 2022) (The court noted that chapter 11 cases impose fiduciary duties and administrative tasks such as preparing and filing operating reports and producing other financial information that typically do not arise in chapter 13 cases and that representation requires understanding of subchapter V provisions, including the advantages of consensual confirmation for an individual.).

oversight and monitoring duties and the right to be heard on certain matters. The subchapter V trustee in some cases may make disbursements to creditors in a similar manner to disbursements in chapter 12 and 13 cases.¹⁴

But subchapter V differs from chapters 12 and 13 in significant ways. For example, whereas confirmation standards requirements in chapter 12 (§ 1225) and chapter 13 (§ 1325) are similar and do not contemplate voting by creditors, subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a) and contemplate voting by classes of creditors.¹⁵ Unlike chapter 13, subchapter V does not provide for a codebtor stay.

Enactment of SBRA required revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) had authority to make changes in the Official Forms to take effect on SBRA’s effective date. Changes to the Bankruptcy Rules, however, take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require.

To take account of the new law, the Rules Committee made changes to the Official Forms and promulgated interim rules (the “Interim Rules”) that amend the Federal Rules of Bankruptcy Procedure.¹⁶ The changes to the Official Forms became effective as of the effective

¹⁴ Part IX discusses disbursements in subchapter V cases.

¹⁵ Part VIII discusses confirmation requirements in subchapter V cases. For a discussion of debt limits in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 12:8 – 12:10.

¹⁶ On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure (“Interim Rules”) to address provisions of SBRA for adoption in each judicial district by local rule or general order and new Official Forms. The proposed Interim Rules and Official Forms reflected changes in response to comments received. ADVISORY COMMITTEE ON BANKRUPTCY RULES, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption, and approved the new Official Forms. The Executive Committee of the Judicial

date of SBRA. The Rules Committee recommended that each judicial district adopt the Interim Rules as local rules or by general order. Enactment of later legislation expanding the debt limit required technical revisions in Interim Rule 1020 in and the Official Forms for voluntary petitions.¹⁷ Appendix B summarizes the changes that the Interim Rules made.

If a small business debtor does not elect subchapter V, the provisions that govern small business cases apply.¹⁸ The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee refers to “small business cases” and to “cases under subchapter V of chapter 11.”

This terminology is technically accurate. Under the SBRA amendments, a “small business debtor” is not necessarily a debtor in a “small business case.” Rather, a “small business case” is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case. Moreover, under the temporary extension of the debt limits under later legislation, a debtor can be a subchapter V debtor, but not a small business debtor, if its debts are less than \$ 7.5 million but more than the limit for a small business debtor.

Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

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

¹⁷ On April 6, 2020, the Advisory Committee on Bankruptcy Rules proposed one-year technical amendments to Interim Rule 1020 to take account of the revised definition of “debtor” under the CARES Act, which Section III(B) discusses. The Advisory Committee also proposed conforming technical changes to official forms, including Official Forms 101 and 202, which are the forms for the filing of a voluntary petition by an individual and a non-individual, respectively.

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

¹⁸ For a summary of key features of a non-sub V small business case governed by the provisions for small business cases, see *supra* note 6.

The distinction is important for at least one reason. Section 362(n) makes the automatic stay inapplicable in certain circumstances when the debtor in the current case is or was a debtor in a pending or previous small business *case*. Because a subchapter V debtor is not in a small business *case*, § 362(n) will not apply in a later case of the subchapter V debtor.¹⁹

Three types of cases are now possible under chapter 11: (1) a non-small business case under traditional chapter 11 for a debtor who is not a small business debtor and either (a) has debts in excess of the sub V debt limit or (b) has debts below the limit and is eligible for subchapter V but does not elect it; (2) a small business case for a small business debtor that does not elect subchapter V; and (3) a subchapter V case for a qualifying debtor who elects it. This paper generally uses “traditional” to describe a chapter 11 case (including a small business case) that is not a subchapter V case.

II. Overview of Subchapter V

For electing debtors who qualify, subchapter V: (1) modifies confirmation requirements; (2) provides for the participation of a trustee (the “sub V trustee”) while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) changes several

¹⁹ In *In re Abundant Life Worship Center of Hinesville, GA., Inc.*, 2020 WL 7635272 (Bankr. S.D. Ga. 2020), a debtor whose earlier small business case had been dismissed seven months earlier filed a new chapter 11 case and amended the petition to elect subchapter V. The debtor contended that § 362(n)(1) did not apply because, upon its subchapter V election, it ceased being a debtor in a “small business case.” *Id.* at *8. The court ruled that the status of the debtor in the current case made no difference: “The statute plainly requires only that the prior case was a small business case, not the subsequent case.” *Id.* at * 18.

The debtor also contended that the exception in paragraph (n)(2) of § 362 to the operation of paragraph (n)(1) applied. Section 362(n)(2)(B) provides that paragraph (n)(1) does not apply if the debtor establishes “that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time *the case then pending* was filed” (emphasis added) and that “it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable time.”

The court rejected this argument, concluding that the language, “the case then pending” refers to a separate case pending at the time of the filing of the second case. Because the debtor’s previous case was not a “case then pending,” the court ruled, the exception did not apply. *Id.* at *11-12. The court thus followed *Palmer v. Bank of the West*, 438 B.R. 167 (E.D. Wis. 2010).

administrative and procedural rules; and (4) alters the rules for the debtor's discharge and the definition of property of the estate with regard to property an individual debtor acquires postpetition and postpetition earnings (which has implications for operation of the automatic stay of § 362(a)). Only the sub V debtor may file a plan or a modification of it.

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

A. Changes in Confirmation Requirements

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

A sub V plan may modify a claim secured only by a security interest in the debtor's principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor. Such modification is not permitted in traditional chapter 11 cases or in chapter 12 or 13 cases. (Section VII(B)).

B. Subchapter V Trustee and the Debtor in Possession

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

The United States Trustee appoints the sub V trustee. The role of the sub V trustee is to oversee and monitor the case, to appear and be heard on specified matters, to facilitate a consensual plan, and to make distributions under a nonconsensual plan confirmed under the cramdown provisions. (Part IV).

C. Case Administration and Procedures

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

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

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

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

occur within 45 days of the filing of the plan (§ 1129(e)) do not apply in a sub V case. (Section VI(D)).

No disclosure statement. Section 1125, which states the requirements for a disclosure statement in connection with a plan and regulates the solicitation of acceptances of a plan, does not apply in a sub V case, unless the court orders otherwise. Although no disclosure statement is required, the plan must include: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan. (Sections VI(B), VII(B)).

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

D. Discharge and Property of the Estate

1. Discharge – consensual plan

If the court confirms a consensual plan, a sub V debtor (including an individual debtor) receives a discharge under § 1141(d)(1)(A) upon confirmation. The provision in § 1141(d)(5) for delay of discharge in individual cases until completion of payments does not apply in a sub V case. In the case of an individual, the § 1141(d)(1)(A) discharge does not discharge debts excepted under § 523(a).²⁰ One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

2. Discharge – cramdown plan

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

²⁰ § 1141(d)(2).

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

3. Property of the estate

Section 1115 provides that, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. Section 1115 does not apply in a subchapter V case.²¹ If the court confirms a plan under the cramdown provisions of § 1191(b), however, property of the estate includes (in cases of both individuals and entities) postpetition assets and earnings.²² See Section XI(B).

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

A. Debtor's Election of Subchapter V

The provisions of subchapter V apply in cases in which an eligible debtor elects them.²³

If an eligible debtor does not make the election, the traditional provisions of Chapter 11 apply. If

²¹ § 1181(a).

²² § 1186(a).

²³ One commentator has suggested that a creditor may want to attempt to limit the availability of subchapter V by including in the credit agreement a commitment from the debtor not to make the election or to waive it, noting that such a contractual provision may not be enforceable. Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 264 (2020). Professor Bradley suggests alternatively that a creditor could require a "springing" (sometimes referred to as a "bad boy") guarantee from a debtor's insider that would arise if the debtor elected subchapter V. *Id.* at 264-65.

the non-electing debtor is a small business debtor as defined in § 101(51D), the debtor is in a “small business case” under § 101(51C), and the special provisions governing such cases apply.

As Section III(B) discusses, § 1182(1) defines eligibility for subchapter V until June 20, 2024. Thereafter, a debtor must be a small business debtor under § 101(51D) to be eligible for subchapter V. Except for the debt limit (\$ 3,024,725 under § 101(51D) and \$ 7.5 million under § 1182(1)), eligibility for subchapter V is the same under both provisions.

An individual eligible for subchapter V will also be eligible for chapter 13 if the debtor has regular income and debts that do not exceed the chapter 13 debt limits.²⁴ Effective June 21, 2022, the debt limit in a chapter 13 case was temporarily increased to \$ 2,750,000 for both secured and unsecured debts under the Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATCA”).²⁵ On June 20, 2024, the debt limits return to \$ 465,275 for unsecured debts and \$ 1,395,875 for secured debts.²⁶

Appendix E compares subchapter V cases with chapter 13 cases, small business cases, and traditional chapter 11 cases.

The statute does not state when or how the debtor makes the election. Bankruptcy Rule 1020(a) requires a debtor to state in the petition whether it is a small business debtor.²⁷ In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order for relief. The case proceeds in accordance with the debtor’s statement unless and until the court enters an order finding that the statement is incorrect.

²⁴ § 109(e) governs chapter 13 eligibility.

²⁵ Bankruptcy Threshold Adjustments and Technical Corrections Act § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”). The increased debt limits apply retroactively in any bankruptcy case commenced on or after March 27, 2020 that is pending on the date of BTATCA’s enactment. *Id.* § 2(h)(2)(A).

²⁶ BTATCA § 2(i)(1)(A). The court may convert a chapter 11 case to chapter 13 if the debtor requests it. § 1112(c).

²⁷ FED. R. BANK. P. 1020(a).

Interim Rule 1020(a) as originally promulgated added the requirement that the debtor state in the petition whether the debtor elects application of subchapter V and provided that the case proceed in accordance with the election unless the court determined that it is incorrect. In an involuntary case, the Interim Rule required the debtor to state whether it is a small business debtor and to make the election within 14 days after the order for relief.²⁸ In response to temporary legislation that changed the debt limit for subchapter V eligibility to \$7.5 million and put the eligibility requirements in § 1182(1),²⁹ revised Interim Rule 1020 provides in both instances for the debtor to state whether the debtor is a small business debtor or a debtor as defined in § 1182(1) and, if the latter, whether the debtor elects application of subchapter V.

Revisions to the Official Forms for voluntary chapter 11 cases require the debtor to state whether it is a small business debtor or a § 1182(1) debtor and whether it does or does not make the election.³⁰ Revised Official Forms also provide for creditors to receive notice of the debtor's statement of its status and the election that it makes.³¹

Parties in interest may object to a debtor's statement of whether it is a small business debtor or is eligible for subchapter V. Bankruptcy Rule 1020(b) requires an objection to a debtor's statement of its small business status within 30 days after the later of the conclusion of the § 341(a) meeting or amendment of the statement. Interim Rule 1020(b) makes the same

²⁸ INTERIM RULE 1020.

²⁹ See Section III(B).

³⁰ OFFICIAL FORM B101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); OFFICIAL FORM B102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

³¹ OFFICIAL FORM B309E2 is the form for individuals or joint debtors under subchapter V, and OFFICIAL FORM B309F2 is the form for corporations or partnerships under subchapter V. Existing OFFICIAL FORMS B309E (individuals or joint debtors) and B309F (corporations or partnerships) were renumbered as B309E1 and B309F1. Both new forms contain the same information as the existing notices but provide additional information applicable in subchapter V cases.

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

requirement applicable to the statement regarding the debtor's statement that it is an eligible subchapter V debtor.

Most courts have determined that the burden is on the debtor to establish eligibility for subchapter V if challenged.³² A contrary view is that the objecting party as the moving party has the burden of proving that the debtor is not eligible.³³ The issue may be academic in most cases dealing with eligibility. For the most part, the outcomes do not appear to turn on the resolution of factual disputes but on the legal conclusions to be drawn from the facts.

It is not clear whether a bankruptcy court's order determining that a debtor is eligible is a final order for purposes of appeal under 28 U.S.C. § 158(a)(1).³⁴ A district court or bankruptcy

³² *NetJets Aviation, Inc. v. RS Air, LLC* (*In re RS Air, LLC*), 2022 WL 1288608 at *8-9 (B.A.P. 9th Cir. 2022); *In re Blue*, 630 B.R. 179, 187 (Bankr. M.D.N.C. 2021); *National Loan Invs., L.P. v. Rickerson* (*In re Rickerson*), 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021); *Lyons v. Family Friendly Contracting LLC* (*In re Family Friendly Contracting LLC*), 2021 WL 5540887 at *2 (Bankr. D. Md. 2021); *In re Vertical Mac Construction, LLC*, 2021 WL 3668037 at *2 (Bankr. M.D. Fla. 2021); *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021); *In re Offer Space, LLC*, 629 B.R. 299, 304 (Bankr. D. Utah 2021); *In re Ikalowych*, 629 B.R. 261, 275 (Bankr. D. Colo. 2021); *In re Johnson*, 2021 WL 825156 at *4 (Bankr. N.D. Tex. 2021); *In re Thurman*, 625 B.R. 417, 419 n.4 (Bankr. W.D. Mo. 2020).

³³ *E.g.*, *Hall L.A. WTS, LLC v. Serendipity Labs, Inc.* (*In re Serendipity Labs, Inc.*), 620 B.R. 679, 680 n.3 (Bankr. N.D. Ga. 2020); *In re Body Transit, Inc.*, 613 B.R. 400, 409 n. 15 (Bankr. E.D. Pa. 2020) ("It is appropriate to place the burden of proof on [the objecting party], as it is the *de facto* moving party.").

³⁴ *In NetJets Aviation, Inc. v. RS Air, LLC* (*In re RS Air, LLC*), 2022 WL 1288608 (B.A.P. 9th Cir. 2022), the court reviewed the bankruptcy court's eligibility order in connection with an appeal of the order confirming the subchapter V plan. The court stated, "The interlocutory Subchapter V Order merged into the final Confirmation Order." *Id.* at *3 n. 3. The court cited *United States v. Real Prop. Located at 475 Martin Lane*, 545 F.3d 1134, 1141 (9th Cir. 2008) (under merger rule, interlocutory orders entered prior to the judgment merge into the judgment and may be challenged on appeal).

In *Gregory Funding v. Ventura* (*In re Ventura*), 638 B.R. 499 (E.D. N.Y. 2022), however, the court in reversing an order of the bankruptcy court determining that the debtor was eligible for subchapter V, without discussing the finality issue, stated that district courts have appellate jurisdiction over final judgments, orders, and decrees. *Id.* at *3.

The district court's ruling in *Guan v. Ellingsworth Residential Community Association, Inc.* (*In re Ellingsworth Residential Community Association, Inc.*), 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed*, 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied*, 2022 WL 1131391 (2022), indicates that an eligibility determination is a final order. The creditor filed a notice of appeal after the bankruptcy court issued an order scheduling a hearing on confirmation of the debtor's subchapter V plan after a hearing at which it took the eligibility objection under advisement. The creditor appealed the scheduling order, and the bankruptcy court denied the creditor's motion for a stay pending appeal. In a later order, the bankruptcy court determined that the debtor was eligible. See *In re Ellingsworth Residential Community Association, Inc.*, 619 B.R. 519 (Bankr. M.D. Fla. 2019). The creditor did not seek leave to amend her notice of appeal to include the order denying a stay pending appeal or the eligibility order.

appellate panel has jurisdiction to hear an appeal from an interlocutory order, with leave of the court, under 28 U.S.C. § 158(a)(3) and § 158(b)(1), respectively.³⁵ Courts of appeals have discretionary jurisdiction to hear an appeal of an interlocutory order (as well as a final one) of the bankruptcy court under 28 U.S.C. § 158(d)(2) that a bankruptcy court, district court, or bankruptcy appellate panel certifies on various grounds.³⁶

Bankruptcy Rule 1009(a) gives a debtor the right to amend a voluntary petition, list, schedule, or statement “as a matter of course at any time before the case is closed.” A question is whether a debtor may amend the small business designation or the subchapter V election that the voluntary petition includes. Current Bankruptcy Rule 1020 does not address whether a debtor can amend the small business designation, and Interim Rule 1020 likewise does not address the issue of whether a delayed sub V election should be allowed and, if so, under what circumstances.³⁷

The district court held that the scheduling order was interlocutory and that the order denying the eligibility objections was not properly before the court. *Guan v. Ellingsworth Residential Community Association, Inc.* (*In re Ellingsworth Residential Community Association, Inc.*), 2021 WL 3908525 at * 2 (M.D. Fla. 2021), *appeal dismissed*, 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied*, 2022 WL 1131391 (2022). The implication is that the eligibility order was a final order because it finally resolved the objection to eligibility. The district court nevertheless determined that, even if the creditor had properly raised the issue, the appeal would be denied on the merits. *Id.*

The Eleventh Circuit dismissed the appeal *sua sponte* for lack of jurisdiction because the district court’s order affirming the bankruptcy court’s interlocutory scheduling order was not a final order of the district court within its appellate jurisdiction under 28 U.S.C. § 158(d)(1). *Guan v. Ellingsworth Residential Community Association, Inc.* (*In re Ellingsworth Residential Community Association, Inc.*), 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied*, 2022 WL 1131391 (2022).

³⁵ *In re Parkinson*, 2021 WL 1554068 at * 2 (D. Idaho 2021). (“[R]eviewing and resolving any questions concerning Subchapter V will not waste litigation resources, but will conserve them. In like manner, taking up Appellants’ appeal at the current juncture will advance the ultimate termination of the underlying bankruptcy litigation.”).

³⁶ The lower court must certify either: (1) that the order involves a question of law as to which no controlling circuit or Supreme Court authority exists or a matter of public importance; (2) that the order involves a question of law requiring resolution of conflicting decisions; or (3) that an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A)(i)-(iii).

³⁷ The Advisory Committee Note to Interim Rule 1020 states, “The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.”

Part XIII discusses whether a debtor who does not make the subchapter V election in the original petition may later amend the petition to elect application of Subchapter V. The issue arose in cases filed before enactment of SBRA in which the debtor sought to proceed under subchapter V when it became available. A similar issue may arise in a case filed by a debtor between March 27 and June 20, 2022, if the debtor was not eligible for subchapter V at the time of filing based on the amount of its debt but became eligible after enactment of the Bankruptcy Technical Adjustments and Technical Correction Act on the latter date that increased the debt limit, as Section III(B) discusses.

One problem with permitting a debtor to change the election is that deadlines for conducting a status conference³⁸ and for filing a plan³⁹ run from the date of the order for relief. The Advisory Committee in its Report observed, “Should a court exercise authority to allow a delayed election, it is likely that one of the court’s prime considerations in ruling on a request to make a delayed election would be the time restriction imposed by subchapter V. . . .”⁴⁰ Section VI(J) and Part XIII discuss extension of the time limits and their effect on the ability of a debtor to amend the petition to make an election after their expiration.

³⁸ See Section VI(C).

³⁹ See Section VI(D).

⁴⁰ Advisory Committee on Bankruptcy Rules, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), at 3, available at https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

B. Eligibility for Subchapter V; Revised Definitions of “Small Business Debtor” and “Small Business Case”

1. Statutory provisions governing application of subchapter V and the debt limit

The operative statutory provision for application of subchapter V is § 103(i), which SBRA added.⁴¹ As amended by the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”)⁴² in March 2020, it provides:

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

As originally enacted by SBRA, § 1182(1) defined “debtor” as meaning a “small business debtor,”⁴³ a term defined in § 101(51D). As Section III(B)(2) discusses below, SBRA also revised the § 101(51D) definition of “small business debtor,” but did not change the then-existing debt limit of \$ 2,725,625 (now \$ 3,024,725 as adjusted on April 1, 2022, under § 104).

The CARES Act increased the debt limit to \$ 7.5 million through amendments to § 1182(a) and § 103(i). The CARES Act amended § 1182(1) so that its definition of “debtor” is the same as the definition of “small business debtor” in revised § 101(51D), with a technical correction that it also made,⁴⁴ except that the debt limit in § 1182(1) is \$ 7.5 million.⁴⁵ It did not change the debt limit in revised § 101(51D). The CARES Act changed § 103(i) to replace “small business debtor” with “debtor (as defined in section

⁴¹ SBRA inserted new subsection (i) in § 103 and renumbered existing subsections (i) through (k) as (j) through (l). SBRA § 4(a)(2).

⁴² Coronavirus Aid, Relief, and Economic Security Act § 1113(a)(2), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Before enactment of the CARES Act, § 103(i) provided:

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

⁴³ SBRA § 2(a).

⁴⁴ The technical correction involved the exclusion of public companies. Later legislation changed the provision. See Section III(G) and note 95 *infra*.

⁴⁵ CARES Act § 1113(a)(1).

1182).” As thus amended, § 103(i) provides that subchapter V applies in the case of a debtor as defined in § 1182 who elects its application.

The CARES Act provided for the increased debt limit to be effective for only one year after its enactment on March 27, 2020.⁴⁶ The Covid-19 Bankruptcy Relief Extension Act of 2021⁴⁷ amended the CARES Act to extend the amended provisions for an additional year. On March 27, 2022, §§ 1182(1) returned to its original language in the SBRA. At that time, § 1182(1) again defined “debtor” as “a small business debtor,” and § 103(i) therefore limited application of subchapter V to a small business debtor who elected it.

The Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATCA”),⁴⁸ enacted on June 21, 2022, temporarily reinstated for two years the expired provisions of § 1182(a), with some changes relating to affiliated debtors. BTATCA made the same changes in the definition of a small business debtor in § 101(51D).⁴⁹ The sunset provision of BTATCA provides that, on June 21, 2024, § 1182(1) will define debtor as a “small business debtor.” At that time, § 103(i) will make subchapter V applicable only if the debtor is a small business debtor who elects it. The BTATCA changes to the definition of “small business debtor” do not expire.⁵⁰

These temporary amendments in BTATCA became effective on the date of enactment.⁵¹ They are retroactive to cases filed on or after March 27, 2020 that were pending on the date of its

⁴⁶ CARES Act § 113(a)(5).

⁴⁷ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

⁴⁸ Bankruptcy Threshold Adjustment and Technical Corrections Act, §§ 2(a), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”).

⁴⁹ See Sections III(F), (G).

It is somewhat amusing that, in the course of one week, three different debt limits governed eligibility for subchapter V. On Sunday, March 27, 2022, the debt limit was \$ 7.5 million. When that limit expired the next day, it was \$ 2,725,625, the debt limit under § 101(51D). On Friday, April 1, 2022, adjustments under § 104 made the debt limit under § 101(51D) \$ 3,024,725.

⁵⁰ BTATCA § 2(i)(1)(B).

⁵¹ BTATCA § 2(h)(1).

enactment.⁵² A debtor who filed a chapter 11 petition between March 27, 2022 and the effective date of BTATCA but was not eligible for subchapter V because its debts exceeded the debt limit, therefore, has the opportunity to seek to amend its petition to elect subchapter V.

Section XIII discusses the issues that arose when a debtor sought to amend its petition to elect subchapter V in a case filed before the effective date of SBRA. That caselaw may provide guidance in addressing retroactivity issues under the BTATCA amendments.

In summary, the effect of BTATCA is that until June 20, 2024, § 1182(1) states the definition of a debtor eligible to be a sub V debtor. After that, a debtor must be a small business debtor under the revised definition in § 101(51D). The only difference in the language of the two statutes is the higher debt limit in the temporary version of § 1182(1). (Because none of this legislation changed the debt limit in the definition of “small business debtor,” a debtor with debts in excess of the § 101(51D) limit but below \$ 7.5 million that does not elect subchapter V cannot be a small business debtor.)

BTATCA provides for an inflationary adjustment to the debt limit in § 1182(1) under § 104.⁵³ Although this amendment does not expire, the next adjustment does not take place until April 1, 2025, by which time § 1182(1) will no longer state the debt limit.

2. Overview of eligibility for subchapter V

In general, a debtor is eligible to elect subchapter V if the debtor: (1) is a “person;” (2) is engaged in “commercial or business activities;” (3) does not have aggregate debts in excess of the debt limit; and (4) at least 50 percent of the debts arise from the debtor’s commercial or business activities,⁵⁴ subject to certain exceptions. (“Person” under § 101(41) includes an

⁵² BTATCA § 2(h)(2).

⁵³ BTATCA § 2(b).

⁵⁴ *See generally, e.g., In re Blue*, 630 B.R. 179, 191-93 (Bankr. M.D.N.C. 2021).

individual, corporation, or partnership but does not generally include a governmental unit. A limited liability company is a “person.”⁵⁵)

A debtor is ineligible for sub V if: (1) its primary activity is the business of owning single asset real estate; (2) it is a member of a group of affiliated debtors that has aggregate debts in excess of the debt limit; (3) it is a corporation subject to reporting requirements under the Securities Exchange Act of 1934; or (4) it is an affiliate of a reporting corporation.

Although, as Section III(B)(1) explains, the statutory basis for determining a debtor’s eligibility for subchapter V is § 1182(1) until June 20, 2024, the § 1182(1) definition contains the same language as the definition of a small business debtor in § 101(51D), with the exception of the amount of the debt limit (\$ 7.5 million in § 1182(1), \$ 3,024,725 in § 101(51D)). Because the eligibility requirements in § 1182(1) are the same as those in § 101(51D) (and will return to § 101(51D) under BTATCA’s sunset provision), the next section discusses the definition of a small business debtor, as SBRA and later legislation revised it.

Later sections discuss in detail: the requirement that the debtor be “engaged in commercial or business activities” (Section III(C)); what debts “arose from” such activities (Section III(D)); whether the commercial or business debts must be connected to the debtor’s current commercial or business activities (Section III(E)); what debts are included in determination of the debt limit (Section III(F)); and the exclusion of reporting companies and affiliates of an issuer (Section III(G)).

⁵⁵ *E.g.*, *In re QDN, LLC*, 363 Fed. Appx. 873, 876 n. 4 (3d Cir. 2010); *In re CWNevada, LLC*, 602 B.R. 717 (Bankr. D. Nev. 2019); *In re 4 Whip, LLC*, 332 B.R. 670, 672 (Bankr. D. Conn. 2005); *In re ICLNDS Acquisition, LLC*, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio (2001); *see In re Asociación de Titulares de Condominio Castillo*, 581 B.R. 346, 358-60 (B.A.P. 1st Cir. 2018) (collecting cases).

3. Revisions to the definition of “small business debtor” and requirements for eligibility for subchapter V in general

Under pre-SBRA law, paragraph (A) of § 101(51D) defined a “small business debtor” as a person⁵⁶ (1) engaged in commercial or business activities, (2) excluding a debtor whose principal activity is the business of owning or operating real property, (3) that has aggregate noncontingent liquidated secured and unsecured debts⁵⁷ as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$ 2,725,625 (adjusted on April 1, 2022 under § 104 to \$ 3,024,725), (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor.

Paragraph (B) of former § 101(51D) excluded any member of a group of affiliated debtors that had aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

SBRA amended the § 101(51D) definition of “small business debtor” and provided that a small business debtor could elect application of subchapter V. As Section III(B)(1) explains, later legislation temporarily put the eligibility requirements for subchapter V in § 1182(1), increased the debt limit for subchapter V to \$ 7.5 million, and made other revisions.

Except for the difference in the debt limits, the temporary language of § 1182(1) is identical to the language of § 101(51D). Specifically, paragraphs (A) and (B) of § 1182(1) are the same as paragraphs (A) and (B) of § 101(51D), as amended by both SBRA and later legislation.

⁵⁶ A trust is not a “person” unless it is a business trust. *E.g., In re Quadruple D Trust*, 639 B.R. 204 (Bankr. D. Col. 2022). The court’s opinion includes a comprehensive analysis of the standards for determining what is a business trust, concluding that the debtor was not a business trust and that it was not eligible to file for bankruptcy protection.

⁵⁷ § 101(51D)(A). Debts owed to one or more affiliates or insiders are excluded from the debt limit. *Id.* See Section III(F).

SBRA did not change the provision that a “small business debtor” does not include a debtor that is “a member of a group of affiliated debtors” that has aggregate debts in excess of the debt limit. § 101(51D)(B)(i). The Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATCA”),⁵⁸ enacted on June 21, 2022, made a technical correction to this language, which Section III(F) discusses. The same language is in § 1182(1).

SBRA also retained the requirement in § 101(51D) that the debtor be “engaged in commercial or business activities.” SBRA revised paragraph (A), however, to add the requirement that 50 percent or more of the debtor’s debt must arise from the debtor’s commercial or business activities. The same requirements are temporarily in § 1182(1). Section III(C) discusses eligibility issues that have arisen as to whether the debtor is “engaged in commercial or business activities,” and Section III(D) considers what constitutes a debt arising from commercial or business activity. Section III(E) addresses whether the debts arising from the debtor’s commercial or business activities must arise from the debtor’s current commercial or business activities.

SBRA made three other definitional changes in § 101(51D). Later legislation made a technical correction to one of them. As amended, § 101(51D) and § 1182(1) contain identical paragraphs (A) and (B).

First, amended paragraph (A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real

⁵⁸ Bankruptcy Threshold Adjustment and Technical Corrections Act, §§ 2(a)(1), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”).

estate.⁵⁹ Pre-SBRA § 101(51D) excluded a debtor whose principal activity was the business of owning or operating real property.

Second, the requirement that no committee of unsecured creditors exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in a non-sub V small business case unless the court orders otherwise.)

Finally, SBRA added subparagraphs (B)(ii) and (B)(iii) to exclude two additional types of debtors to those that paragraph (B) excludes from being a small business debtor.

The first new exclusion, in (B)(ii), is for a corporation subject to reporting requirements under § 13 or § 15(d) of the Securities Exchange Act of 1934.⁶⁰ As amended by later legislation, the second new exclusion, in (B)(iii), is for a debtor that is an affiliate of a corporation subject to those reporting requirements.

Section III(G) discusses the exclusions for a public company and its affiliates.

An individual who does not have regular income may be a chapter 13 debtor in a joint case with the individual's spouse who does have regular income,⁶¹ and an individual who is not a family farmer or fisherman may be a chapter 12 debtor in a joint case with the individual's spouse who is engaged in a farming operation or a commercial fishing operation.⁶²

⁵⁹ Section 101(51B) defines “single asset real estate” as “real property constituting a single property of project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.” § 101(51B). For a discussion of case law relating to the definition of “single asset real estate” in the sub V context, see *In re NKOGS1, LLC*, 626 B.R. 860 (Bankr. M.D. Fla. 2021) (Debtor is qualified for subchapter V because the hotel that it owns and operates is not a “single asset real estate” project.). See also *In re Caribbean Motel Corp.*, 2022 WL 50401 (Bankr. D. P.R. 2022) (motel renting rooms by the hour generating five to seven percent of income from providing food service on request and selling goods such as prophylactics and aspirin is not a single asset real estate debtor).

⁶⁰ § 101(51D)(B)(ii).

⁶¹ 11 U.S.C. § 109(e).

⁶² 11 U.S.C. § 109(f) (only a family farmer or family fisherman may be a chapter 12 debtor); 11 U.S.C. § 101(18)(A) (definition of family farmer includes spouse); 11 U.S.C. § 101(19A) (definition of family fisherman includes spouse).

Subchapter V has no such provision. Although an affiliate of an eligible subchapter V debtor may be a subchapter V debtor even if the affiliate is not otherwise eligible, a spouse is not an affiliate as defined in § 101(2).⁶³

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

C. Debtor Must Be “Engaged in Commercial or Business Activities”

If a debtor is conducting active operations at the time of filing, it plainly meets the eligibility requirement that the debtor be “engaged in commercial or business activities.” A profit motive is not necessary for a debtor to qualify as being “engaged in commercial or business activities.” Thus, a nonprofit entity, such as a homeowner’s association, meets the requirement.⁶⁴ Similarly, an entity formed for the sole purpose of acquiring and selling interests

⁶³ *In re Johnson*, 2021 WL 825156 (Bankr. N.D. Tex. 2021).

⁶⁴ *In re Ellingsworth Residential Community Association, Inc.*, 619 B.R. 519 (Bankr. M.D. Fla. 2019). The district court agreed with the bankruptcy court in an order affirming the issuance of a scheduling order. *Guan v. Ellingsworth Residential Community Association, Inc. (In re Ellingsworth Residential Community Association, Inc.)*, 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed*, 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied*, 2022 WL 1131391 (2022).

in aircraft and providing depreciation tax benefits to its sole member is eligible for subchapter V even though it has no profit motive.⁶⁵

An individual who is the principal of an entity such as a corporation or limited liability company may want to file a subchapter V case to deal with personal liabilities arising out of guarantees or other obligations when the entity fails and is no longer operating. The entity that is out of business may itself want to deal with its assets and debts under subchapter V.

Courts have dealt with two eligibility issues when the business is no longer operating. The first is whether eligibility depends on the debtor being engaged in commercial or business activities at the time of the filing of the petition. If so, the second question is what types of activities satisfy the requirement that the debtor be engaged in commercial or business activities.

1. Whether debtor must be engaged in commercial or business activities on the petition date

In *In re Wright*, 2020 WL 2193240 (Bankr. D. S.C. 2020), the court held that nothing in the definition limits it to a debtor currently engaged in business and ruled that an individual who had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. *Accord*, *In re Bonert*, 619 B.R. 248, 255 (Bankr. C.D. Cal. 2020); *see In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La., 2020).

Other courts have concluded that a debtor must be currently engaged in business to be eligible for subchapter V. Thus, in *In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. 2020), The court reasoned, “The plain meaning of ‘engaged in’ means to be actively and currently involved. In § 1182(a)(1)(A) of the Bankruptcy Code, ‘engaged in’ is written not in the past or future but

⁶⁵ *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 2022 WL 1288608 at *6-8 (B.A.P. 9th Cir. 2022). The court’s holding on this point is broad: “[N]o profit motive is required for a debtor to qualify for subchapter V relief. To hold otherwise would wrongfully exclude nonprofits and other persons that lack such a motive.” *Id.* at *8.

in the present tense.”⁶⁶ *Accord, e.g., In re Blue*, 630 B.R. 179, 188-89 (Bankr. M.D.N.C. 2021) (collecting and discussing cases); *In re Offer Space, LLC*, 629 B.R. 299, 305-06 (Bankr. D. Utah 2021); *In re Ikalowych*, 629 B.R. 261, 280-83 (Bankr. D. Colo. 2021); *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021).

In *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021), the debtor and the debtor’s spouse had filed a chapter 7 petition, before enactment of subchapter V, to deal with business debts arising from the debtor’s ownership of several limited liability companies.

After the U.S. Trustee filed a complaint objecting to their discharge, and after subchapter V’s effective date, the debtor and the spouse filed a motion to convert their case to chapter 11, conditioned on the court’s authorization for the case to proceed under subchapter V.

The U.S. Trustee and a number of creditors objected, asserting that a debtor must be “actively carrying out” commercial or business activities at the time of the filing of the petition to be “engaged in” commercial or business activities for purposes of subchapter V eligibility.

The court rejected the “actively carrying out” test as too narrow because it would preclude subchapter V relief for debtors with businesses temporarily closed for unexpected non-financial reasons such as weather, natural disaster, regulatory requirements, or a pandemic. But the court concluded that the inquiry is “inherently contemporary in focus instead of retrospective,

⁶⁶ *In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020). Although the U.S. Trustee timely raised the issue of eligibility by objecting to the sub V election, the U.S. Trustee did not request a hearing on it. Accordingly, the ruling on eligibility occurred in connection with the hearing on confirmation of the plan, which all impaired classes of creditors had accepted. *Id.* at 423-24.

The only party objecting to the plan was the U.S. Trustee, who contended that the court could not confirm the plan of a debtor ineligible for subchapter V because it was not accompanied by a disclosure statement. The court overruled the objection and confirmed the plan in the unusual circumstances of the case. The court reasoned that (1) the U.S. Trustee had in essence waived the right to request a disclosure statement by not requesting that the court require a disclosure statement while the eligibility objection was pending; and (2) the plan substantially complied with disclosure statement requirements by containing “adequate information.” *Id.* at 424.

requiring the assessment of the debtor’s current state of affairs as of the filing of the bankruptcy petition.” *Johnson*, 2021 WL 825156 at *6.

Because nothing indicated that the debtor’s companies were only temporarily out of business or that the debtor intended to cause any of them to resume operations, the court concluded that the debtor’s prior ownership and management of them did not qualify the debtor for subchapter V. *Id.* at *7.

The *Johnson* court advanced three reasons for this conclusion.

First, applying the dictionary definition of “engaged” as “involved in activity: occupied, busy” to the statutory language, the court determined that a person “engaged in business or commercial activities” is a person “occupied with or busy in commercial or business activities – not a person who at some point in the past had such involvement.” *Id.* at * 6.

Second, the *Johnson* court noted that the purpose of subchapter V is to facilitate expedience and minimize cost for the reorganization of a small business. Such benefits are essential to the successful the reorganization of a small business that is “currently occupied with/busy in commercial or business activities” but not to a small business no longer so occupied. *Id.* at *6.

Finally, the court relied on interpretations of “engaged in” in eligibility provisions applicable to railroads under subchapter IV of chapter 11 and to chapter 12 debtors that apply a contemporary analysis to eligibility. *Id.* at *7. Thus, a former railroad did not qualify for subchapter IV,⁶⁷ and a family farmer must be currently engaged in a farming operation or intend to continue to engage in a farming operation at the time of the filing of the petition.⁶⁸

⁶⁷ *Hileman v. Pittsburgh & Lake Erie Props., Inc. (In re Pittsburgh & Lake Erie Props., Inc.)*, 290 F.3d 516, 519 (3rd Cir. 2002).

⁶⁸ *Watford v. Federal Land Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1528 (11th Cir. 1990). *See also In re McLawchlin*, 511 B.R. 422, 427-28 (Bankr. S.D. Tex. 2014).

In *In re Two Wheels Properties, LLC*, 625 B.R. 869 (Bankr. S.D. Tex. 2020),⁶⁹ a corporation’s charter had been forfeited under state law for tax reasons, state law did not permit its reinstatement in that circumstance, and state law permitted only the liquidation of its assets. The court ruled that, because the corporation could not be “engaged in commercial or business activities” under state law, it was ineligible to be a sub V debtor.

National Loan Invs., L.P. v. Rickerson (In re Rickerson), 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021) also ruled that eligibility requires that the debtor be engaged in commercial or business activities on the petition date.

The Bankruptcy Appellate Panel of the Ninth Circuit extensively reviewed the subchapter V case law on the issue in *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 2022 WL 1288608 (B.A.P. 9th Cir. 2022). The Ninth Circuit BAP adopted the majority view that “engaged in” is “inherently contemporary in focus and not retrospective.” *Id.* at *5. The court ruled, *id.*:

Thus, a debtor need not be maintaining its core or historical operations on the petition date, but it must be “presently” engaged in some type of commercial or business activities to satisfy [the eligibility requirement].

2. What activities are sufficient to establish that the debtor is “engaged in commercial or business activities” when the business is no longer operating

When an entity has gone out of business at the time of the filing of the bankruptcy case, courts concluding that sub V eligibility requires current commercial or business activities have considered whether the principal of the entity or the entity itself is nevertheless eligible based on current activities other than operating it, such as winding down its affairs or dealing with assets or creditors.

⁶⁹ *Cf. In re BK Technologies, Inc.*, 2021 WL 1230123 (Bankr. N.D. W.Va. 2021) (Dismissing sub V case based on bad faith because, among other things, the debtor had liquidated its assets prior to filing the petition and, therefore, was not engaged in business).

In *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021), discussed in Section III(B)(1), the individual debtor and the debtor’s spouse sought to proceed under subchapter V to deal with the debtor’s personal liabilities arising out of his ownership and operation of defunct limited liability companies.

After the court concluded that that eligibility required that the debtor be engaged in commercial or business activities at the time of the filing of the petition, the court considered the debtor’s argument that he was currently engaged in commercial or business activities because, as an employee, he managed the business of a limited liability company owned by the debtor’s mother. The mother had acquired her interest by inheritance upon the death of her husband, who had originally organized and owned it. The debtor and spouse had no ownership interest in the mother’s company.

The *Johnson* court rejected the debtor’s argument. Applying dictionary definitions of “commerce” and “business” to the eligibility statute’s language, the court concluded that a person engaged in “commercial or business activities” is “a person engaged in the exchange or buying and selling of economic goods or services for profit.” *Id.* at *8.

Neither the debtor nor the spouse was engaged in the exchange or buying and selling of goods or services for their own profit. Because they had no ownership in the mother’s company, the debtor’s management of the company could not be for their indirect profit. Accordingly, the debtor’s management of the mother’s company as an employee and officer did not meet the requirement that the debtor be engaged in commercial or business activities. *Id.* at *8.

The court in *In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021), agreed with the rulings in *Thurmon* and *Johnson* that whether a debtor is engaged in commercial or business

activities must be determined as of the petition date. *Id.* at 280-83.⁷⁰ The *Ikalowych* court, however, held that an individual was eligible for subchapter V when the limited liability company that the debtor managed and in which the debtor held an indirect 30 percent ownership interest had surrendered its assets to the secured lender immediately before filing, but the individual was still engaged in wind down work relating to the company. *Id.* at 284-85.

Based on the text of the statute, dictionary definitions of “commercial”, “business”, and “activities”, and phrases analogous to “commercial or business activities” in other federal statutes, *id.* at 275-79, the *Ikalowych* court reasoned that the phrase “commercial or business activities” is “exceptionally broad.” *Id.* at 276.

Thus, the *Ikalowych* court interpreted “commercial or business activities” to mean, *id.* at 276:

[A]ny private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so).

In determining whether a debtor is engaged in “commercial or business activity,” the court employed a “totality of the circumstances” test, which includes consideration of the circumstances immediately before and after the date of the sub V filing as well as the debtor’s conduct and intent. *Id.* at 283.⁷¹

⁷⁰ The *Ikalowych* court qualified its ruling, *id.* at 283:

[F]ocusing only on the exact nanosecond the Petition was filed is a bit too narrow. For example, perhaps the Debtor did no work on the Petition Date itself. So, in considering whether the Debtor was engaged in “commercial or business activity” as of the Petition Date, the Court deems relevant the circumstances immediately preceding and subsequent to the Petition Date as well as the Debtor’s conduct and intent.

⁷¹ The court cited *Watford v. Fed. Lank Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1528 (11th Cir. 1990), which adopted a “totality of the circumstances” test to decide whether the debtor in a chapter 12 case was “engaged in a farming operation.”

The *Ikalowych* court acknowledged that the facts in *Thurmon* and *Johnson* (both discussed in Section III(B)(1)) were similar to, but not the same as, the facts in the case before it. *Id.* at 285-86. The distinguishing factor was the wind down work, which included interactions with the lender and a landlord, cleanup and turnover of leased premises, assisting with payroll, dealing with tax accountants and tax issues, and organization and storage of business records. *Id.* at 285. The court reasoned, “Each category of Wind Down Work itself constitutes ‘commercial or business activities’ in the broad sense.” *Id.* at 286.

The *Ikalowych* court also considered whether the debtor was “engaged in commercial or business activities” based on two other activities.

First, the debtor was the sole owner of a limited liability company that he formed and managed as a mechanism to obtain income through investments and the provision of services. This limited liability company owned 30 percent of the operating company just discussed and also received income from the debtor’s services as a board member of a cemetery company and as a consultant for other companies. The court concluded, “Managing or directing the operations of a limited liability company is a ‘commercial or business activity.’” *Id.* at 284.

Second, the court considered the debtor’s employment by an insurance brokerage company (in which the debtor had no ownership interest) to sell its commercial insurance products, which had begun shortly before filing, qualified as “commercial or business activities.” Under the broad scope of the definition, the court ruled, *id.* at 286 (citations to dictionary definitions omitted):

[T]he Debtor’s work as a wage earner with [the insurance company] constitutes “commercial or business activities.” After all, his role is selling a product in the private

marketplace in order to make money for himself and his employer. That is what “commercial activity” and “business activity” means.

The *Ikalowych* court realized that its conclusion “suggests that virtually all private sector wage earners may be considered as ‘engaged in commercial or business activities.’ So be it.” *Id.* at 286-87. But the court continued, this does not mean that every private sector wage earner is eligible for subchapter V because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at 287. Section III(E) discusses this aspect of the court’s ruling.

National Loan Invs., L.P. v. Rickerson (In re Rickerson), 636 B.R. 416 (Bankr. W.D. Pa. 2021), rejected *Ikalowych*’s conclusion that an employee is “engaged in commercial or business activities” for purposes of sub V eligibility. The court reasoned that the ordinary meaning of the phrase does not encompass “an employee who is in an employment relationship with an employer – at least where the employee has no ownership or other special interest with an employer.” *Id.* at 426.

Ikalowych’s broad reading, the court explained, “threatens to virtually drain it of any meaning.” 636 B.R. at 426. The court continued, *id.* at 426:

If any person who is an employee is thus engaging in commercial or business activities, and thus potentially eligible to proceed under Subchapter V, why limit it there? What about a debtor whose only source of income is Social Security – cannot such a person nonetheless be said to be engaging in commercial or business activity by purchasing food and gasoline on a regular basis, and therefore potentially be eligible to proceed under Subchapter V?

The court in *In re Offer Space, LLC*, 629 B.R. 299 (Bankr. D. Utah), concluded that a debtor no longer operating its business was nevertheless “engaged in commercial or business activities” in the circumstances of the case.

About three months before the subchapter V filing, after several months of difficulties due to legal claims and chargebacks, the debtor began informing its customers that it would be unable to continue to provide vendor marketing services, which included customer relations management, merchant account management, and marketing campaign management using proprietary software. One of its customers purchased the software in exchange for shares of its publicly traded stock. *Id.* at 302.

At the time of filing, the debtor was no longer conducting business, had no employees, and did not intend to reorganize. It had been marshaling its assets and taking steps to realize value from its assets and pay its creditors. Its assets consisted of a bank account, accounts receivable, counterclaims in a lawsuit, and the stock. *Id.* at 303

The U.S. Trustee objected to eligibility because the debtor was not an operational business on the petition date. *Id.* at 304.

Like the *Ikalowych* court, the *Offer Space* court looked to the dictionary definitions of relevant terms (“engaged,” “commercial,” “business,” and “activity”), *Offer Space*, 629 B.R. at 305, and noted that Congress had chosen “very broad language.” *Id.* at 306. The court observed that, in contrast to the definition of a family farmer in § 101(18A), which refers to a debtor engaged in a farming *operation*, the subchapter V definition uses the broader and more inclusive term, *activities*. *Id.* at 307.

Considering the “totality of the circumstances,” the *Offer Space* court concluded that the debtor was “engaged in commercial or business activities” because it had active bank accounts,

had accounts receivable, was analyzing and exploring counterclaims in a lawsuit, was managing the publicly traded stock it acquired from the earlier sale of its main operational asset, and was winding down its business, including steps to pay creditors and realize value from its assets.

Offer Space, 629 B.R. at 306.

The *Offer Space* court rejected the U.S. Trustee’s contention that the legislative history of SBRA demonstrated that subchapter V is not available for a debtor seeking to liquidate its shutdown operations.

After concluding that the plain language of the statute made it unnecessary to consider legislative history, the court concluded that, although successful reorganizations might be the primary purpose of SBRA, noting indicated that it did not have other purposes, including “relief for small business debtors who intend to liquidate their businesses without the cumbersome structure that otherwise exists in Chapter 11.” *Id.* at 307-08. Moreover, the court observed, chapter 11 permits confirmation of liquidation plans under § 1129(a)(11),⁷² and Congress did not include this section in the list of those that it made inapplicable in subchapter V cases. *Id.* at 308.

The debtor in *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233 (Bankr. S.D. Tex. 2021), similarly had terminated its historical business operations before it filed its subchapter V case but was engaged in other activities that the court concluded were sufficient for it to be “engaged in commercial and business activities.”

⁷² Section 1129(a)(11) conditions confirmation of a plan on a determination that confirmation “is not likely to be followed by the liquidation . . . of the debtor or any successor to the debtor, unless such liquidation . . . is proposed in the plan.”

The court in *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 237-38 (Bankr. S.D. Tex. 2021), also noted that a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. The court observed that § 1123(b)(4) permits a chapter 11 plan to provide for the sale of all or substantially all of its assets and that it is not one of the sections that is inapplicable in a subchapter V case.

Two principals of the debtor’s limited partner and an independent contractor managed the debtor and maintained its facility and vehicles to preserve the value of the assets, including running technical parts of the facilities, maintaining utilities like power and water, making repairs after severe storms, and filing reports and tax returns that state and federal agencies required. The managers worked on a plan to sell assets and pay creditors in the chapter 11 case and sold one asset in the months preceding the bankruptcy filing. The debtor was also litigating a multi-million dollar lawsuit and pursuing collection remedies on an account receivable, both arising out of its prepetition transactions with a party who claimed to be a creditor in the case and objected to the subchapter V election. *Id.* at 236-37.

The court concluded that, because all of these activities were “commercial or business activities,” the debtor was eligible for subchapter V relief. *Id.* at 237.

The *Port Arthur Steam Energy* court addressed the argument that eligibility for subchapter V required current operation of a business because SBRA’s legislative history demonstrated that the Congressional purpose of subchapter V was to promote reorganizations. The court rejected the argument, concluding that, because the eligibility statute is not ambiguous, consideration of legislative history was not properly a part of the analysis. In any event, the court continued, a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. *Id.* at 237.

The court in *In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. 2021), held that a salaried employee who received a material contribution to her income from part-time consulting work as an independent contractor was “engaged in commercial or business activities.” Agreeing with the *Offer Space* reasoning that “activities” is a much broader term than “operations,” the court concluded, “[N]othing in the Bankruptcy Code or legislative history of subchapter V mandates

that commercial or business activities must be full-time to qualify, and Debtor’s activities in this case are substantial and material.” *Id.* at 190.

The *Blue* court also concluded that the debtor’s rental of her former residence to tenants was within the broad scope of commercial or business activities. *Id.* at 194.

The *Blue* court ruled that more than 50 percent of the debtor’s debts arose from commercial or business activities and that such debts did not have to arise from the debtor’s current commercial or business activities for purposes of sub V eligibility. Sections III(D) and (III(E)), respectively, discuss these aspects of the court’s decision.

In *In re Vertical Mac Construction, LLC*, 2021 WL 3668037 (Bankr. M.D. Fla. 2021), the debtor filed a subchapter V case to liquidate its assets and disburse the sale proceeds to creditors. Shortly after filing the petition, the debtor moved to sell its assets under § 363, and the court approved the sale.

The court denied the U.S. Trustee’s objection to eligibility based on the fact that the debtor was no longer operating a business on the filing date. The court concluded that the debtor was engaged in commercial or business activities on the filing date “by maintaining bank accounts, working with insurance adjusters and insurance defense counsel to resolve [various claims] and preparing for the sale of its assets.” *Id.* at * 4.

The Bankruptcy Appellate Panel of the Ninth Circuit in *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 2022 WL 1288608 at *5-6 (B.A.P. 9th Cir. 2022), adopted a broad approach to what activities qualify as “commercial or business activities” on the petition date, citing cases that earlier text discusses.

The bankruptcy court in *RS Air* had found that the debtor was engaged in commercial or business activities on the petition date by litigating with the objecting creditor, paying registry

fees for its aircraft, remaining in good standing as a limited liability company under state law, filing tax returns, and paying taxes. The bankruptcy court also found that the debtor intended to resume business operations once it was able to do so. The BAP concluded that these activities were “commercial or business activities” within the meaning of the eligibility statute. *Id.* at *6.

In a chapter 12 case, the court in *In re Mongeau*, 633 B.R. 387 (Bankr. D. Kansas 2021), ruled that debtors who had discontinued their own farming operations were nevertheless “engaged in farming” based on their involvement in the operation of farms of their extended family, their intent to continue farming operations in the future, and their ownership of some farm assets. The court relied in part on subchapter V cases concluding that winding down a business that had ceased operations on the filing date is sufficient to be “engaged” in business activities. *Id.* at 397.

D. What Debts Arise From Debtor’s Commercial or Business Activities

Eligibility for subchapter V requires that not less than 50 percent of the debtor’s debts arise from the commercial or business activities of the debtor.⁷³ Chapter 12 similarly conditions eligibility on a specified percentage of debt arising from a farming or fishing operation.⁷⁴ The court in *In re Ikalowych*, 629 B.R. 261, 288 (Bankr. D. Colo. 2021), applying chapter 12 case

⁷³ The requirement is in paragraph (A) of § 1182(1), which governs subchapter V eligibility under the CARES Act, which increased the debt limit for subchapter V eligibility. When the increased debt limit sunsets on March 27, 2022, § 101(51D) will govern sub V eligibility. See Section III(B). Paragraph (A) is the same in both statutes. See Section III(B).

⁷⁴ For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor’s income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B).

law, concluded that qualifying business debts “must be directly and substantially connected to the ‘commercial or business activities’ of the debtor.”⁷⁵

The *Ikalowych* court determined that the individual debtor’s liability on guarantees of certain debts of a limited liability company that he managed and was winding down and of his wholly-owned operating company that provided his services and that owned 30 percent of the limited liability company met this standard.⁷⁶ Because these debts were 86 percent of his total debts, the court concluded he was eligible for subchapter V. *Ikalowych*, 629 B.R. at 288.

In *In re Blue*, 630 B.R. 179 (Bankr. M.D. N.C. 2021), the debtor had retained her former residence when she bought a new one and rented it until she evicted a tenant approximately three years before filing. Because the tenant had substantially damaged the property, the debtor owed \$ 38,271.31 for partial repairs but had not been able to complete them and had not rented it in the meantime.

After determining that her rental of the property fell within the “broad scope of commercial or business activities,” *id.* at 195, the court considered the question of whether the mortgage debt on the property and the repair debts arose from such activities.

The court concluded that the debtor had originally incurred mortgage debt when she purchased it for her residence and that she did not intend to lease it at that time. The court ruled, therefore, that the mortgage debt did not arise from commercial or business activities. *Id.* at 194.

⁷⁵ The court quoted *In re Woods*, 743 F.3d 689, 698 (10th Cir. 2014), which in the chapter 12 context stated, “a debt ‘for’ a principal residence ‘arises out of’ a farming operation only if the debt is directly and substantially connected to the farming operation.”

⁷⁶ Section (III)(C)(2) discusses the *Ikalowch* court’s ruling that the debtor was “engaged in commercial or business activities.” The court also determined that the debtor was engaged in commercial or business activities as a salaried employee, but the court concluded that those activities did not make the debtor eligible for subchapter V because none of the debts arose from that activity.

The court found that the debtor had continuously rented the property until the damage to the property occurred and that she had not rented it since then because of her inability to finance and complete necessary repairs. Because the damage occurred when she was actively renting the property, the court concluded, the debts arose from commercial or business activities. *Id.* at 195.

In *Lyons v. Family Friendly Contracting LLC (In re Family Friendly Contracting LLC)*, 2021 WL 5540887 (Bankr. D. Md. 2021), the former owner of the business and an affiliate that owned the business premises had sold their interests to the current owners of the debtor and an affiliate. The sale had been financed with bank loans on which the debtor and its affiliate were jointly and severally liable. The bank loans comprised over 90 percent of the debt.

The former owner objected to the debtor's eligibility on the ground that most of the debtor's obligations to the bank were incurred primarily for the benefit of the debtor's owners and affiliate and, therefore, did not arise out of the debtor's commercial or business activities. The court concluded that the loans were part of a "fully integrated transaction" that provided benefits to the debtor. *Id.* at * 4.

In determining how much of the debtor's debt arose from its commercial or business activities, the court concluded that the eligibility statute "does not require the court to dissect the various benefits obtained by all the parties and, for purposes of § 1182(1)(A), include only debt that is linked to a direct benefit obtained by a debtor, while excluding debt that directly benefitted others." *Id.* at * 5. Accordingly, the court ruled that the debtor was eligible.

National Loan Invs., L.P. v. Rickerson (In re Rickerson), 636 B.R. 416 (Bankr. W.D. Pa. 2021), considered whether an individual's personal tax obligation qualified as a business debt. The court noted that courts had concluded that, for purposes of determining whether a debtor's

debts are “primarily consumer debts” for purposes of dismissal for abuse under § 707(b), a personal tax obligation is neither a consumer nor a business debt. *Id.* at 428.⁷⁷

The *Rickerson* court declined to rule on that basis, however. Instead, the court concluded that taxes owed with regard to income the debtor earned from previous businesses did not arise from commercial or business activities. The obligation arose from the debtor’s failure to address taxes she owed on her income, not her commercial and business activities. *Id.* at 429.

In re Sullivan, 626 B.R. 326 (Bankr. D. Colo. 2021), examined the question of how to determine whether debts “arose from the commercial or business activities of the debtor” in detail.⁷⁸

The debt in question was the debtor’s obligation imposed in a divorce proceeding to pay the former spouse an “equalization payment” for the former spouse’s share of the value of the debtor’s business that the debtor retained. Shortly after the filing of the case, the COVID-19 pandemic hit and resulted in the liquidation of the business.

Proper characterization of the equalization payment was critical because, if it were not a business debt, the debtor’s business debts would be less than 50 percent of the total, and the debtor would be ineligible to be a sub V debtor. Because the court concluded that the equalization debt did not arise from a business or commercial purpose, the court ruled that the debtor was ineligible and denied confirmation of the sub V plan. *Sullivan*, 626 B.R. at 333.⁷⁹

⁷⁷ The court cited *In re Brashers*, 216 B.R. 59 (Bankr. D. Okla. 1998) and *In re Stovall*, 209 B.R. 849 (Bankr. E.D. Va. 1997).

⁷⁸ The definition in effect under the CARES Act is in § 1182(a)(1). See Section III(B). The *Sullivan* court discussed the definition in § 101(51D)(A), which has the same language, because the case was filed before enactment of the CARES Act, and the CARES Act applies only to cases filed after its enactment.

⁷⁹ The situation in *Sullivan* suggests two questions.

The first is whether the former spouse or any other party in interest timely objected to the debtor’s sub V election as Interim Bankruptcy Rule 1020(b) requires. The court did not address whether a court may consider an out-of-time objection to the subchapter V election or whether the court may raise the issue *sua sponte* after the time for an objection has expired.

The *Sullivan* court began its analysis by noting that, although the Bankruptcy Code does not define when a debt arises from “commercial or business activities,” it defines “consumer debts” in § 101(18) as “debts incurred by an individual primarily for a personal, family, or household purpose.” In determining whether a debt is for a “personal, family, or household purpose,” the court continued, courts have focused on the debtor’s purpose in incurring the debt,⁸⁰ reasoning that a debt incurred with a “profit motive” or an “eye toward profit” is not a consumer debt. *Id.* at 330-31.⁸¹ The court noted rulings that student loans,⁸² alimony obligations,⁸³ and divorce-related debts are consumer debts.⁸⁴

The debtor argued that the equalization debt arose from business or commercial activities because it represented a transfer of the value of the business, akin to one partner’s buy-out of another’s interest in a business. The court acknowledged, “[I]t is possible to characterize this debt as a business debt and it is possible to treat many otherwise personal or family debts as debts incurred with an eye toward profit,” but noted that the profit motive inquiry raised difficulties: “Probably all courts would agree that the home mortgage debt is a consumer debt and yet the family home is the asset that most families view as their greatest investment – the one that they purchase with an eye toward appreciation in value.” *Sullivan*, 626 B.R. at 331.

Because the legislative history of the definition of “consumer debt” in § 101(8) indicated that it was adapted from consumer protection laws and because the § 101(8) definition mirrors

A second, more practical, question is what benefit the debtor expected to gain from a successful subchapter V case. Any debt arising from a separation agreement or divorce decree that is not a domestic support obligation is excepted from discharge under § 523(a)(15), and the sub V discharge of an individual is subject to all exceptions in § 523(a). See Part IX. A plan could not have eliminated the debtor’s liability for the equalization payment.

⁸⁰ The court cited *In re Garcia*, 606 B.R. 9, 106 (Bankr. D. N.M. 2019).

⁸¹ The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 806 (10th Cir. 1999) and *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988).

⁸² The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 807 (10th Cir. 1999).

⁸³ The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 807 (10th Cir. 1999).

⁸⁴ The court cited *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 149 (4th Cir. 1996); *In re Garcia*, 606 B.R. 98, 105 (Bankr. D. N. M. 2019), and *In re Traub*, 140 B.R. 286 (Bankr. D. N.M. 1992).

the definition of consumer debt in the Truth in Lending Act (“TILA”), the court sought further guidance from cases interpreting the TILA. *Id.* at 331-32.

Cases under the TILA, the court explained, focus on the purpose of the loan transaction. The *Sullivan* court quoted a five-factor test that another court employed in *Sundby v. Marquee Funding Group, Inc.*, 2020 WL 5535357 at * 8-9 (S.D. Ca. 2000) (internal quotations and citations omitted):

1. The relationship of the borrower’s primary occupation to the acquisition. The more closely related, the more likely it is to be a business purpose.
2. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.
3. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.
4. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.
5. The borrower’s statement of purpose for the loan.

The *Sullivan* court concluded that the first four of these factors favored characterization of the equalization debt as a business debt. But the court questioned whether it had a business purpose. “While the debtor characterizes the equalization payment as payment for the [debtor’s business], the separation agreement does not describe it in that fashion. Rather, it states that it was a payment ‘to equalize the division of marital property . . .’, and [the business] was only one asset of their marital property.” *Sullivan*, 626 B.R. at 332.

The *Sullivan* court next looked to federal tax law as a source for distinguishing between “business” and “personal” payments in that it generally permits a deduction for “ordinary and necessary business expenses,” but not for most personal expenses. *Id.* at 332-33.

The court analyzed the Supreme Court’s decision in *United States v. Gilmore*, 372 U.S. 39 (1963), which held that a taxpayer could not deduct legal fees incurred in connection with the division of business interests in a divorce proceeding as a business expense. Rejecting the taxpayer’s argument that the legal fees were a business expense because they were incurred to protect interests in various corporations, the Supreme Court held that the focus should be on “the original character of the claim with respect to which an expense was incurred, rather than its potential consequences on the fortunes of the taxpayer.” 372 U.S. at 49. Because the spouse’s claims stemmed entirely from the marital relationship, and not from income-producing activity, the Supreme Court concluded that the legal fees were not business expenses and denied the deduction. *Id.* at 52. The *Sullivan* court noted that the Supreme Court stated, “[T]he marriage relationship can hardly be deemed an income-producing activity.” *Sullivan*, 626 B.R. at 333, quoting *Gilmore*, 372 U.S. at 52 n. 22.

After analyzing marriage dissolution under state law as an equitable proceeding including the division of marital property to each spouse of what equitably belongs to each spouse, the *Sullivan* court concluded, 626 B.R. at 333 (citations omitted):

[T]he equalization payment debt is rooted and grounded in the equitable termination of their marriage. The equitable distribution of their marital property was not a business or commercial transaction – it did not stem from a profit motive. Instead, it was a method of ensuring that each spouse received their fair share of marital property. This is inherently a personal and family-related purpose. The fact that the parties’ marital

property included a business does not alter the underlying purpose of the property division.

E. Whether Debts Must Arise From Current Commercial or Business Activities

Eligibility for subchapter V requires that the debtor be “engaged in commercial or business activities” and that not less than 50 percent of the debtor’s debts arise from “the commercial or business activities of the debtor.” § 101(51D)(A); §1182(1)(A).

In *In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021), the court concluded that an individual working as a salaried employee was engaged in commercial or business activities. *Id.* at 286. The court observed that, although this ruling suggested “that virtually all private sector wage earners may be considered as ‘engaged in commercial or business activities,’” *id.* at 286-87, this did not mean that every private sector wage earner is eligible for subchapter V relief because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at 287. Thus, the court concluded that debtor’s employment did not make him eligible for subchapter V because none of the debts arose from that activity. *Id.* at 287.

The court’s conclusion was not necessary for the decision; the court determined that most of the debtor’s debts arose from other commercial or business activities. Nevertheless, the implication may be that eligibility requires that more than 50 percent of the debtor’s debts must be connected to current commercial or business activities.

The court in *In re Blue*, 630 B.R. 179 (Bankr. M.D. N.C. 2021), addressed this issue and ruled that no connection is necessary. There, the debtor filed a subchapter V case to deal with debts arising from her ownership and operation of a corporation that had discontinued its operations about 21 months earlier, as well as other debts. At the time of filing, the debtor was a

salaried, full-time, W-2 employee. In addition to her income, the debtor worked part-time for two different companies as an independent contractor.

As section III(C)(2) discusses, the *Blue* court determined that the debtor’s work as an independent contractor constituted “commercial or business activities.” The Bankruptcy Administrator, however, argued that the debtor was not eligible for subchapter V because no nexus existed between the debtor’s current activities as an independent contractor and the debts arising from her previous activities. *Id.* at 191.

The premise of the argument is based on the language of the eligibility requirement, which states that not less than 50 percent of the debtor’s debt must arise from “*the* commercial or business activities of the debtor.” § 101(51D)(A); § 1182(1)(A) (emphasis added). Use of the word “the” at the end of paragraph (A), the argument continues, implies a reference to the same “commercial or business activities” in which the debtor must be engaged under the language at the beginning of paragraph (A).

The *Blue* court rejected the argument, concluding, “Such an implication is not required by the language of the statute, and would be far too limiting for the remedial purposes of subchapter V.” *Id.* at 191. The court reasoned that courts have interpreted and applied the eligibility statute broadly, citing cases noting that the purposes of SBRA include providing relief for debtors that intend to liquidate their businesses without the cumbersome structure that otherwise exists in chapter 11⁸⁵ and that debtors may proceed under subchapter V even though their debts stem from both currently operating and non-operating businesses.⁸⁶ *Id.* at 191.

The *Blue* court concluded, *id.* at 191:

⁸⁵ The court cited *In re Offer Space, LLC*, 629 B.R. 299, 303 (Bankr. D. Utah 2021).

⁸⁶ The court cited *In re Blanchard*, 2020 WL 4032411 at *2 (Bankr. E.D. La. 2020).

[D]ebtor intends to use subchapter V to address both defunct and non-defunct commercial and business activities, and the more straightforward interpretation of § 1182(1)(A) does not require a connection of debts to current business activities. Nothing in the statute requires that there be a nexus between the qualifying debts and the Debtor's current business or commercial activities. Moreover, such an interpretation could, for example, disqualify meritorious small businesses from the remedial purposes of subchapter V simply by having significant debts from former operations. The Court will not interpret subchapter V as narrowly as suggested by the BA.

F. What Debts Are Included in Determination of Debt Limit

A debtor is not eligible for subchapter V if the “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” exceed the applicable debt limit. Debts owed to affiliates or insiders are excluded from the calculation. As Section III(B) explains, the Bankruptcy Threshold Adjustments and Technical Corrections Act (“BTATCA”)⁸⁷ provides that § 1182(1) governs eligibility for subchapter V until June 20, 2024. Thereafter, a debtor must be a “small business debtor” as defined in § 101(51D) to be eligible for subchapter V.

Under both statutes, however, a debtor is ineligible if the debtor is a member of a group of affiliated debtors when the aggregate of all such debts of all of the affiliates exceeds the debt limit. § 101(51D)(B)(i); § 1182(1)(B)(i). Only the debts of affiliates who are debtors in a bankruptcy case are included.⁸⁸

⁸⁷ Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”).

⁸⁸ As enacted by SBRA, both statutes excluded “any member of a group of affiliated debtors” with debts in excess of the debt limit. The Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATCA”), effective June 21, 2022, added “under this title” after “affiliated debtor.” BTATCA §§ 2(a)(1), 2(d). Thus, both § 101(51D)(i) and

The requirement that debts be “liquidated” and “noncontingent” for inclusion in the debt limit also appears in the eligibility requirements for relief under chapters 12⁸⁹ and 13.⁹⁰

The court in *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), considered subchapter V’s eligibility debt limits, noting that courts had addressed similar language governing debt limitations in chapter 12 and 13 cases. The court observed that the standards in those cases provide useful guidance but that subchapter V cases involve more complex creditor relationships. *Id.* at *5.

The court concluded that claims for damages arising from the rejection of unexpired leases were contingent, *id.* at *5-7, and that the debtor’s obligations under a note pursuant to the Paycheck Protection Funding Program of the CARES Act were both contingent and unliquidated, *id.* at 9-12. Because these debts were not included in the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In re 305 Petroleum, Inc., 622 B.R. 209 (Bankr. S.D. Miss. 2020), considered the exclusion of debts of debtors in an affiliated group. Four affiliated debtors filed chapter 11 cases. Each of them had elected subchapter V, but one was a single asset real estate debtor that was ineligible for subchapter V. In this opinion, the court considered whether the three debtors were also ineligible because the debt of all of the affiliates exceeded \$ 7.5 million. Without including the SARE debtor, the debt of all of the affiliates was less than \$ 7.5 million.

§ 1182(1)(B)(i) now provide for the exclusion of “any member of a group of affiliated debtors under this title” with debts that exceed the debt limit. Under the amendment, therefore, debts of affiliates who are not in bankruptcy are disregarded. BTATCA resolved another issue discussed *infra* note 95.

The amendments apply in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

⁸⁹ Chapter 12 is available only to a “family farmer” or “family fisherman” under § 109(f). Definitions of the terms include the debt limit requirement. §§ 101(18)(A); 101(19A)(A)(i).

⁹⁰ § 109(e). For a discussion of what debts are “liquidated” and “noncontingent” for purposes of the debt limitation in chapter 13 cases, *see generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 12:8, 12:9.

The court concluded that the debts of all filing affiliates were included in the debt limit and that, therefore, none of them were eligible because their collective debts exceeded \$ 7.5 million.⁹¹

⁹¹ The court analyzed the issue under the definition of small business debtor in § 101(51D) and reached the correct result under its provisions. Paragraph (B) of § 101(51D) excludes “any member of a group of affiliated *debtors*” (emphasis added) if the group’s debts collectively exceed the limit. “Debtor” is defined in § 101(13) as a person “concerning which a case under [title 11] has been commenced.” Because all of the entities had filed bankruptcy petitions and they were affiliates, each was a member of a group of affiliated debtors with aggregate debts in excess of the limit. Therefore, none of them were eligible.

But because the case arose after the CARES Act, the applicable statute was § 1182(1), as section III(B) discusses. Although § 1182(1) at the time used the same language as § 101(51D), the outcome was potentially different.

As amended by the CARES Act, § 1182(1)(A) defined “debtor” for purposes of subchapter V, and it was part of subchapter V. BTATCA enacted a revised § 1182(1)(A), discussed below.

Because § 1182(1)(A) defined “debtor” at the time of the *305 Petroleum* case, the definition of “debtor” in § 101(13) arguably did not apply. The definition of “debtor” in § 1182(1)(A) excluded an SARE debtor. Because the SARE was not a “debtor” under the § 1182(1)(A) definition, it arguably was not in the group of “affiliated debtors” for purposes of the exclusion in § 1182(1)(B)(i). Consequently, its debts would not be included in determining eligibility. In other words, “debtors” in § 1182(1)(B)(i) meant “debtors” under (1)(A), which did not include an SARE.

An argument in favor of this reading is that, if Congress had intended otherwise, it would have used “persons” in (B)(i), or more simply, “affiliates”, so that § 1182(1)(B)(i) would read as follows:

(1) Debtor. -- The term “debtor”—

(B) does not include —

(i) any member of a group of [*affiliates or affiliated persons*] that has [debts greater than \$7.5 million].

Under this analysis, the non-SARE debtors in *350 Petroleum* would be eligible for subchapter V because the SARE entity is excluded.

The argument against this interpretation is that Congress in the CARES Act amendments did not intend to change the eligibility requirements of § 101(51D) other than to increase the debt limit. Moreover, the contrary interpretation involves a circular definition of “debtor.” It requires use of the § 1182(1) definition of “debtor” to determine the meaning of “debtors” in one part of the definition. This creates an ambiguity that leads to an interpretation that uses the general definition of debtor in § 101(13) as the proper definition of the term in (1)(B). The ineligibility of all of the debtors in *350 Petroleum* then follows even under the CARES Act version of § 1182(1).

BTATCA resolves the issue. It added language to paragraph (B)(1) of both § 101(51D) and § 1182(1) so that both provisions now exclude “any member of a group of affiliated debtors *under [title 11]*” (emphasized language added) whose debts exceed the debt limit. BTATCA §§ 2(a)(1), (d). Accordingly, the debts of affiliates who are not bankruptcy debtors are not included in the debt limits.

G. Ineligibility of Corporation Subject to SEC Reporting Requirements and of Affiliate of Issuer

The SBRA added two exclusions from the definition of “small business debtor” that did not previously exist. Later legislation made a technical correction to the SBRA language.⁹²

As amended by SBRA, the definition of “small business debtor” does not include a debtor that “is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d).” § 101(51D)(B)(ii). Under § 1182(1), which governs sub V eligibility until June 20, 2024,⁹³ identical language makes such a debtor ineligible for subchapter V. § 1182(1)(B)(ii). In general, the provisions of the Securities Exchange Act require reporting by any public company.

As amended by the Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATCA”),⁹⁴ paragraphs (B)(iii) of both § 101(51D) and § 1182(1) also exclude “an affiliate of a corporation described in clause (ii)” that, as just explained, is a public company.⁹⁵

⁹² See Section III(B).

⁹³ See Section III(B).

⁹⁴ BTATCA §§ 2(a), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”). The amendment applies to cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

⁹⁵ As originally enacted by SBRA, paragraph (B)(iii) provided that a small business debtor did not include “an affiliate of a debtor.” SBRA § 4(a)(1). For a discussion of the issues relating to this provision, *see* Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 7.

The CARES Act made a technical correction to (B)(iii). CARES Act § 1113(a)(4)(A). The revised (B)(iii) excluded “any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)).” The temporary § 1182(1) that the CARES Act enacted contained the identical exclusions in (B)(iii). CARES Act § 1113(a)(1).

Section 3(8) of the Securities Exchange Act defines “issuer” as “any person who issues or proposes to issue any security.” 15 U.S.C. § 78(c)(8). Section 3(10) broadly defines “security” as including, among other things, any “stock,” “certificate of interest or participation in any profit-sharing agreement,” or “investment contract.” 15 U.S.C. § 78(c)(10).

Read broadly, the exclusion for the affiliate of an issuer under the CARES ACT version of (B)(iii) would render ineligible any debtor that is an affiliate of any corporation or other limited liability entity. By definition, stock in a corporation or an interest in a limited liability entity is a “security.” Thus, for example, if an individual has a sufficient equity interest in two or more such entities to qualify as an “affiliate” under § 101(2), all of the affiliates would be disqualified. Similarly, if one entity is an affiliate of another, neither could be a small business or sub V debtor.

In re Serendipity Labs, Inc., 620 B.R. 679 (Bankr. N.D. Ga. 2020), considered whether the corporate debtor was an affiliate of a publicly traded company. The public company owned more than 27 percent of the voting shares of the debtor but only 6.51 percent of the voting shares of the debtor entitled to vote on the debtor’s bankruptcy filing. The debtor argued that, in determining whether the public company was an “affiliate” within the definition of § 101(2)(a), the court should count only the shares with power to vote on the matter before the court, *i.e.*, the bankruptcy filing.

Section 101(2)(a) defines “affiliate” to include “an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor.” The *Serendipity Labs* court noted that the Bankruptcy Code does not define “voting securities” but that the Securities Exchange Commission in 17 C.F.R. § 230.405 defined “voting securities” as “ securities the holders of which are presently entitled to vote for the election of directors.” The court concluded that this unambiguous definition is the appropriate one to use for purposes of § 101(2)(a). 620 B.R. at 683. All of shares held by the public company met this requirement.

The court in *In re Phenomenon Marketing & Entertainment, LLC*, 2022 WL 1262001 (Bankr. C.D. Cal. 2022), applied this reading of the statute to conclude that a limited liability company was not eligible to be a subchapter V debtor because affiliates of the debtor were “issuers.” One of the affiliates was the sole member of the debtor, and another affiliate was the sole member of the debtor’s member.

The court ruled that the affiliates were “issuers” under the Securities Exchange Act even though the securities were not publicly traded. *Id.* at *3-4. The court ruled that the plain meaning of the statute required the result and that it was not absurd. *Id.* at *5

Congress could not have intended this result. The appropriate interpretation of the CARES ACT version of (B)(iii) would limit its application to an affiliate of an issuer that is subject to the reporting requirements specified in (B)(ii). See Mark T Power, Joseph Orbach, and Christine Joh, et al, *Not so Technical: A Flaw in the CARES Act’s Correction to “Small Business Debtor*, 41-Feb Amer. Bankr. Inst. J 32, 33 (2022) (“It is evident that Congress intended to exclude from subchapter V eligibility public companies, including affiliates.”).

BTATCA amended (B)(iii) in both § 101(51D) and § 1182(1) to resolve the issue. As the text states, (B)(iii) excludes an affiliate of a public company rather than an affiliate of an issuer. The amendment thus abrogates the ruling in *In re Phenomenon Marketing & Entertainment, LLC*, 2022 WL 1262001 (Bankr. C.D. Cal. 2022).

Analyzing a split of authority on the issue in other contexts, the *Serendipity Labs* court ruled that the language of § 101(2)(a) did not limit the meaning of “voting securities” to those entitled to vote on the matter before the court. The court reasoned that “power to vote” in § 101(2)(a) modifies only the holding of securities, not their ownership or control. Because the public company owned more than 20 percent of the debtor’s voting securities, it was an affiliate. Accordingly, the debtor, as an affiliate of an issuer, was ineligible for subchapter V. 620 B.R. at 685.

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases.⁹⁶ The trustee is a standing trustee, if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. SBRA § 4(b) amends 28 U.S.C. § 586 to make its provisions for the appointment of standing chapter 12 and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.⁹⁷

The United States Trustee Program has selected a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.⁹⁸ The appointment of a sub V trustee in each case instead of a standing trustee appears to be contrary to the expectations of proponents of the SBRA. In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated,

⁹⁶ § 1183(a). SBRA § 4(a)(3) amends § 322(a) to provide for a sub V trustee to qualify by filing a bond in the same manner as other trustees.

⁹⁷ § 1181(a). Section 1104, which governs the appointment of a trustee in a traditional chapter 11 case, does not apply in sub V cases. In a sub V case, the U.S. Trustee’s appointment of the trustee is not subject to the court’s approval as it is under § 1104(d).

⁹⁸ See Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP’s Implementation of the HAVEN Act and the SBRA*, 38 AMER. BANKR. INST. J. 12 (Oct. 2019).

“There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee.”⁹⁹

The trustee must be a “disinterested person. § 1183(a). Section 101(14) defines a disinterested person as a person that, among other things, “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.” § 101(14)(C).

In *In re 218 Jackson LLC*, 631 B.R. 937 (Bankr. M.D. Fla. 2021), the court ruled that the sub V trustee was not a disinterested person because he was not impartial. The trustee represented a creditor in a chapter 11 bankruptcy case in which the principals of the debtor were the same as those in the case before it. The trustee’s representation of the creditor included representation in a state court lawsuit against the principals.

Noting that a unique duty of a sub V trustee is the facilitation of a consensual plan (see Section IV(B)(1)), the court concluded that a sub V trustee must be independent and impartial. *Id.* at 948. The court observed that the trustee had been “openly and actively adverse” to the debtor and that time records showed “no time trying to bring the parties together or encouraging a consensual plan of reorganization.” *Id.*

On the facts before it, the court determined that cause existed to remove the trustee under § 324 because the trustee was not independent and impartial and had an interest materially adverse to the debtor’s principals. *Id.* at 949. Because, due to the conflict, the trustee’s fees were not reasonable or necessary, the court denied the request for compensation.

⁹⁹ *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), available at https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

B. Role and Duties of the Subchapter V Trustee

The role of the sub V trustee is similar to that of the trustee in a chapter 12 or 13 case. But as later text discusses, a sub V trustee has the specific duty to “facilitate the development of a consensual plan of reorganization.” §1183(b)(7). Sub V trustees may, therefore, confront issues that are quite different from those that trustees in other cases deal with.¹⁰⁰

Section 1183 enumerates the trustee’s duties. Section 1106, which specifies the duties of the trustee in a traditional chapter 11 case, does not apply in sub V cases.¹⁰¹ §1183, however, makes many of its provisions applicable in some circumstances. As in chapter 12 and 13 cases, the debtor remains in possession of assets and operates the business. If the court removes the debtor as debtor in possession under §1185(a), the trustee operates the business of the debtor.¹⁰²

For a general discussion of a subchapter V trustee’s role and duties, see *In re 218 Jackson LLC*, 631 B.R. 937, 946-48 (Bankr. M.D. Fla. 2021).

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

In general, the role of the trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan.¹⁰³ Because the subchapter V trustee is a fair and

¹⁰⁰ The United States Trustee Program has promulgated its expectations with regard to the duties of the sub V trustee and the trustee’s role in the case. U.S. DEP’T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials> [hereinafter SUBCHAPTER V TRUSTEE HANDBOOK]. For a discussion of the sub V trustee’s duties and role in the case, and strategic considerations for creditors, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 260-62, 267-71 (2020).

¹⁰¹ § 1181(a).

¹⁰² § 1183(b)(5).

¹⁰³ The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 1-1, provides an overview of the sub V trustee’s duties:

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

impartial fiduciary with monitoring and supervisory duties and the duty to facilitate a consensual plan, courts are likely to request that the subchapter V trustee advise the court of the trustee's positions and recommendations concerning issues affecting administration of the case.¹⁰⁴ The sub V trustee's role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

First, the sub V trustee has the duty to "facilitate the development of a consensual plan of reorganization."¹⁰⁵ No other trustee has this duty, although a chapter 13 trustee has the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan."¹⁰⁶ One practitioner has suggested that the sub V trustee should be a "financial wizard" who can work with all parties on cash flows, interest rates, payment requirements, and "all the numbers puzzles that comprise a plan," and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.¹⁰⁷ The United States Trustee Program expects sub V trustees to be proactive in the plan process.¹⁰⁸

instances, the subchapter V trustee may be required to administer property of the debtor's bankruptcy estate for the benefit of creditors.

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

¹⁰⁴ *E.g., In re Major Model Management, Inc.*, 2022 WL 2203143 at *16 (Bankr. S.D.N.Y. 2022) (Requesting sub V trustee's views concerning whether class proof of claim should be permitted and agreeing that claims allowance process was the better approach).

¹⁰⁵ § 1183(b)(7).

¹⁰⁶ § 1302(b)(4).

¹⁰⁷ Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 AMER. BANKR. INST. J. 8 (Nov. 2019). See also Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 261 (2020) ("Trustees seem likely to play the role of mediator.").

¹⁰⁸ The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-9, states:

As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor's counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon

Second, the trustee must appear and be heard at the status conference that §1188(a) requires.¹⁰⁹ Although § 105(d) (which does not apply in a sub V case under §1181(a)) provides for a status conference in any case on the court’s own motion or on the request of a party in interest, it does not require one. Thus, a status conference is not required in any other type of case. Section VI(C) discusses the status conference.

Finally, the trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.¹¹⁰ The trustee’s duty to appear and be heard regarding confirmation gives the trustee standing to object to confirmation.¹¹¹

The responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor’s property, business, and financial condition.¹¹² Like a chapter 12 trustee, however, a sub V trustee does not have the duty to investigate the financial affairs of the debtor. Section 704(a)(4) imposes such a duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a traditional chapter 11 case has a broad duty of investigation under § 1106(a)(3) unless the court orders otherwise.

the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

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

¹⁰⁹ § 1183(b)(3). See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-8 (“The trustee should review the debtor’s report carefully. . .” and “should be prepared to discuss the debtor’s report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.”).

¹¹⁰ § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all of these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

¹¹¹ *In re Topp’s Mechanical, Inc.*, 2021 WL 5496560 at *1 n.1 (Bankr. D. Neb. 2021)

¹¹² *In re Ozcelebi*, 2022 WL 990283 at * 8 (Bankr. S.D. Tex. 2022) (“The responsibility of the subchapter V trustee to participate in the plan process and to be heard on the plan and other matters cloaks the subchapter V trustee with the statutory right to obtain information about the debtor’s property, business, and financial condition.”).

The court may impose the investigative duties that § 1106(a)(3) specifies for a chapter 11 trustee in a traditional case on the sub V trustee. Under §1183(b)(2), the court (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) may order that the sub V trustee perform certain duties of a chapter 11 trustee under § 1106(a).

The specified duties are: (1) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3)); (2) to file a statement of the investigation, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate, and to transmit a copy or summary of it to entities that the court directs (§ 1106(a)(4)¹¹³); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).¹¹⁴ The same procedures apply to a chapter 12 trustee’s duty to investigate under § 1202(b)(2).

In *In re 218 Jackson LLC*, 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021), the court observed that, given (1) the trustee’s duty to facilitate a consensual plan, (2) the fact that the debtor remains in possession of estate property, and (3) the absence of a requirement that the trustee investigate the financial affairs of the debtor unless the court orders otherwise, “It is not a stretch then to conclude that the subchapter V trustee’s role was intentionally designed to be less adversarial.”

¹¹³ Section 1106(a)(4)(B) directs a chapter 11 trustee to transmit the copy or summary to any creditors’ committee, equity security holders’ committee, and indenture trustee. Committees do not exist in a small business case unless the court orders otherwise under § 1102(a)(3) as amended, and a small business debtor is unlikely to have an indenture trustee as a creditor.

¹¹⁴ § 1183(b)(2). In *In re AJEM Hospitality, LLC*, 2020 WL 3125276 (M.D.N.C. 2020), the court on motion of the bankruptcy administrator, and with the consent of the debtor and sub V trustee, authorized the trustee to conduct an investigation limited to the investigation of potential intercompany claims. The court noted, “The language of [§ 1106(a)(3)] specifically allows the Court to limit the scope of an investigation ‘to the extent that the court orders’” *Id.* at *2.

Nevertheless, the trustee’s monitoring and supervisory responsibilities include oversight of the debtor’s compliance with the Bankruptcy Code.¹¹⁵ Thus, when circumstances in the case raise significant questions such as the debtor’s true financial condition, what property is property of the estate, the debtor’s management of the estate as debtor-in-possession, and the accuracy and completeness of the debtor’s disclosures and reports, a court may expect parties who have identified potential issues – including creditors, the U.S. Trustee, or the subchapter V trustee – to request an order under § 1183(b)(2) requiring the trustee to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, as well as other matters relevant to the case or formulation of a plan.¹¹⁶

2. Other duties of the trustee

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),¹¹⁷ a sub V trustee under §1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine proofs of claim and object to allowance of any claim that is improper, if a purpose would be served (§ 704(a)(5)); (3) to oppose the discharge of the debtor, if advisable (§ 704(a)(6)); (4) to furnish information concerning the estate and the estate’s administration that a party in interest requests, unless the court orders otherwise (§ 704(a)(7)); and (5) to make a final report and to file it (§ 704(a)(9)).¹¹⁸ Under §1183(b)(4),

¹¹⁵ See *In re Major Model Management, Inc.*, 2022 WL 2203143 at *16 (Bankr. S.D.N.Y. 2022) (The subchapter V trustee “has a fiduciary duty to ensure compliance with the Bankruptcy Code.”).

¹¹⁶ *In re Ozcelebi*, 2022 WL 990283 at * 8 (Bankr. S.D. Tex. 2022).

¹¹⁷ Chapter 12 (§ 1202(b)(1)) and chapter 13 (§ 1302(b)(1)) trustees also have the duty of a chapter 7 trustee under § 704(a)(3) to ensure that the debtor performs the debtor’s intentions under § 521(a)(2)(B) to surrender, redeem, or reaffirm debts secured by property of the estate. The imposition of this duty in chapter 12 and 13 cases is curious in that § 521(b)(2)(B) applies only in chapter 7 cases. SBRA does not impose this anomalous duty on the sub V trustee.

¹¹⁸ § 1183(b)(1).

the sub V trustee also has the same duty as chapter 12 and 13 trustees to ensure that the debtor commences timely payments under a confirmed plan (§§ 1202(b)(4), 1302(b)(5)).¹¹⁹

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees.¹²⁰ The U.S. Trustee Program has developed procedures for reporting by sub V trustees to enable U.S. Trustees to evaluate and monitor their performance.¹²¹

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

Under § 1185(a), the court may remove the debtor as debtor in possession. If the court does so, the sub V trustee under § 1183(b)(5) has the duties of a trustee specified in paragraphs (1), (2), and (6) of § 1106.¹²² In addition, § 1183(b)(5)(B) authorizes the trustee to operate the debtor's business when the debtor is removed from possession.¹²³ Similar provisions apply in chapter 12 cases.¹²⁴

¹¹⁹ § 1183(b)(4).

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

¹²¹ SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, ch. 8. *See also* U.S. DEP'T OF JUSTICE, 3 UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL: CHAPTER 11 CASE ADMINISTRATION (Feb. 2020) §§ 3-17.16, 3-17.16.1, 3.17.1.2, 3.17.16.3, 3.17.16.5, 3.17.16.6, https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download.

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

¹²² Section 1183(b)(5) also requires the sub V trustee to perform duties specified in § 704(a)(8). The specification of the duty is duplicative because the § 704(a)(8) duty is one of the duties listed in § 1106(a)(1) that the sub V trustee must perform.

¹²³ As originally enacted by SBRA, § 1183(b)(5) required that, upon removal of the debtor in possession, the trustee “perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of [§ 1106(a)], including operating the business of the debtor.”

The Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATAC”), effective June 21, 2022, amended § 1183(b)(5), dividing it into two subparagraphs. Subparagraph (A) retains the requirement that the trustee perform the duties specified in the enumerated sections of § 1106(a). Subparagraph (B) states that the trustee is “authorized to operate the business of the debtor,” thus removing operation of the business as a mandatory requirement. BTATCA § 2(e). The amendment applies in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

¹²⁴ The court may remove a chapter 12 debtor from possession under § 1204. Under § 1202(b)(5), the chapter 12 trustee then has the duties of a trustee under § 1106(a)(1), (2), and (6). §§ 1106(a), 1202(b).

Under paragraph (1) of § 1106(a), the trustee must perform the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These duties are: (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); (3) to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); (4) to file reports (§ 704(a)(8)); (5) to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9)); (6) to provide required notices with regard to domestic support obligations (§ 704(a)(10)); (7) to perform any obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and (8) to use reasonable and best efforts to transfer patients from a health care business that is being closed (§ 704(a)(12)).¹²⁵

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

The trustee's duties do not, however, include the filing of a plan, which only the debtor can do under § 1189(a). Section V(C) discusses issues arising from the trustee's lack of authority to file a plan.

C. Trustee's Disbursement of Payments to Creditors

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

Paragraphs (a) and (c) of § 1194 contain provisions dealing with the trustee's disbursement of money prior to confirmation. It is not clear, however, how they can have any

¹²⁵ § 1106(a)(1).

operative effect. Nothing in subchapter V requires preconfirmation payments to the trustee or authorizes the court to require them.

Section 1194(a) states that the trustee shall retain any “payments and funds” received by the trustee until confirmation or denial of a plan.¹²⁶ Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph’s direction for their disbursement based on whether the court confirms a plan or denies confirmation indicates that it deals only with money the trustee receives prior to confirmation.

If a plan is confirmed, §1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee. The provision is effectively the same as the provisions that govern disbursement of preconfirmation payments in chapter 12 and 13 cases.¹²⁷

Provisions for a trustee’s disbursement of preconfirmation funds make sense in a chapter 13 case because a chapter 13 debtor must begin making preconfirmation payments to the trustee, adequate protection payments to creditors with a purchase-money security interest in personal property, and postpetition rent to lessors of personal property within 30 days of the filing of the

¹²⁶ § 1194(a).

¹²⁷ §§ 1194(a), 1226(a), 1326(a)(2). The chapter 12 provision, § 1226(a), does not specifically provide for fees of a trustee who is not a standing trustee and does not permit a deduction for adequate protection payments. The fees of a non-standing chapter 12 trustee are allowable as an administrative expense and as such are within the scope of the deduction.

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

A standing chapter 13 trustee collects a percentage fee as the debtor makes payments. 28 U.S.C. § 586(e)(2) (2018); *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 17:5. Thus, the funds a standing chapter 13 trustee has upon denial of confirmation are net of the trustee’s fee that has already been paid. A non-standing chapter 13 trustee’s fee is included in the deduction because it is an administrative expense.

chapter 13 case.¹²⁸ If the court denies confirmation in a chapter 13 case, therefore, it is possible that the chapter 13 trustee will be holding money that the debtor paid.

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

Nevertheless, paragraph (c) of §1194 authorizes the court, prior to confirmation and after notice and a hearing, to authorize the trustee to make payments to provide adequate protection payments to a holder of a secured claim.¹²⁹ But a court can hardly require a sub V trustee to make adequate protection payments as §1194(c) contemplates if the trustee has no money to make them.

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

2. Disbursement of plan payments by the trustee

Whether the sub V trustee makes disbursements to creditors under a confirmed plan depends on the type of confirmation that occurs. Under §1194(b), the trustee makes payments under a plan confirmed under the cramdown provisions of §1191(b), unless the plan or

¹²⁸ § 1326(a).

¹²⁹ § 1194(c).

confirmation order provides otherwise.¹³⁰ If a consensual plan is confirmed under §1191(a), however, the trustee’s service terminates under §1183(c) upon “substantial consummation,”¹³¹ and the debtor makes plan payments.¹³² Part IX discusses payments under the plan.

D. Termination of Service of the Trustee and Reappointment

1. Termination of service of the trustee

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

When the court confirms a consensual plan under §1191(a), the trustee’s service terminates upon substantial consummation,¹³³ which ordinarily occurs when distribution commences.¹³⁴ Confirmation of a plan under the cramdown provisions of §1191(b) does not terminate the trustee’s service. As just discussed, the trustee continues to serve and makes payments under the plan as §1194 requires.

Part IX further discusses these provisions.

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.¹³⁵

¹³⁰ §1194(b).

¹³¹ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

¹³² § 1191(a).

¹³³ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

¹³⁴ § 1183(c). Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

¹³⁵ Section 701(a) directs the U.S. Trustee to appoint an interim trustee promptly after entry of an order for relief under chapter 7. In a converted case, the U.S. Trustee may appoint the trustee serving in the case immediately before entry of the order for relief.

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

2. Reappointment of trustee

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

First, §1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee's duty under §1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.¹³⁶ The reason for this provision is unclear.

Cramdown confirmation does not terminate the service of the sub V trustee. Therefore, if a debtor seeks modification after cramdown confirmation, the trustee is in place, so reappointment is unnecessary. When confirmation of a consensual plan has occurred, the trustee's service terminates upon substantial consummation,¹³⁷ after which §1193(b) prohibits modification. Perhaps the purpose of the reappointment provision is to make sure that someone appears at the hearing to point this out to the court if a debtor attempts to modify a confirmed consensual plan after its substantial consummation.

Second, §1183(c) permits reappointment of the trustee if necessary to perform the trustee's duties under §1185(a). §1185(a) provides for the removal of the debtor in possession, among other things, for "failure to perform the obligations of the debtor under a plan confirmed under this chapter."¹³⁸ Because §1185(a) contemplates the postconfirmation removal of the debtor in possession, a trustee must be available to take charge of the assets and the business. Section XII(B) further discusses the postconfirmation removal of the debtor in possession.

¹³⁶ § 1183(c)(1).

¹³⁷ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

¹³⁸ § 1185(a).

E. Compensation of Subchapter V Trustee

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

If the sub V trustee is not a standing trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of § 330(a), without regard to the limitation in § 326(a) on compensation of a chapter 11 trustee based on money the trustee disburses in the case. As Section IV(E)(2) discusses, some observers expected that technical amendments would impose a limit on compensation of five percent of payments under the plan, which is the rule for a non-standing chapter 12 or 13 trustee.¹³⁹ Some of them, however, have indicated that it is unlikely that this will occur in the foreseeable future.

1. Compensation of standing subchapter V trustee

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586.¹⁴⁰ As amended, § 326(a) excludes a subchapter V trustee from its provisions governing compensation of a chapter 11 trustee, and § 326(b) provides that the court may not allow compensation of a standing trustee in a subchapter V case under § 330.

Under SBRA's amendments to 28 U.S.C. § 586(e),¹⁴¹ the U.S. Trustee Program establishes the compensation for a standing sub V trustee in the same manner it does for standing chapter 12 and 13 trustees.¹⁴² Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12 and 13 cases are extended to cover subchapter V standing trustees. Thus, the standing

¹³⁹ The observers are bankruptcy judges, lawyers, and professors who have followed and supported enactment of SBRA with whom the author has discussed the issue.

¹⁴⁰ SBRA § 4(a)(4).

¹⁴¹ SBRA § 4(b)(1)(D).

¹⁴² 28 U.S.C. § 586(e).

subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.

If the service of a standing trustee is terminated by dismissal or conversion of the case or upon substantial consummation¹⁴³ of a consensual plan under § 1181(a) (as Section IX(A) discusses, the trustee does not make payments under a consensual plan), new 28 U.S.C. § 586(e)(5) provides that the court “shall award compensation to the trustee consistent with the services performed by the trustee and the limits on the compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)].”¹⁴⁴ The limits require reference to the standing trustee’s maximum annual compensation, 28 U.S.C. § 586(e)(1)(A), and to the maximum percentage fee, 28 U.S.C. § 586(e)(1)(B).

2. Compensation of non-standing subchapter V trustee

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

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

¹⁴³ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

¹⁴⁴ 28 U.S.C. § 586(e)(5).

In *In re Tri-State Roofing*, 2020 WL 7345741 (Bankr. D. Idaho 2020), the court ruled that § 326(b) does not prevent an award of compensation to a sub V trustee under § 330(a)(1) and that it does not place a cap on such compensation.

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error.¹⁴⁵ The drafters of subchapter V intended that provisions for compensation of non-standing sub V trustees be the same as those for non-standing chapter 12 and 13 trustees.¹⁴⁶

Specifically, § 326(b) limits compensation of a non-standing chapter 12 or chapter 13 trustee to “five percent upon all payments under the plan.” Although it appears the drafters intended this limitation to apply to compensation of sub V trustees, the language of the SBRA amendments to § 326(b) do not make this limitation applicable to a non-standing sub V trustee.¹⁴⁷ Observers close to the legislative process expected a technical amendment to resolve

¹⁴⁵ See *supra* note 139.

¹⁴⁶ See generally *In re Louis*, 2022 WL 2055290 at * 11 n. 10 (Bankr. C.D. Ill. 2022) (Noting that the absence of a cap on compensation may have been a drafting error and but that the United States Trustee Program’s position is that compensation may be awarded without regard to a cap, the court awarded compensation to the subchapter V trustee without applying a cap and without deciding the issue in the absence of any objections).

¹⁴⁷ A full understanding of the issue requires further elaboration.

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

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

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

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

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

this issue by making the five percent limitation also applicable to sub V trustees.¹⁴⁸ Technical corrections in the CARES Act, however, did not address this issue.¹⁴⁹ Some of the observers have indicated that it is unlikely that this will occur in the foreseeable future.

Although SBRA addresses compensation of a standing trustee upon conversion or dismissal of a sub V case prior to confirmation in its amendment of 28 U.S.C. § 586(e)(5), it does not address allowance or payment of compensation of a non-standing trustee in those circumstances.

If the case is converted, the sub V trustee may file an application for compensation, and the allowed amount will be entitled to administrative expense priority under § 503(b)(1), subject in priority to administrative expenses in the chapter 7 case. § 726(b).

Dismissal of the case raises the prospects that the sub V trustee may find the compensation disputed if the trustee seeks payment under applicable nonbankruptcy law and that the trustee will not be paid, given the debtor's distressed financial circumstances.

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

¹⁴⁸ Such an amendment would also clarify that a non-standing trustee is entitled to compensation. As amended, § 326(b) applies to cases under subchapter V, chapter 12, and chapter 13. Before and after the amendment, § 326(b) states that the court “may allow reasonable compensation under section 330 of this title to a trustee appointed under section 1202(a) or 1302(a) of this title,” but it does not state that the court may allow compensation under § 330 of a trustee appointed under § 1183. § 326(b). Because § 330(a) is subject to § 326, and § 326(b) does not provide for compensation of a non-standing sub V trustee, it may be arguable that a sub V trustee is not entitled to compensation. The position of the United States Trustee Program is, “Case-by-case trustees are compensated through § 330(a)(1) which allows for ‘reasonable compensation for actual, necessary services rendered by the trustee . . . and by any paraprofessional person employed by such person.’” SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-21.

¹⁴⁹ The technical corrections in the CARES Act involved the exclusion of public companies from the definition of a small business debtor and unclaimed funds in subchapter V cases. CARES Act § 1113(a)(4).

A trustee may seek to avoid the former issue by filing an application for compensation in response to a motion to dismiss and requesting that the court rule on it, preferably before dismissal of the case.

Allowance of an administrative expense claim in a dismissed case, however, may still leave the sub V trustee without compensation. In allowing compensation to the sub V trustee after dismissal of the case, the court in *In re Tri-State Roofing*, 2020 WL 7345741 at *1, n. 1 (Bankr. D. Idaho 2020), observed, “[A]dministrative expense claims are not monetary judgments but rather entitle the claimant to receive a distribution from the bankruptcy estate. If there are no funds currently held by the Trustee, it is difficult to understand how this claim would be paid.” (Citation omitted).

A potential solution to all of these problems is to request that the court condition dismissal on allowance and payment of the trustee’s compensation.

In re Slidebelts, Inc., 2020 WL 3816290 (Bankr. E.D. Cal. 2020), supports this proposition. There, the debtor in a traditional chapter 11 case sought its dismissal for the purpose of obtaining a loan under the Paycheck Protection Funding Program of the CARES Act of the case and then re-filing a case under subchapter V. Professionals employed by the committee of unsecured creditors requested that the court condition dismissal on allowance and payment of their fees.

The court observed that § 349(b)(3) ordinarily reverts the property of the estate in the debtor, but that, as the Supreme Court recognized in *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973, 979 (2017), the court may order otherwise “for cause.” The court reasoned that committee professionals had rendered services in reliance on provisions of the Bankruptcy Code for payment of their compensation in the case. This reliance, the court concluded, constituted

“cause” under § 349(b) for conditioning dismissal on allowance and payment of the committee professionals. *Id.* at * 3.

In *In re Hunts Point Enterprises, LLC*, 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss the case. Because the case revolved around a two-party dispute and the debtor’s request for dismissal demonstrated that it no longer wanted to file a plan of reorganization, the court concluded that cause existed for dismissal of the case, conditioned on the debtor’s payment of the sub V trustee’s compensation.

In traditional chapter 11 cases, cash collateral or debtor in possession financing orders often provide for a so-called “carve-out” to provide money to pay professionals employed by the debtor and the committee of unsecured creditors. It seems appropriate to include the sub V trustee in any carve-out in a subchapter V case.

Even if the case does not involve cash collateral or debtor in possession financing – or if the cash collateral or financing order does not provide for a carve-out – it may be advisable for the sub V trustee, the debtor, or both to request that the court require the debtor to make regular payments to a fund dedicated to the payment of professional fees.

Judges in the Middle District of Florida have included a provision for interim trustee compensation in subchapter V cases in an “Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference.”¹⁵⁰ The orders require the debtor to pay \$ 1,000 as interim compensation to the sub V trustee within 30 days of the petition date and monthly thereafter. The amount is subject to adjustment upon

¹⁵⁰ *E.g., In re Nostalgia Family Medicine P.A.*, Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Bankr. M.D. Fla. Mar. 26, 2021).

request of any interested party and to the court’s approval of the trustee’s compensation under § 330. The debtor must include the interim compensation in any cash collateral budget.

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

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

A non-standing trustee’s compensation is allowable as an administrative expense, which has priority under § 507(a)(2) subject only to claims for domestic support obligations. Under § 1129(a)(9)(A), a plan must provide for payment of administrative expenses in full on or before the effective date of the plan.¹⁵¹ This requirement applies in subchapter V cases to confirmation of a consensual plan under § 1191(a).¹⁵²

Section 1191(e) permits payment of administrative expense claims through the plan if the court confirms it under the cramdown provisions of § 1191(b).¹⁵³ Accordingly, a non-standing sub V trustee faces deferral of payment of compensation for services in the case.

As Section IV(E)(2) discusses, it is possible that a technical amendment to § 326(b) will impose a limitation on a non-standing trustee’s compensation to five percent of payments under the plan. If this occurs, a non-standing trustee’s compensation may arguably be limited to five percent of payments as they are made.

F. Trustee’s Employment of Attorneys and Other Professionals

Section 327(a) permits a bankruptcy trustee to employ attorneys and other professionals “to represent or assist the trustee in carrying out the trustee’s duties.” SBRA does not modify

¹⁵¹ § 1129(a)(9)(A).

¹⁵² § 1191(a).

¹⁵³ § 1191(e).

this provision for subchapter V cases. If a standing sub V trustee is appointed, the standing trustee presumably would follow the practice of standing trustees in chapter 12 and 13 cases and not retain counsel or other professionals except in exceptional circumstances.

A non-standing sub V trustee's employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances.¹⁵⁴ In this regard, a person serving as a sub V trustee should have a sufficient understanding of applicable legal principles to perform the trustee's monitoring and supervisory duties, and appear and be heard on specified issues, without the necessity of separate legal advice.

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

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.¹⁵⁵

¹⁵⁴ See *In re Penland Heating and Air Conditioning, Inc.*, 2020 WL 3124585 (E.D.N.C. 2020). The court declined to approve the sub V trustee's application to approve the employment of the trustee's law firm, stating, "[A]uthorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA." *Id.* at *2. In a footnote, the court cautioned that "overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved." *Id.* at *2 n. 2.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-17 to 3-18, states:

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

¹⁵⁵ 28 U.S.C. § 1654.

The statute applies only to natural persons; it does not permit a corporation or other entity to appear in federal court except through licensed counsel.¹⁵⁶

Courts have applied the rule to prohibit an individual who serves as the trustee for a trust or as the personal representative of an estate from representing the trust or estate unless the trust or estate has no creditors and the individual is the sole beneficiary.¹⁵⁷ Because a bankruptcy trustee acts as the representative of the estate¹⁵⁸ and creditors have an interest in the estate, the same rule would appear to require a non-attorney trustee to retain a lawyer in order to appear and be heard in a bankruptcy court.

In *In re McConnell*, 2021 WL 203331 at *16-18 (Bankr. N.D. Ga. 2021), however, the court determined that 28 U.S.C. § 1654 did not apply to require a nonlawyer panel trustee in a chapter 7 case to retain a lawyer to file an application for the retention of a real estate broker.

The *McConnell* court reasoned, “The nature of proceedings in bankruptcy courts for the administration of estate assets in Chapter 7 cases suggests that the rule of 28 U.S.C. § 1654 applicable in a federal lawsuit between discrete parties should not be extended to apply to a chapter 7 trustee’s filing of routine papers that the Bankruptcy Code and Bankruptcy Rules require in connection with the sale of property.” *Id.* at *17. The court observed that, without discussing § 1654, bankruptcy courts have recognized that a trustee may file papers in a bankruptcy court without a lawyer in the course of performing the trustee’s duties, such as the

¹⁵⁶ *E.g.*, *Rowland v. California Men’s Colony*, 506 U.S. 194, 202 (1993) (“[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that ‘parties may plead and conduct their own cases personally or by counsel,’ does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.”).

¹⁵⁷ *E.g.*, *J. J. Rissell, Allentown, P.A. Trust v. Marchelos*, 976 F. 3d 1233 (11th Cir. 2020) (trust); *Guest v. Hansen*, 603 F.3d 15 (2d Cir. 2010) (estate); *Knoefler v. United Bank of Bismarck*, 20 F.3d 347 (8th Cir. 1994) (trust); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696 (9th Cir. 1987) (trust).

¹⁵⁸ § 323(a).

filing of applications to retain professionals¹⁵⁹ and routine objections to claims.¹⁶⁰ *Id.* at *18 & nn. 59-60.

The nature of reorganization proceedings in bankruptcy courts and the facilitative, advisory, and monitoring role that subchapter V specifically contemplates for the trustee suggest that 28 U.S.C. § 1654 likewise should not apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

In this regard, 28 U.S.C. § 1654 and the case law establishing the rule have their roots in 18th and 19th century practice in federal courts¹⁶¹ when the availability of bankruptcy relief was either nonexistent or short-lived.¹⁶² The statute could not have contemplated a reorganization case involving many parties and many inter-related moving parts that involve business issues and often require negotiations and compromise to achieve a successful outcome for all the parties. In

¹⁵⁹ The court cited: *In re Garcia*, 335 B.R. 717, 726 (B.A.P. 9th Cir. 2005); *In re Jay*, 2018 WL 2176082 at *12 (Bankr. D. Utah 2018), *aff'd* 2019 WL 4645385 (D. Utah 2019) (“[I]n simple cases, trustees should prepare applications to employ realtors or accountants as they are seldom contested and routinely granted.”); *In re McLean Wine Co., Inc.*, 463 B.R. 838, 848-49 (Bankr. E.D. Mich. 2011) (application to employ other professionals is trustee work); *In re Peterson*, 566 B.R. 179, 195, 207-08 (Bankr. M.D. Tenn. 2017) (application for employment of professionals, including accountant and special counsel, is trustee duty). *Contra, e.g., In re Yovtcheva*, 590 B.R. 307 (Bankr. E.D. Pa. 2018); *In re Hambrick*, 2012 WL 10739279, at * 5 (Bankr. N.D. Ga. 2012); *In re Holub*, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991).

¹⁶⁰ The court cited: *In re King*, 546 B.R. 682, 699 (Bankr. S.D. Tex. 2016) (Routine objection to claim that is unopposed and does not require legal analysis or a brief falls within trustee's duty); *In re Lexington Hearth Lamp and Leisure, LLC*, 402 B.R. 135 (Bankr. M.D.N.C. 2009) (Although the court concluded that compensation is allowed for services that require a law license, *id.* at 142, the court ruled that the filing of objections to claims that require no legal analysis is a trustee duty. *Id.* at 144-45.) *In re Perkins*, 244 B.R. 835 (Bankr. D. Montana 2000); *In re Holub*, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991). *Contra, e.g., In re Howard Love Pipeline Supply Co.*, 253 B.R. 790 (Bankr. E.D. Tex. 2000) (“[T]he express duty of the trustee to object to improper claims does not authorize a non-attorney trustee to engage in the unauthorized practice of law.”).

¹⁶¹ Section 35 of the Judiciary Act of 1789 is the statutory predecessor to 28 U.S.C. § 1654 (2018) and contained substantially the same language. *See United States v. Dougherty*, 473 F.2d 1113, 1123 n. 10 (D.C. Cir. 1972).

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

¹⁶² *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AMER. BANKR. INST. L. REV. 5, 12-23 (1995). *See also* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 1:2.

other words, a bankruptcy reorganization is quite different from a lawsuit that involves discrete parties asserting claims and defenses to establish their rights and obligations.

This distinction is particularly important in a subchapter V case. Specific duties of the sub V trustee are to facilitate the development of a consensual plan of reorganization,¹⁶³ and to appear and be heard on confirmation and other significant issues that relate to confirmation.¹⁶⁴ The statute makes it clear that the trustee's primary role is to work with the parties and then to *report* to the court, not to engage in litigation with them.

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

Assuming that the nonlawyer trustee is knowledgeable about reorganization law and practice (and a sub V trustee who is not knowledgeable should not be a sub V trustee), neither the debtor, creditors, nor the court need a lawyer to present the trustee's reports and views to the court. In short, unless a sub V trustee needs to *litigate* something, the trustee does not need counsel. The statute and case law governing federal *litigation* should not be extended to the trustee's appearance in court to *report*.

The subchapter V trustee's primary role is analogous to the role of an examiner in a traditional chapter 11 case,¹⁶⁵ or an expert witness that a court appoints.¹⁶⁶ Such parties provide

¹⁶³ § 1183(b)(7).

¹⁶⁴ § 1183(b)(3).

¹⁶⁵ § 1106(b). Although bankruptcy courts often authorize an examiner to employ counsel or other professionals, § 327(a) does not provide authority for an examiner to employ a professional person. *See generally* 5 NORTON BANKRUPTCY LAW AND PRACTICE § 99:29. *See also In re W.R. Grace & Co.*, 285 B.R. 148, 156 (Bankr. D. Del. 2002) (“[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings. The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals.” (citation omitted)).

¹⁶⁶ FED. R. EVID. 706.

information to the court and the parties and may do so without counsel. A sub V trustee with similar advisory duties should similarly be permitted to provide information to the court without the necessity of having to do so through a lawyer.¹⁶⁷

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

If a nonlawyer is the sub V trustee, the trustee's ability to appear in court without a lawyer is critical to accomplishment of the objective of subchapter V of providing debtors – and creditors – with the opportunity to accomplish an expeditious and economic reorganization, hopefully on a consensual basis. A requirement for employment of counsel adds an additional layer of expense that should not ordinarily be necessary and that threatens accomplishment of subchapter V's primary objective.¹⁶⁸ Moreover, if a nonlawyer trustee must have a lawyer, the additional expense may as a practical matter preclude the appointment of a nonlawyer trustee.

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

¹⁶⁷ In some jurisdictions, some chapter 7 panel trustees are not lawyers. The author's informal discussions with bankruptcy judges indicate that in some courts nonlawyer trustees appear without counsel when the matter does not require actual litigation.

¹⁶⁸ This consideration suggests that a court may invoke § 105(a) to permit a nonlawyer to appear without counsel as being "necessary or appropriate" to carry out the provisions of the Bankruptcy Code.

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

The debtor, as debtor in possession, remains in possession of assets of the estate.¹⁶⁹ A sub V debtor in possession has the rights, powers, and duties of a trustee that a traditional chapter 11 debtor in possession has, including the operation of the debtor's business.¹⁷⁰ The court may remove the debtor as debtor in possession under §1185(a). The court may reinstate the debtor in possession.¹⁷¹

It is important to note that many of the requirements applicable in a traditional chapter 11 case govern a subchapter V case. The court must approve retention of the debtor's lawyers and other professionals¹⁷² and their compensation.¹⁷³ The debtor cannot use cash collateral¹⁷⁴ or use, sell, or lease property outside the ordinary course of business¹⁷⁵ without court approval. The debtor must comply with guidelines of the U.S. Trustee, including the closing of prepetition bank accounts and the establishment of new debtor-in-possession accounts. The debtor must file

¹⁶⁹ § 1186(b).

¹⁷⁰ § 1184. Section 1107(a), which provides for the debtor to remain in possession with the rights, powers, and duties of a trustee, is inapplicable in a sub V case. § 1181(a). Section 1184 replaces § 1107(a) in sub V cases.

¹⁷¹ § 1185(b).

¹⁷² § 327(a).

¹⁷³ § 330(a). *See generally In re Rockland Industries, Inc.*, 2022 WL 451542 (Bankr. D. S.C. 2022) (disallowing portion of requested fees of attorney for subchapter V debtor). The court commented on the review of applications for compensation under § 330 in a subchapter V case, *id.* at *6:

As a threshold matter, the Court emphasizes that the more cost-effective and streamlined approach to Chapter 11 bankruptcy offered by Subchapter V should not revive “economy of the estate” considerations that previously existed under the Bankruptcy Act and which have long since been abandoned. To be clear, the UST does not espouse, or even seemingly favor, an economy-of-the-estate standard. However, any deviation from the § 330 compensation standard because this is a Subchapter V case is a step on, or toward, a slippery slope that must be avoided. Professional services rendered in bankruptcy cases are scrutinized for necessity and reasonableness, and following the testimony of counsel at the Hearing, the Court is satisfied that this case presents more complexity than originally acknowledged by the UST and that this complexity should not prevent the Debtor from availing itself of the advantages of the Subchapter V designation. While the streamlined nature of Subchapter V means that reduced fees is a likely natural consequence, it should not be a forced result.

¹⁷⁴ § 363(c)(2).

¹⁷⁵ § 363(b).

appropriate “first day motions” to deal with issues such as payment of prepetition wages or other employee benefits, payment of prepetition taxes, or payment of other prepetition obligations (such as customer deposits or warranty obligations).

A subchapter V case is subject to dismissal or conversion for cause under § 1112(b)(1) under the same standards that apply in a traditional chapter 11 case.¹⁷⁶ Thus, failure to take such actions may constitute cause for dismissal or conversion under § 1112(b)(1).¹⁷⁷

B. Duties of Debtor in Possession

Upon the filing of a voluntary case, a small business debtor must file documents required of a small business debtor in a non-sub V case under §§ 1116(1)(A) and (B).¹⁷⁸ In a sub V case, §1116 is inapplicable, but §1187(a) requires the sub V debtor to comply with §§ 1116(1)(A) and (B) upon making the election.¹⁷⁹

The timing of the election does not change the time for a debtor who qualifies as a small business debtor to file the required documents. In a voluntary case, it is the date of the filing of the petition. If a small business debtor makes the election in the petition (as Interim Rule 1020(a) requires), § 1187(a) requires the debtor to file the documents at that time. If the debtor does not make the election in the petition, § 1116(1) is applicable and requires the debtor to

¹⁷⁶ See generally *In re Ozcelebi*, 2022 WL 990283 (Bankr. S.D. Tex. 2022).

¹⁷⁷ E.g., *In re MCM Natural Stone, Inc.*, 2022 WL 1074065 (Bankr. W.D. N.Y. 2022).

¹⁷⁸ New. § 1187(a).

¹⁷⁹ Section 1116 does not apply in a sub V case, § 1181(a), but § 1187 incorporates all its requirements. In view of this, it is unclear why SBRA made § 1116 inapplicable in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee. This statutory scheme is important in the case of a debtor who is not a small business debtor because its debts exceed \$2,725,625 but qualifies for subchapter V because its debts are less than \$ 7.5 million. Because § 1116 applies only in a small business case, it would not apply to such a debtor, but § 1187 requires such a debtor to comply with its requirements.

append the documents to the petition. In an involuntary case, the debtor must file the documents within seven days after the order for relief.¹⁸⁰

The timing requirements operate differently in the case of a debtor who is not a small business debtor because its debts exceed \$ 2,725,625. In this situation, § 1116 does not apply because the case is not a small business case. In a voluntary or involuntary case, §1187(a) requires the debtor to comply with § 1116 upon making the sub V election, which could occur after the filing of a voluntary petition or entry of an order for relief in an involuntary case.

The documents that § 1116(1) requires are: the debtor's most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.¹⁸¹

SBRA also requires a sub V debtor to file periodic reports under § 308, which continues to apply in a non-sub V small business case.¹⁸² Section 308(b) requires periodic reports that must contain information including: (1) the debtor's profitability; (2) reasonable approximations of the debtor's projected case receipts and cash disbursements; (3) comparisons of actual case receipts and disbursements with projections in earlier reports; (4) whether the debtor is in

¹⁸⁰ Section 1116(1) requires a small business debtor in an involuntary case to file the required documents within seven days after the order for relief. Interim Rule 1020(a) permits a debtor to make the subchapter V election within 14 days after entry of the order for relief in an involuntary case. Section 1187(a) requires compliance with the requirements of § 1116(1) upon the debtor's election to be a subchapter V debtor.

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

¹⁸¹ § 1116(1).

¹⁸² § 1187(b). Although § 308 applies only in a small business case, § 1187(b) requires all sub V debtors to comply with it.

Bankruptcy Rule 2015 implements § 308. Interim Bankruptcy Rule 2015(a)(6) provides that the duty to file periodic reports in a chapter 11 small business case terminates on the effective date of the plan. Interim Bankruptcy Rule 2015(b) requires a subchapter V debtor to perform the duties prescribed in (a)(6). *See In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at * 6 (Bankr. D. P.R. 2022).

compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and (5) if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.¹⁸³

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7).¹⁸⁴ Thus, the debtor’s senior management personnel and counsel must: (1) attend meetings scheduled by the court or the U.S. Trustee (including initial debtor interviews, scheduling conferences, and § 341 meetings, unless waived for extraordinary and compelling circumstances¹⁸⁵); (2) timely file all schedules and statements of financial affairs (unless the court after notice and a hearing grants an extension not to exceed 30 days after the order for relief, absent extraordinary and compelling circumstances); (3) file all postpetition financial and other reports required by the Bankruptcy Rules or local rule of the district court;¹⁸⁶ (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other government filings and pay all taxes entitled to administrative expense priority; and (6) allow the U.S. trustee to inspect the debtor’s business premises, books, and records.¹⁸⁷

A sub V debtor in possession has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).¹⁸⁸

¹⁸³ § 308.

¹⁸⁴ § 1187(b).

¹⁸⁵ As in non-sub V small business cases, the debtor and counsel must attend the initial debtor interview scheduled by the U.S. Trustee and must attend the § 341 meeting of creditors, at which the U.S. Trustee presides. *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-3, 3-5. The U.S. Trustee expects the sub V trustee to participate in both. *Id.*

¹⁸⁶ That is not a typo. The statute specifies local rule of the district court.

¹⁸⁷ § 1118.

¹⁸⁸ § 1184.

The duties under § 1106(a)(1) include the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a).¹⁸⁹ These provisions include duties: to be accountable for all property received; to examine and object to proofs of claim if a purpose would be served; to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise; to file reports; to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee; to provide required notices with regard to domestic support obligations; to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.

Other § 1106(a) duties applicable to the sub V debtor under § 1184 are the duties under § 1106(a)(5) through (a)(8): to file a plan;¹⁹⁰ to file tax returns for any year for which the debtor has not filed a tax return; to file postconfirmation reports as are necessary or as the court orders; and to provide required notices with regard to any domestic support obligations.¹⁹¹

Subchapter V does not expressly impose on a sub V debtor the duties to communicate and cooperate with the sub V trustee and to negotiate with creditors in an effort to obtain consensual confirmation, but at least one court has noted the debtor's failure to do so, despite

¹⁸⁹ § 1106(a)(1).

¹⁹⁰ The duty under § 1106(a)(5), applicable to the sub V debtor under § 1184, is to “as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case.”

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

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

¹⁹¹ § 1106(a)(5-8).

encouragement from the court, in connection with dismissal of the case and denial of confirmation.¹⁹²

C. Removal of Debtor in Possession

Section 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.¹⁹³ “Cause” includes “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case.” This language is identical to § 1104(a),¹⁹⁴ which governs appointment of a trustee in a traditional chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case. Although § 1185(a) does not list the debtor’s bad faith as a ground for removal of the debtor from possession, the specified grounds are not exhaustive, and a court may consider it.¹⁹⁵ An incurable conflict of interest between the debtor’s principal and the estate – such as the possibility of claims against the principal or affiliates – may also establish cause.¹⁹⁶

¹⁹² *In re* U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile U.S.A. Limited Partnership, 2021 WL 1679062 at *2 n. 4, *5 (Bankr. N.D. W. Va. 2021). The court concluded its Memorandum Opinion dismissing the debtor’s case, in which it also determined that the debtor’s plan was not feasible, as follows, *id.* at * 5:

The Debtor had ample opportunities as it meandered through this case to negotiate with interested parties and propose a confirmable plan of reorganization. Specifically, the court encouraged the Debtor to engage with the Subchapter V Trustee and negotiate with the Creditors. By all accounts, however, the Debtor lacked motivation in those regards while evading certain of its responsibilities to the bankruptcy estate. Cause undoubtedly exists to dismiss this case, and the Debtor has been in bankruptcy for over a year without putting forth a feasible, confirmable plan. The court will therefore enter a separate order dismissing the Debtor’s case.

¹⁹³ § 1181(a). Sections 1104 and 1105, which deal with appointment of a trustee and termination of the trustee’s appointment, are inapplicable in a sub V case.

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

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

¹⁹⁴ Section 1104 does not apply in a sub V case. § 1181(a).

¹⁹⁵ *In re* Young, 2021 WL 1191621 at * 6-7 (Bankr. D. N.M. 2021).

¹⁹⁶ *In re* No Rust Rebar, Inc., 2022 WL 1639322 at * 8 (Bankr. S.D. Fla. 2022).

A court may, after notice and a hearing, remove a debtor from possession *sua sponte*.¹⁹⁷

In *In re Neosho Concrete Products Co.*, 2021 WL 1821444 at * 8 (Bankr. W.D. Mo. 2021), the court found guidance for the standards a court should consider in determining whether to remove a sub V debtor from possession under § 1185(a) in case law construing the provisions of § 1104(a) for appointment of a trustee in a traditional chapter 11 case.¹⁹⁸

Applying rulings in § 1104(a) cases, the court concluded that it had discretion to determine whether “cause” exists to remove a sub V debtor in possession. The court determined that the party seeking removal of the sub V debtor bears the burden of establishing cause by a preponderance of the evidence. The court noted, “Because removal of a debtor in possession is an “extraordinary remedy,’ the movant’s burden is high.” *Id.* at *8.¹⁹⁹

The court adopted a “flexible” approach to determining whether cause exists for removal of a sub V debtor from possession and identified the following factors that a court may consider, among others: (1) the materiality of any misconduct; (2) the debtor’s evenhandedness or lack thereof in dealing with insiders and affiliated entities in relation to other creditors; (3) the existence of prepetition avoidable transfers; (4) whether any conflicts of interest on the part of

In situations in which potential disputes between the estate and insiders exist, the debtor should consider ways to avoid losing possession through effective management of the conflict. This includes transparency and full and accurate disclosure of information relating to potential claims. If creditors, the subchapter V trustee, or the U.S. Trustee raise substantial issues about the potential claims, the debtor should consider asking the court, pursuant to § 1183(b)(5), to expand the subchapter V trustee’s duties to include duties under § 1106(b)(3) and (4) to investigate the potential claims and to file a report of the investigation.

If a dispute over claims against insiders cannot be resolved consensually, a potential solution is to provide in the plan for the subchapter V trustee, or perhaps a creditor, to prosecute potential claims for the benefit of creditors. Although the provisions of subchapter V do not contemplate that the subchapter V trustee prosecute claims of the estate, such an approach seems possible under the procedure developed in traditional chapter 11 cases under which the court authorizes the committee of unsecured creditors or a creditor to pursue claims against insiders through “derivative standing.”

¹⁹⁷ *In re Pittner*, 2022 WL 348188 (Bankr. E.D. Mass. 2022).

¹⁹⁸ *Accord*, see *In re No Rust Rebar, Inc.*, 2022 WL 1639322 at * 8 n. 48 (Bankr. S.D. Fla. 2022).

¹⁹⁹ The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership)*, 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

the debtor are interfering with its ability to fulfill its fiduciary duties; and (5) whether any self-dealing or squandering of estate assets had occurred. *Id.* at 8.²⁰⁰

The court concluded that cause did not exist to remove the debtor from possession because its principal had “competently managed the estate and adapted to challenges as it encountered them,” had agreed to reimburse the estate for the value of preferential transfers he had received, had retained separate counsel, and had prioritized the interests of the debtor above his own. *Id.* at 9.²⁰¹

Removal of a debtor from possession may be an alternative to dismissal or conversion of a subchapter V case for cause under § 1112(b)(1).²⁰² In *In re Pittner*, 2022 WL 348188 (Bankr. E.D. Mass. 2022), the debtor, who was in his fifth bankruptcy case and had been in bankruptcy for ten years, failed to comply with an order of the court that the debtor either file a motion to retain a real estate broker or a motion under § 363(b) to sell two parcels of real estate. After concluding that the violation of the order constituted cause to convert or dismiss under § 1112(a)(4)(E) and that the debtor had not invoked the exception in § 1112(b)(2) to the

²⁰⁰ The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership)*, 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

²⁰¹ The court also denied a motion to convert the case to chapter 7.

²⁰² Section 1112(b)(1) requires dismissal or conversion to chapter 7 of a chapter 11 case for “cause,” unless the court determines that the appointment of a trustee or an examiner under § 1104 is in the best interests of the estate.

Section 1112(b)(2) states an exception if the court “finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate” and the debtor or another party in interests establishes a reasonable likelihood of confirmation of a plan and that (1) the grounds for converting or dismissing the case do not include substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (2) a reasonable justification exists for the act or omission; and (3) the act or omission will be cured within a reasonable period of time fixed by the court.

Because § 1104 does not apply in a subchapter V case, § 1181(a), some courts have stated that § 1112(b)(1) permits no alternative other than conversion or dismissal if cause exists, unless the exception in § 1112(b)(2) applies. *E.g., In re Ozcelebi*, 2022 WL 990283 at * 9 (Bankr. S.D. Tex. 2022); *In re MCM Natural Stone, Inc.*, 2022 WL 1074065 at * 4 (Bankr. W.D. N.Y. 2022). These courts did not consider removal of the debtor from possession as an alternative.

requirement of conversion or dismissal for cause, the court considered whether dismissal or conversion was in the best interest of creditors and the estate. *Id.* at *3.²⁰³

The court reasoned that dismissal would likely provide no recovery for unsecured creditors and that dismissal would bring no resolution to the disputes between the debtor and secured creditors based on the “long, contentious history” between them. It would result, the court predicted, in the filing of a sixth case. *Id.* at *3. The court agreed with the subchapter V trustee that conversion would result in abandonment of the debtor’s principal assets and “would likely end no differently than a dismissal.” *Id.*

The court noted that § 1112(b)(1) requires conversion or dismissal for cause “unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.” Although § 1104(a) does not apply in a subchapter V case,²⁰⁴ the court continued, subchapter V contains “its own parallel provision in § 1185(a)’s authorization for the court to remove a debtor in possession for cause, with a resulting increase under § 1183(b)(5) in the powers of the subchapter V trustee.” *Id.* at *3.

The court reasoned, *id.* at *4:

Removal of a debtor from possession is simply a lesser form of the conversion option. It is precisely that in every motion to convert or dismiss under § 1112(b)(1), where the Court is obligated to ask in every instance where cause is shown whether the appointment of a chapter 11 trustee might better serve the interests of creditors and the estate.

The court ruled that the debtor’s deliberate refusal to obey the court’s order was cause for removal of the debtor from possession under § 1185(a) and that removal, with the resulting

²⁰³ Not surprisingly, the court rejected the debtor’s contention that “moving forward on a purchase and sale agreement outside of the Court-established deadlines would be a better option” as an appropriate response to the failure to comply with the order. 2022 WL 348188 at *2.

²⁰⁴ § 1181(a).

increase in the subchapter V trustee's powers and duties under § 1183(b)(5), was in the best interests of creditors and the estate and better served those interests than either conversion or dismissal. *Id.*

From a debtor's standpoint, the removal remedy may be more advantageous than conversion or dismissal. The debtor retains the exclusive right to file a plan and has the right to seek reinstatement of possession under § 1185(b). A debtor thus has at least the opportunity of "repenting" from the conduct that led to the debtor's ouster and cooperating with the subchapter V trustee and creditors to achieve a result that benefits everyone more than conversion, dismissal, or liquidation of assets in the subchapter V case.

Section 1185(a) also provides for removal of the debtor in possession "for failure to perform the obligations of the debtor" under a confirmed plan, as Sections V(C) and XII(B) discuss. Sections 1104(a) and 1204(a) do not contain this ground for removal of a debtor in possession in traditional chapter 11 cases and in chapter 12 cases.²⁰⁵

Section 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing.²⁰⁶ Section 1202(b) contains identical language in chapter 12 cases, and § 1105 similarly permits the court to terminate the appointment of a chapter 11 trustee and restore the debtor to possession and management of the estate and operation of the debtor's business.

Like §§ 1104(a) and 1204(a), § 1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists.²⁰⁷ A potential issue is whether removal of the debtor for failure to perform under a confirmed plan is mandatory if the failure is not material or if the

²⁰⁵ § 1185(a).

²⁰⁶ § 1185(b).

²⁰⁷ § 1185(a).

debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

If the court removes the debtor in possession, the trustee is authorized to operate the business of the debtor²⁰⁸ and has other duties that Section IV(B)(3) discusses.

The removal of a sub V debtor from possession has one significant legal difference from appointment of a trustee in a traditional chapter 11 case.

In a traditional case, § 1121(c)(1) provides that appointment of a trustee terminates the debtor's exclusivity period to file a plan under § 1121(b) and permits the trustee to file a plan. One of the duties of a trustee in a chapter 11 case under § 1106(a)(5) is to file a plan, to file a report of why the trustee will not file a plan, or to recommend conversion or dismissal of the case.

In a subchapter V case, however, § 1121 does not apply, §1181(a), and the debtor thus remains the only party who can file a plan under §1189(a). Moreover, the duties of a sub V trustee upon removal of the debtor in possession do not include the duty to file a plan or report or to recommend conversion or dismissal. §1183(b)(5)

When a sub V trustee after removal of the debtor's possession thinks that confirmation of a reorganization plan is possible, therefore, the trustee will have to convince the debtor to file a satisfactory plan or to amend the petition to eliminate the sub V election so that the case becomes a traditional chapter 11 case in which the trustee may file a plan.

Unless the debtor files a plan that the court confirms or amends the election, or unless the court reinstates the debtor's possession, the case must conclude through either dismissal or

²⁰⁸ § 1183(b)(5).

conversion. One possibility is for the trustee to liquidate the debtor's assets and then seek their distribution through conversion to chapter 7 or a structured dismissal of the case.²⁰⁹

In re Young, 2021 WL 1191621 at *7 (Bankr. D. N.M. 2021), suggested such an alternative. There, the court removed the debtor from possession due to gross mismanagement, bad faith, and dishonesty instead of converting the case on those grounds. The court reasoned that, because the sub V trustee was familiar with the case and might be able to liquidate the estate's assets and make distributions to creditors for a lower fee than a chapter 7 trustee would charge, removal of the debtor in possession was a better option than conversion. *Id.* at 7. The court reserved for a later day the possibility that eventual conversion to chapter 7 might be necessary.

An eventual consequence of removal of the debtor from possession may be the court's revocation of the subchapter V election so that the case proceeds as a traditional chapter 11 case, with the appointment of a trustee to administer it. In *In re National Small Business Alliance*, 2022 WL 2347699 (Bankr. D.C. 2022), the court had spent over a year following its removal from possession trying to confirm a plan. After the court denied the debtor's fifth attempt, the court revoked the debtor's subchapter V election so that the case could proceed as a traditional

²⁰⁹ A so-called "structured dismissal" involves payment of allowed administrative expenses and distributions on allowed claims, followed by dismissal of the case. *See generally*, Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017). The Supreme Court observed in *Jevic Holding Corp.*, *id.* at 979:

[T]he [Bankruptcy] Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a

"hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).

Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." *Ibid.*, n. 973.

chapter 11 case and directed the appointment of a chapter 11 trustee. The court granted this relief based on its determination that neither conversion to chapter 7 nor dismissal of the case for inability to confirm a plan was in the best interest of creditors and the estate.

Although subchapter V does not expressly permit revocation of the election, the court concluded that “the ability to revoke a Subchapter V election is consistent with the Bankruptcy Code [and] the Congressional goals of ensuring that Subchapter V cases provide a quicker reorganization process” and that the revocation option “provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter 11.” *Id.* at *3. The court noted that § 105(a) authorized the revocation because it was “consistent with the right of a debtor to convert the case to another chapter under § 1112(a).” *Id.*

The court concluded that revocation of the subchapter V election, although not expressly authorized, is permissible “in appropriate situations and based upon a totality of the circumstances.” *Id.* at 3.

Revocation of the election is arguably inconsistent with the right of the debtor to control its own destiny under the provisions of subchapter V that permit only the debtor to make the subchapter V election and to file a plan. Nevertheless, the result from the debtor’s standpoint is no different from conversion to chapter 7, in which the debtor also loses control over its assets and operation of its business.

When the debtor is removed from possession, a question arises whether the debtor’s attorney (or any other professional employed by the debtor) is entitled to compensation for services rendered to the debtor after the removal.

The Supreme Court in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023 (2004), ruled that an attorney for a former chapter 11 debtor in possession who provides services

after conversion to chapter 7 is not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney. The same principle applies when a trustee is appointed in a chapter 11 case, thus removing the debtor as debtor in possession.

Subchapter V does not address this issue. If the *Lamie* ruling precludes compensation of a sub V debtor's attorney after removal and the debtor cannot find an attorney to provide counsel without compensation, the debtor will not have a realistic chance of obtaining reinstatement or filing a plan and may not be able to participate effectively in the case.

VI. Administrative and Procedural Features of Subchapter V

Subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. This Part discusses: the elimination of the committee of unsecured creditors (Section VI(A)) and the § 1125(b) disclosure statement (Section VI(B)), unless the court orders otherwise; the mandatory status conference (Section VI(C)); the 90-day deadline for the debtor to file a plan (Section VI(D)), unless the court extends it (Section VI(J)); elimination of U.S. Trustee fees (Section VI(E)); and the modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a) (Section VI(F)).

This Part also discusses: procedures relating to a creditor's § 1111(b) election (Section VI(G)); voting on the plan and confirmation procedures (Section VI(H)); the filing of claims and the fixing of a bar date for the filing of proofs of claim (Section VI(I)); and the debtor's performance of postpetition obligations as lessee under an unexpired lease under § 365(d). (Section VI(K)).

A. Elimination of Committee of Unsecured Creditors

SBRA amended § 1102(a)(3) to provide that a committee of unsecured creditors will not be appointed in the case of a small business debtor unless the court for cause orders otherwise.²¹⁰ Prior to the amendment, § 1102(a)(3) provided for the U.S. Trustee to appoint a committee in a small business case unless the court, for cause, ordered that a committee not be appointed.

The same rule applies in a subchapter V case. The provisions of § 1102,²¹¹ which require the appointment of a committee of unsecured creditors and permit the appointment of other committees, and of § 1103, which states the powers and duties of committees, do not apply in a sub V case unless the court orders otherwise. §1181(b).

Although SBRA eliminates the appointment of a committee of unsecured creditors in both sub V and non-sub V small business cases unless the court orders otherwise, the Interim Rules did not change the requirement of Bankruptcy Rule 1007(d) that a debtor in a voluntary chapter 11 case file a list of its 20 largest unsecured creditors, excluding insiders.

The requirement of the list serves two purposes. First, an objection to the debtor's designation of itself as a small business debtor or to its election of subchapter V²¹² must be served on the creditors on the Rule 1007(d) list under Interim Rule 1020(c). Second, if the court directs the appointment of a committee, the list provides the information that the U.S. Trustee needs to identify the largest unsecured creditors for purposes of selecting committee members from the holders of the largest claims willing to serve under § 1102(b)(1).

²¹⁰ SBRA § 4(a)(11).

²¹¹ The provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).

²¹² See Section III(A).

B. Elimination of Requirement of Disclosure Statement

Section 1125 regulates postpetition solicitation of acceptances or rejections of a plan. It requires that creditors receive “adequate information”²¹³ about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.²¹⁴ The court must hold a hearing on approval of the disclosure statement after at least 28 days’ notice before solicitation of votes on the plan may occur.²¹⁵

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing,²¹⁶ so that solicitation may occur without prior notice and hearing on the disclosure statement.²¹⁷ The hearing on approval of the disclosure statement may be combined with the hearing on confirmation.²¹⁸ In addition, the court in a small business case may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary,²¹⁹ and may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B.²²⁰

In a sub V case, § 1125 is inapplicable unless the court orders otherwise.²²¹ Thus, the debtor need not file a disclosure statement in connection with its plan unless the court requires it. If the court orders that § 1125 apply, the provisions of § 1125(f) apply.

²¹³ Section 1125(a)(1) defines “adequate information” as information that would enable “a hypothetical investor of the relevant class to make an informed judgment about the plan.” § 1125(a)(1).

²¹⁴ § 1125(b).

²¹⁵ FED. R. BANKR. P. 3017(a).

²¹⁶ § 1125(f)(3)(A).

²¹⁷ § 1125(f)(3)(B).

²¹⁸ § 1125(f)(3)(C).

²¹⁹ § 1125(f)(1).

²²⁰ § 1125(f)(2).

²²¹ § 1181(b).

A sub V debtor’s plan must contain certain information that a disclosure statement typically contains, including: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization. §1181(a)(1).

Subchapter V does not require that the plan contain “adequate information,” and it does not provide for prior judicial review of the required information before solicitation of acceptances of the plan. Nevertheless, confirmation of a sub V plan requires that a plan comply with the applicable provisions of § 1129(a),²²² among which are the requirements that a plan²²³ and its proponent²²⁴ comply with applicable provisions of chapter 11 and that the plan be proposed in good faith.²²⁵ These provisions provide the basis for a court to consider whether a debtor’s plan contains the information that § 1181(a) requires. Material or intentional errors or omissions could provide a basis for denial of confirmation.²²⁶

C. Required Status Conference and Debtor Report

Section 105(d) permits, but does not require, the court to convene a status conference in a case under any chapter, on its own motion or on request of a party in interest.²²⁷ Section 105(d) does not apply in a sub V case.²²⁸ Instead, §1188(a) makes a status conference mandatory and requires the court to hold it not later than 60 days after the entry of the order for relief in the case.²²⁹ The court may extend the time for holding the status conference if the need for an

²²² § 1191(a), (b). See Section VIII(A).

²²³ § 1129(a)(1).

²²⁴ § 1129(a)(2).

²²⁵ § 1129(a)(3).

²²⁶ See generally Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 10.

²²⁷ § 105(d).

²²⁸ § 1181(a).

²²⁹ Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

extension is “attributable to circumstances for which the debtor should not justly be held accountable.”²³⁰ Section VI(J) discusses extension of the deadline. The statutory purpose of the status conference is “to further the expeditious and economical resolution” of the case.

Not later than 14 days prior to the status conference, the debtor must file, and serve on the trustee and all parties in interest, a report that “details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.”²³¹ The trustee has the duty to appear and be heard at the status conference.²³²

Subchapter V does not specify any consequences if the status conference does not timely occur or if the debtor fails to file a report. Courts have noted that the deadline for the status conference is a deadline for the court, not the debtor, and that a debtor is not in default until the status conference has been set and the debtor fails to file the report at least 14 days before that date.²³³

A debtor’s unexcused failure to file the report timely or to attend the status conference could be cause for dismissal or conversion of the case under § 1112(b) or denial of confirmation. “Cause” for dismissal includes unexcused failure to satisfy timely any filing or reporting requirement under the Bankruptcy Code, § 1112(b)(4)(F), and the failure to comply with an order of the court, § 1112(b)(4)(E). Confirmation of a subchapter V plan requires compliance by the proponent with applicable provisions of the Bankruptcy Code. § 1129(a)(2). Section VI(D) considers these issues further in the context of a debtor’s failure to file a plan within the 90-day deadline of §1189(a).

²³⁰ § 1188(b).

²³¹ § 1188(c).

²³² New § 1183(b)(3).

²³³ *In re Tibbens*, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re Wetter*, 620 B.R. 243, 252 (Bankr. W.D. Va. 2020).

Neither subchapter V nor the Interim Rules specify how the court schedules the status conference, the agenda for the status conference, or the contents of the debtor's report. The practitioner must consult local rules, orders, and procedures to determine how the bankruptcy judge will address these matters and the judge's expectations about the report and the status conference.²³⁴

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

§1188(a) states only that the purpose of the status conference is “to further the expeditious and economical resolution” of the subchapter V case, and §1188(c) requires only that the report detail “the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.” While some courts are scheduling the status conference without further direction, others have provided more specific instructions.

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

A scheduling order may also outline specific items to be included in the report, which may include one or more of the following: (1) the efforts the debtor has undertaken or will

²³⁴ For example, the New Jersey bankruptcy court has promulgated a mandatory form for the debtor's report, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms. Bankruptcy courts in the District of Maryland, <https://www.mdb.uscourts.gov/content/local-bankruptcy-forms>, and in the Central District of California, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms, have published suggested forms.

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

Regardless of whether the court specifies its requirements with regard to the debtor's report or sets an agenda for the scheduling conference, counsel for the parties should anticipate that the court will be interested in any of these matters that the case involves and that debtor's counsel must ultimately address in connection with plan confirmation. Creditors may use the status conference as an opportunity to obtain information about the financial affairs of the debtor and to articulate their views and concerns about the debtor's operations, prospects for a feasible plan, and other matters.²³⁵

²³⁵ See Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 256, 272-72, 281 (2020).

D. Time for Filing of Plan

Only the debtor may file a plan.²³⁶ The debtor has a duty to do so.²³⁷

The deadline for the sub V debtor to file the plan is 90 days after the order for relief.²³⁸

The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable,²³⁹ the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221.²⁴⁰ Section 1193(a) permits preconfirmation modification of a plan.²⁴¹ Section VI(J) discusses extension of the deadline.

Section 1121(e) requires that a debtor in a small business case file a plan within 300 days of the filing date,²⁴² and § 1129(e) requires that confirmation occur within 45 days of the filing of the plan.²⁴³ These requirements do not apply in a subchapter V case.²⁴⁴ They continue to apply in the case of a small business debtor who does not elect subchapter V.

The schedule for the filing of the plan in a sub V case thus differs from the schedule in a non-sub V small business case in two ways. First, a sub V debtor must file a plan much more promptly than a non-sub V debtor – 90 days instead of 300.²⁴⁵ Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

²³⁶ § 1189(a).

²³⁷ See *supra* note 190.

²³⁸ § 1189(b). Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

²³⁹ *Id.*

²⁴⁰ The court in *In re Trepetin*, 617 B.R. 841, 848-49 (Bankr. D. Md. 2020), found guidance for determining whether to extend the deadline in a chapter 12 case that addressed the issue under § 1221, *In re Gullicksrud*, 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016).

²⁴¹ § 1193(a).

²⁴² § 1121(e).

²⁴³ § 1129(e).

²⁴⁴ § 1181(a).

²⁴⁵ Because of the short time to file a plan, counsel for a sub V debtor should promptly request the court to issue a bar order establishing a deadline for the filing of proofs of claim if the court by local rule or general order has not fixed a deadline for filing proofs of claim in sub V cases.

Subchapter V does not provide any consequences when a debtor does not timely file a plan. Under other provisions of chapter 11, however, a debtor's failure to comply with a plan deadline subjects the debtor to the risks of dismissal of the case, its conversion to chapter 7, or denial of confirmation of a plan.

As in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal under § 1112(b)(4)(J). When cause exists, § 1112(b)(1) states that the court, on request of a party in interest, *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interests of creditors and the estate, unless the court determines that the appointment of a trustee or examiner *under § 1104* is in the best interests of the estate. Because § 1104 does not apply in a subchapter V case,²⁴⁶ § 1112(b)(1) requires the court to convert or dismiss the case if the debtor does not timely file a plan upon request of the sub V trustee, a creditor, or other party in interest.²⁴⁷

Section 1112(b)(2), however, provides an exception to this requirement. It prohibits dismissal or conversion if: (1) the court “finds and specifically identifies unusual circumstances” establishing that conversion or dismissal is not in the best interests of creditors; and (2) the debtor (or other party in interest) satisfies two other requirements, unless the ground for conversion or dismissal is (1) substantial or (2) continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

The first requirement for application of the exception is a reasonable likelihood that a plan will be confirmed within a reasonable time. § 1112(b)(4)(A). The second is that a

²⁴⁶ § 1181(a).

²⁴⁷ *E.g., In re Online King LLC*, 628 B.R. 340, 348 (Bankr. E.D.N.Y. 2021); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 343 (Bankr. S.D. Fla. 2020); *see In re Majestic Gardens Condominium C Association, Inc.*, 2022 WL 789447 at * 2 (Bankr. S.D. Fla. 2022) (Failure to file plan within deadline generally requires dismissal, but court allows debtor's request to amend petition to remove subchapter V election instead of dismissing case).

reasonable justification for the act or omission constituting cause exist and that it be fixed within a reasonable time fixed by the court. § 1112(b)(4)(B).

Under these provisions, a debtor can overcome a motion for dismissal or conversion based on failure to timely file a plan by establishing (1) that conversion or dismissal is not in the best interest of creditors; (2) a reasonable justification for missing the deadline; (3) an ability to cure the omission (preferably by pointing to a plan already filed or a well-founded motion for an extension of the time to do so); and (4) the likelihood of confirmation of a plan within a reasonable time.²⁴⁸

Confirmation of a subchapter plan requires compliance with §§ 1129(a)(1) and (a)(2).²⁴⁹ Paragraph (a)(1) requires that the plan comply with the applicable provisions of the Bankruptcy Code, and paragraph (a)(2) requires that the proponent of the plan comply with the applicable provisions of the Bankruptcy Code.

In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020), the court concluded that the failure to comply with the § 1189(a) deadline for the filing of a plan would preclude confirmation of a plan under §§ 1129(a)(1) and (2). The debtor had elected application of subchapter V in a case filed before subchapter V's effective date, and the plan deadline had already expired. After the court refused to extend the deadline based on the determination that the election to proceed under subchapter V in these circumstances was within the debtor's control, the court dismissed the case because the debtor could not possibly confirm a plan in view of the default.²⁵⁰

²⁴⁸ Dismissal is not necessarily fatal for the debtor. Upon dismissal, the debtor can file another subchapter V case. The provisions of 11 U.S.C. § 362(n) that make the automatic stay inapplicable in a case pending within the previous two years apply only in a "small business case."

²⁴⁹ § 1191(a) (confirmation of a consensual plan); § 1191(b) (cramdown confirmation). See Section VIII(A).

²⁵⁰ Other courts have concluded that the court may extend the deadline for filing a plan (and for the status conference) in these circumstances. See Part XIII.

The court in *In re Tibbens*, 2021 WL 1087260 at *6 (Bankr. M.D.N.C. 2021), reached a contrary conclusion: “Although the failure to timely file a plan constitutes cause for dismissal under § 1112(b)(4)(J), nothing in the Bankruptcy Code suggests that this failure alone is fatal to confirmation.”

The *Tibbens* court noted that the provisions of § 1112(b)(2) that prohibit dismissal or conversion under the circumstances just discussed apply, among other things, when the debtor can establish the likelihood of confirmation. Because Congress permitted a debtor to avoid conversion or dismissal by establishing an ability to confirm a plan, the court reasoned, a failure to comply with plan-filing deadlines does not prevent confirmation. *Tibbens*, 2021 WL 1087260 at *6. The court also concluded that legislative history and cases interpreting §§ 1129(a)(1) and (2) focused on contents of the plan and compliance with disclosure and solicitation requirements, not matters such as failure to comply with a deadline. *Id.* at 7.²⁵¹

The *Tibbens* court permitted a debtor to convert a chapter 13 case, filed after enactment of subchapter V but before its effective date, to chapter 11 after the plan-filing deadline had expired but declined to extend the deadline because delays the debtor caused in the chapter 13 case and failures to comply with directives of the court were within the debtor’s control and were circumstances for which the debtor justly should be held accountable. The issue of dismissal or conversion of the case was not before the court, and the court did not address it.

²⁵¹ The *Tibbens* court cited *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988) (§ 1129(a)(1)); *In re Multiut Corp.*, 449 B.R. 323 (Bankr. N.D. Ill. 2011) (§ 1129(a)(1)); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 423-24 (Bankr. S.D. Tex. 2009) (§ 1129(a)(2)) (“Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125.”); and 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1] (§ 1129(a)(1)) (“[T]he courts have recognized that the complexity of plan confirmation permits notions of ‘harmless error,’ so that technical noncompliance with a provision that does not significantly affect creditor rights will not block confirmation.”).

E. No U.S. Trustee Fees

28 U.S.C. § 1930(a)(6)(A) requires the quarterly payment of U.S. Trustee fees in chapter 11 cases based on disbursements in the case. SBRA amended this subparagraph to except cases under subchapter V from this requirement.²⁵²

F. Modification of Disinterestedness Requirement for Debtor’s Professionals

Section 327(a) permits employment of professionals by a debtor in possession in a chapter 11 case only if, among other things, the professional is a “disinterested person.” A person who holds a claim against the debtor is not a disinterested person under the term’s definition in § 101(14)(A).²⁵³ A disinterested person cannot not have an interest “materially adverse to the interest of the estate.”²⁵⁴

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

New § 1195 addresses this issue in part. It provides that a person is not disqualified from employment under § 327(a) solely because the professional holds a prepetition claim of less than \$ 10,000.²⁵⁵

²⁵² SBRA § 4(b)(3).

²⁵³ § 327(a).

²⁵⁴ § 101(14)(C).

²⁵⁵ § 1195.

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

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

Section 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse.²⁵⁶ If the election is made, the claim is allowed as secured to the extent it is allowed. The election may be made at any time prior to the conclusion of the hearing on the disclosure statement.²⁵⁷ Alternatively, if the disclosure statement is conditionally approved under Bankruptcy Rule 3017.1 and a final hearing on the disclosure statement is not held, the election must be made within the date fixed for objections to the disclosure statement under Bankruptcy Rule 3017.1(a)(2) or another date fixed by the court.²⁵⁸

Interim Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the § 1111(b) election may be made not later than a date the court may fix.²⁵⁹

²⁵⁶ § 1111(b). For a discussion of strategic considerations for creditors regarding the § 1111(b) election, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 25, 275-76 (2020). Section VIII(E) discusses the operation and effect of the § 1111(b) election and how courts have applied it in subchapter V cases.

²⁵⁷ FED. R. BANKR. P. 3014.

²⁵⁸ FED. R. BANKR. P. 3017.1.

²⁵⁹ INTERIM RULE 3017.

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

If the court does not establish a deadline for making the § 1111(b) election, a creditor may nevertheless decide to make the election in response to the filing of the debtor's plan. In *In re VP Williams Trans, LLC*, 2020 WL 5806507 (Bankr. S.D.N.Y. 2020), the court overruled the debtor's objection to the § 1111(b) election in this situation.

The court rejected the debtor's argument that the creditor had to file the election before the filing of the plan, concluding that Bankruptcy Rule 3014 provides for the court to set the deadline. Because no one had asked the court to set a deadline, the court permitted the election, noting that the creditor had filed it before any actions to solicit votes or any steps in contemplation of confirmation had occurred. The court also rejected the debtor's arguments that the creditor had waived its right to make the election by filing a proof of claim that did not invoke § 1111(b). *Id.* at 6.

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

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

must fix the date for transmission of the plan, notice of the time for filing acceptances or rejections, and notice of the hearing on confirmation.²⁶⁰

New Interim Rule 3017.2 provides for the court to establish all these times in a subchapter V case in which the disclosure statement requirements of § 1125 do not apply.²⁶¹

I. Filing of Proof of Claim; Bar Date

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

Rule 3003 does not establish a deadline for filing a proof of claim in any chapter 11 case. Instead, Rule 3003(c) provides that the court “shall fix and may extend the time within which proofs of claim or interest may be filed.”

Many courts have adopted procedures for fixing the bar date for the filing of proofs of claim at the outset of a sub V case. Some include the bar date in the Notice of Chapter 11 Bankruptcy Case that the clerk sends. Others establish the deadline in a separate document, such as a scheduling order or other notice. Lawyers representing creditors in subchapter V cases who are accustomed to the usual practice in chapter 11 cases – the issuance of a separate bar date order – must check local practice to make sure that they know the deadline.

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

An advantage of fixing the bar date as 70 days after the filing date is that it expires before the deadline under § 1189(b) for the debtor to file a plan, which is 90 days after the order for

²⁶⁰ FED. R. BANKR. P. 3017.1.

²⁶¹ INTERIM RULE 3017.2.

relief. If a debtor must know with certainty what the claims in the case are before it can file its plan, the debtor will need to ask the court to extend the time until the bar date has expired. The debtor will have to establish that the need for the extension is “attributable to circumstances for which the debtor should not justly be held accountable” under §1189(b).

The court cannot shorten the time for a governmental unit to file a proof of claim, which is 180 days after the order for relief under § 502(b)(9). Although it would be helpful for tax claims to be filed before the debtor files a plan, this should rarely be an obstacle. Most taxes are self-assessed by the debtor upon filing a return. If the debtor does not know its tax liability, it is unlikely that the taxing authority does either. A debtor might not be able to accurately calculate the exact amount of interest and penalties, but it should know the principal amount.²⁶²

In *In re Wildwood Villages, LLC*, 2021 WL 1784408 (Bankr. M.D. Fla. 2021), plaintiffs in a state court class action sought to file a proof of claim on behalf of the class under Rule 7023 of the Federal Rules of Civil Procedure in the sub V case. The court explained that most courts conclude that class proofs of claim are permissible and that the determination of whether to allow and certify a class claim is within the court’s discretion. *Id.* at *2 & n. 8 (collecting cases). The court rejected the debtor’s argument that class claims should not be permitted in subchapter V cases because it would circumvent Congress’ intent that creditors’ committees should not exist in them. Instead, the court addressed the issue under the traditional analysis of the exercise of the court’s discretion. *Id.* at *4.

²⁶² But see *In re Baker*, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020) (The court noted that the expiration of the time for governmental claims is important because the amount of the claims will affect the drafting of the plan and consideration of its feasibility; this supported granting the debtor an extension of time to file the plan until the bar date had passed.).

Under those principles, the court declined to allow a class claim. *Id.* at *4-7. The court directed the debtor to send a proof of claim form to all of the class members identified in the motion for allowance of a class claim, with notice of the bar date. *Id.* at *7.

The court in *In re Major Model Management, Inc.*, 2022 WL 2203143 (Bankr. S.D.N.Y. 2022), also declined to permit the filing of a class proof of claim based on its analysis of factors that apply in traditional chapter 11 cases.

J. Extension of deadlines for status conference and debtor report and for filing of plan

Section 1188 requires a status conference within 60 days after entry of the order for relief and the filing by the debtor of a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization at least 14 days before the status conference. Section 1189(b) requires the debtor to file a plan within 90 days after the order for relief.

Both provisions state that the times run from the date of the order for relief “*under this chapter.*” Under this language, if a debtor in a chapter 7 or 13 case seeks to convert the case to chapter 11 and elect sub V status, it is arguable that the time periods begin on the date of conversion.

Section 348(a), however, provides that conversion of a case from one chapter to another “does not effect a change in the date of the . . . order for relief.” Courts have therefore ruled that the deadlines are measured from the date of the order for relief in the original case.²⁶³ Part XIII considers extensions of the deadlines in the context of the availability of subchapter V in cases pending before enactment of subchapter V.

²⁶³ *In re Tibbens*, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re Trepetin*, 617 B.R. 841, 844 (Bankr. D. Md. 2020).

The court may extend the deadlines if the need for an extension is “attributable to circumstances for which the debtor should not justly be held accountable.” §§ 1188(b), 1189(b). Courts have noted that the requirement for an extension is more stringent than the “for cause” standard of Bankruptcy Rule 9006(b), which governs extensions generally, and § 1121(d)(1), which permits extension of the exclusivity period for the debtor to file and obtain confirmation of a plan in a traditional chapter 11 case.²⁶⁴

Sections 1188(b) and 1189(b) use the same language to provide for extension of their deadlines as § 1221, which governs extension of the 90-day period for the debtor to file a plan in a chapter 12 case. Courts have, therefore, looked to chapter 12 cases applying § 1221 for guidance in interpreting the identical language in subchapter V.²⁶⁵

The court in *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020), noted that courts and commentators had interpreted § 1221 to permit an extension if the debtor “clearly demonstrates that the debtor’s inability to file a plan is due to circumstances beyond the debtor’s control.”²⁶⁶ The court reasoned that it was appropriate to apply a similar standard to requests for extensions under §§ 1188(b) and 1189(b). *Id.* at 848-49. Other courts have done the same.²⁶⁷

²⁶⁴ *E.g.*, *In re Online King, LLC*, 349 B.R. 340, 349 (Bankr. E.D.N.Y. 2021); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).

²⁶⁵ *E.g.*, *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re Baker*, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020); *In re Trepetin*, 617 B.R. 841, 847-48 (Bankr. D. Md. 2020).

²⁶⁶ *In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020) (quotations and punctuation omitted), *quoting In re Gullicksrud*, 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016) (quoting 7 COLLIER ON BANKRUPTCY ¶ 221.012[2]), *and also citing In re Marek*, 2012 WL 2153648, at *8 (Bankr. D. Idaho 2012), and *In re Raylyn AG, Inc.*, 72 B.R. 523, 524 (Bankr. S.D. Iowa 1987).

²⁶⁷ *E.g.*, *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re Baker*, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).

Courts have taken different approaches to the determination of whether circumstances are “beyond the debtor’s control.” The *Trepetin* court formulated the inquiry as whether the debtor is “fairly responsible” for the inability to comply with the deadline.²⁶⁸ In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 345 (Bankr. S.D. Fla. 2020), however, the court concluded that the language asks whether the need for an extension is due to *circumstances* beyond the debtor’s control, not whether *the debtor* was responsible for the inability to meet the deadlines.

Trepetin and *Seven Stars* involved a debtor’s request to proceed under subchapter V in a case pending prior to its enactment when the deadlines had already expired. The *Trepetin* court concluded that the deadlines could be extended because the debtor was not responsible for the inability to meet the deadlines that had not previously existed. The *Seven Stars* court concluded that the circumstances were entirely within the debtor’s control and that no external factors beyond the debtor’s control contributed to the inability to meet the deadlines.

In *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor’s control and for which the debtor should justly be held accountable. *Id.* at *9.

In re Keffer, 2021 WL 1523167 (Bankr. S.D. W.Va. 2021), also considered a chapter 13 debtor’s request to convert to chapter 11 and elect sub V after the deadlines for the status conference and the filing of a plan had expired. The need for chapter 11 relief arose, the court

²⁶⁸ *Accord, In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020).

explained, after the Internal Revenue Service filed a proof of claim for substantially more than the debtor anticipated, increasing his liabilities above the chapter 13 debt limit and making the debtor ineligible for chapter 13.²⁶⁹

The propriety of conversion, the court explained, turned on whether to extend the deadlines. Without an extension, the debtor's chapter 11 case would be subject to dismissal or conversion to chapter 7 for cause for failure to file a plan timely. *Id.* at *9.

The *Keffer* court concluded that *Trepetin* provided a superior approach to the extension issue and rejected the *Seven Stars* view. *Id.* at *9. Because the debtor had proceeded appropriately in the chapter 13 case, and because the debtor was not aware of the large amount of his tax liability until the IRS filed its proof of claim and therefore did not know that chapter 13 would be unavailable, the court ruled that the debtor was not justly accountable for the circumstances necessitating an extension of the deadlines. *Id.* at *9. The court directed that the deadlines run from the date of its order. *Id.* at *10.

The court in *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. 2020), identified four factors to consider in determining whether to extend the deadline for the filing of a plan: (1) whether the circumstances raised by the debtor were within the debtor's control; (2) whether the debtor had made progress in drafting a plan; (3) whether the deficiencies preventing that draft from being filed were reasonably related to the identified circumstances; and (4) whether any party-in-interest had moved to dismiss or convert the case or otherwise objected to a deadline extension in any way.

²⁶⁹ The court did not address whether chapter 13 eligibility should be determined as of the petition date based on the debtor's schedules, which showed that he was eligible. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 12:8.

Regardless of the standard for extending the deadlines, the debtor must describe the circumstances beyond its control and explain why they preclude the timely filing of a plan. For example, although circumstances such as the Covid-19 pandemic, inclement weather, and the Jewish holidays may constitute acceptable reasons for an extension, they do not warrant an extension when the debtor does not demonstrate how they affected the debtor's ability to meet the deadline.²⁷⁰ Circumstances such as the amount of work required to negotiate and propose a plan and competing demands on the debtors – common to any bankruptcy case – are insufficient to justify an extension.²⁷¹ Similarly, an error in calendaring the deadline for filing a plan may not provide a basis for an extension.²⁷²

The need to resolve disputes concerning the debtor's interests in property before filing a plan may justify extending the deadline,²⁷³ but not if the debtor has failed to show that the dispute could not have been resolved prior to the deadline, what progress the debtor has made proposing a plan, and that its resolution is essential to the plan, even in the absence of any objection to the extension.²⁷⁴

²⁷⁰ *In re Online King, LLC*, 629 B.R. 340, 351-52 (Bankr. E.D. Tex. 2021) (pandemic and Jewish holidays); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at *2 (Bankr. M.D. N.C. 2020) (pandemic and inclement weather preventing inspection of business premises for appraisal).

²⁷¹ *In re Online King, LLC*, 629 B.R. 340, 351 (Bankr. E.D. Tex. 2021).

²⁷² *In re Majestic Gardens Condominium Association, Inc.*, 2022 WL 789447 (Bankr. S.D. Fla. 2022). The court declined to extend the deadline even though the debtor's lawyer filed the plan three days after expiration of the deadline. The court noted that the standard for extension of the plan filing deadline is more stringent than the "excusable neglect" standard of Bankruptcy Rule 9006(b)(1) for extending a deadline after its expiration.

The court allowed the debtor to amend the petition to remove the subchapter V election instead of dismissing the case. It is unclear what dismissal would accomplish in this situation: the debtor could simply re-file another case and promptly file the plan in the new one.

²⁷³ *In re HBL SNF, LLC*, 635 B.R. 725 (Bankr. S.D.N.Y. 2022). The court granted an extension of 60 days rather than 90 as the debtor requested. The court reasoned that the 60-day extension would extend the deadline beyond the date of a scheduled hearing on a motion for summary judgment in an adversary proceeding regarding the debtor's lease of its facility and that the court at that time could assess the status of the case and rule on a further extension request, if necessary. The court observed that its "wait and see" approach is "sometimes used by bankruptcy courts when confronted with contested requests for an extension of a debtor's exclusivity period under Section 1121(d) in a traditional Chapter 11 case." *Id.* at 731.

²⁷⁴ *In re Excellence 2000, Inc.*, 2022 WL 163400 (Bankr. S.D. Tex. 2022).

The court may grant an extension even if the deadline has expired at the time the debtor requests it.²⁷⁵ Nevertheless, the better practice is for the debtor to file a motion for an extension in time to permit the court to schedule a hearing on it before the deadline terminates because the failure to timely file a plan constitutes “cause” for dismissal or conversion of the case under § 1112(b)(4)(J).²⁷⁶

Because subchapter V does not contain a deadline for confirmation of a plan and §1193 permits preconfirmation modification of a plan at any time, a debtor may consider the timely filing of a “placeholder” plan with the expectation of a later modification instead of seeking an extension.²⁷⁷

The court in *In re Baker*, 625 B.R. 27, 38 (Bankr. S.D. Tex. 2020), criticized the strategy as “a waste of time and resources for all parties-in-interest” that “does not represent Congress’s intent” in enacting subchapter V. . . . The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans.”

Stating that “filing a placeholder plan merely to satisfy the statutory plan deadline serves no justiciable purpose, contributes to increased costs, and subverts the intent underlying subchapter V, the *Baker* court announced, *id.* at 38:

²⁷⁵ *E.g.*, *In re Excellence 2000, Inc.*, 2022 WL 163400 (Bankr. S.D. Tex. 2022); *In re Tibbens*, 2021 WL 1087260 at * 8 (Bankr. M.D.N.C. 2021); *In re Online King LLC*, 629 B.R. 340, 350-351 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03.

²⁷⁶ *In re Online King LLC*, 629 B.R. 340, 350-51 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03. See Section VI(D).

²⁷⁷ In *In re Baker*, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020), the court described a “placeholder plan” as “a skeletal document filed to satisfy a filing deadline, with the intent to file a completed, substantive document later.”

[T]his Court disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable.

K. Debtor’s postpetition performance of obligations under lease of nonresidential real property – § 365(d)

Section 365(d)(3) requires the timely performance of all obligations of a debtor that is the lessee under an unexpired lease of nonresidential real property, unless the court for cause extends the time for performance. SBRA did not change § 365(d)(3), but the Consolidated Appropriations Act, 2021 (the “CAA”) enacted a temporary amendment that permits the court to extend the time for performance in subchapter V cases that was effective until December 26, 2022.²⁷⁸

Pre-CAA § 365(d)(3), which remains in effect, redesignated as § 365(d)(3)(A),²⁷⁹ permits the court to extend the time for performance of postpetition obligations arising within 60 days after the order for relief, but not beyond such 60-day period.

The CAA temporarily added subparagraph (B) to § 365(d)(3) to permit an extension of the time for performance in a subchapter V case if the debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”²⁸⁰ Subparagraph (B) permitted extension of the time for performance

²⁷⁸ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020). The CAA also temporarily amended § 365(d)(4). Pre-CAA § 365(d)(4) provided that, if assumption of a lease of nonresidential real property under which the debtor is the lessee did not occur by the earlier of confirmation of a plan or 120 days after the order for relief, the lease was deemed rejected and the trustee (or debtor in possession) must surrender the property to the lessor. The court for cause could extend the time by 90 days, for a maximum time of 210 days. The CAA extended the 120-day period to 210 days and permits extension to a maximum of 300 days. CAA § 1010(f)(1)(B). The extended period sunsets two years after enactment of CAA, or December 26, 2022. CAA § 1001(f)(2)(A)(ii).

²⁷⁹ CAA § 1001(f)(1)(A)(i).

²⁸⁰ CAA § 1001(f)(1)(A)(iii).

to the earlier of 60 days after the order for relief or the date of assumption or rejection of the lease.²⁸¹ In addition, subparagraph (B) permitted the court to extend the time for an additional 60 days if the debtor is continuing to experience a material financial hardship due to the COVID-19 pandemic.

CAA also temporarily added subparagraph (C) to § 365(d)(3). It provided that, if the court extended the time for performance of an obligation under subparagraph (B), the obligation would be treated “as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).”²⁸² Section VII(C) considers this provision in its discussion of §1191(e), which permits deferral of administrative expenses under a cramdown plan.

The amended provisions expire on December 26, 2022.²⁸³ They continue to apply, however, in any subchapter V case filed before the sunset date.²⁸⁴

It is unclear whether a sub V debtor who has not experienced financial hardship due to COVID-19 could seek relief under subparagraph (A). Although subparagraph (B) arguably states the rule for all sub V cases, its apparent purpose is to relax the rule in a subchapter V case for a debtor whose problems arise from the COVID-19 pandemic. A sub V debtor who cannot establish that it has experienced Covid-related financial distress, therefore, should be able to proceed under subparagraph (A).

²⁸¹ This provision in subparagraph (B) differs from subparagraph (A) (the pre-CAA rule in § 365(d)(3)). Subparagraph (A) permits extension of the time for performance for 60 days without regard to whether the lease is assumed or rejected. Subparagraph (B) does not permit extension of time beyond the date of assumption or rejection. Arguably, the purpose of subparagraph (B) is to relax the rules for postpetition performance in a subchapter V case so that a sub V debtor could still seek an extension of time for 60 days to perform postpetition obligations notwithstanding the earlier rejection of a lease.

²⁸² CAA § 101(f)(1)(A)(iii).

²⁸³ CAA § 101(f)(2)(A)(i).

²⁸⁴ CAA § 101(f)(2)(B).

VII. Contents of Subchapter V Plan

The requirements for the contents of a sub V plan are contained in §§ 1122 and 1123²⁸⁵ (with two exceptions) and in §1190. An important provision is that §1190(3) permits modification of a claim secured only by a security interest in real property that is the principal residence of the debtor if the loan arises from new value provided to the debtor's business.²⁸⁶

Section 1122 states rules for classification of claims in a chapter 11 plan, and § 1123 states what provisions a plan must and may have. Two provisions in § 1123 – (a)(8) and (c) – are not applicable in sub V cases.²⁸⁷ A subchapter V plan must comply with the other requirements of §§ 1122 and 1123.

Official Form 425A, which is a permissible, but not required, form for a chapter 11 plan, has been modified and may be used in a subchapter V case. Courts may adopt local forms for subchapter V plans²⁸⁸ or make the use of Official Form 425A mandatory and provide guidance on its preparation.²⁸⁹

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

Section 1123(a)(8) requires the plan for an individual debtor to provide for payment to creditors of all or such portion of earnings from postpetition services or other future income as is necessary for the execution of the plan.²⁹⁰ Section 1123(c) prohibits a plan filed by an entity

²⁸⁵ A plan may include a provision for settlement of a dispute with a creditor over the avoidance of its lien. *E.g.*, *Kopleman & Kopleman, LLP v O'Grady (In re O'Grady)*, 2022 WL 1058379 at *6 (D. N.J. 2022).

²⁸⁶ § 1190(3).

²⁸⁷ § 1181(a).

²⁸⁸ *E.g.*, *Debtor's Chapter 11, Subchapter V Plan* (D. Md.) (suggested), available at <https://www.mdb.uscourts.gov/content/local-bankruptcy-forms>; *Chapter 11 Subchapter V Small Business Debtor's Plan of Reorganization [or Liquidation]* (D. New Jersey) (mandatory), available at http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms; *Plan of Reorganization* (W.D. Wisconsin) (suggested), available at <https://www.wiwb.uscourts.gov/forms>.

²⁸⁹ *E.g.*, *SBRA Plan Instructions*, available at <http://www.canb.uscourts.gov/forms/district>. The full text of a somewhat elaborate subchapter V plan is attached to the confirmation order in *In re Abri Health Services, LLC*, 2021 WL 5095489 at * 11 (Bankr. N.D. Tex. 2021).

²⁹⁰ § 1123(a)(8).

other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.²⁹¹

SBRA replaced § 1123(a)(8) with a disposable income provision applicable to all debtors in §1190, which contains additional provisions for the content of a plan. Section 1123(c) is superfluous in a subchapter V case because only the debtor can propose a plan.²⁹²

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

Section 1190 contains three provisions governing the content of a sub V plan.

First, §1190(1)²⁹³ requires information that would otherwise be included in a disclosure statement. The plan must include: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan.

Second, §1190(2) requires the plan to provide for the submission of “all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” In an individual case, this provision replaces the similar rule in the inapplicable § 1123(a)(8). In non-individual cases, it imposes a new requirement.

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

²⁹¹ § 1123(c).

²⁹² § 1189(a).

²⁹³ No apparent reason exists for using numbers for the subsections of this section instead of the customary lower-case letters.

Section 1190(2) raises interpretive issues regarding the requirement that future income be submitted to the “supervision and control” of the trustee.

If a consensual plan is confirmed under §1191(a), §1194 does not contemplate that the trustee make the payments. Moreover, §1183(c)(1) provides for termination of the trustee’s service upon substantial consummation of a consensual plan under §1191(a). Under § 1101(2)(C), “substantial consummation” occurs upon (among other things²⁹⁴) “commencement of distribution under the plan.” An issue is whether a consensual plan must provide for submission of future income to the trustee’s supervision and control when the trustee’s service will terminate once the first plan payment is made.²⁹⁵

The third content provision in §1190(3) changes the rule of § 1123(b)(5) that a plan may not modify the rights of a claim secured only by a security interest in real property that is the debtor’s principal residence.²⁹⁶ The same antimodification rule applies in chapter 13 cases under § 1322(b)(2).²⁹⁷

Section 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was “not used primarily to

²⁹⁴ Substantial consummation also requires transfer of all or substantially all of the property proposed by the plan to be transferred, § 1101(2)(A) (2018), and assumption by the debtor or by the successor to the debtor of the business or of the management of all or substantially all of the property dealt with by the plan, § 1101(2)(B). Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

²⁹⁵ See Section IX(A).

²⁹⁶ E.g., *Mechanics Bank v. Gewalt (In re Gewalt)*, 2022 WL 305271 (B.A.P. 9th Cir. 2022). The court held that a subchapter V liquidation plan providing for payment of the mortgage from the sale of the debtor’s principal residence within two years, without a provision for current mortgage payments, violated § 1123(b)(5) because it impermissibly modified the mortgage lender’s rights under the Supreme Court’s interpretation of 11 U.S.C. § 1322(b)(2) in *Nobleman v. American Savings Bank*. 508 U.S. 324, 329, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). The court noted that it had reached the same result in a chapter 13 case. *Philadelphia Life Ins. Co. v. Proudfoot (In re Proudfoot)*, 144 B.R. 876, 877-78 (B.A.P. 9th Cir. 1992). The exception in § 1190(3) was not relevant in the case. *Gewalt* at *4 n. 7.

²⁹⁷ For a discussion of the antimodification provision in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 5:39-5:42.

acquire the real property.” Subparagraph (B) requires that the new value have been “used primarily in connection with the small business of the debtor.”²⁹⁸ (Query whether an individual whose debts exceed the limits for qualification as a “small business debtor” under § 101(51D)(A) but who qualifies for subchapter V under the temporary \$ 7.5 million debt limit under the CARES Act meets the requirement in (B) for use of loan proceeds for the debtor’s “small business.”)

Courts have considered whether the prohibition on modification of a residential mortgage applies when the property in which the debtor resides has nonresidential characteristics or uses, usually in chapter 13 cases.²⁹⁹ For example, the property may be a multi-family dwelling that does or can generate rental income or a farm. The debtor may use it for business purposes, or it may include additional tracts or acreage beyond a residential lot.

The issue in such cases is whether the claim is secured by property other than the debtor’s residence. Some courts have ruled that antimodification protection extends to a mortgage secured by any real property that the debtor uses, at least in part, as a residence. Other courts, however, have concluded that the debtor’s use of real property as a residence does not alone mean that the debt is secured only by the debtor’s principal residence, and that a mortgage on property the debtor uses as a residence is subject to modification if the property has sufficient nonresidential characteristics or uses.³⁰⁰

²⁹⁸ § 1190(3). For a discussion of strategies for lenders to consider to preclude application of the subchapter V exception to the anti-modification rule, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 282-83 (2020). Professor Bradley suggests lenders might require more than half of the loan proceeds to be used for personal expenses or that, in the case of a proposed loan secured by a second mortgage, the lender instead pay off the first mortgage and refinance that amount so that most of the loan is not for the business. *Id.*

²⁹⁹ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:42.

³⁰⁰ *Id.*

The court in *In re Ventura*³⁰¹ concluded that application of §1190(3) requires a different analysis. There, an individual operated a bread and breakfast business in her residence through a limited liability company she owned. In her chapter 11 case filed prior to SBRA’s enactment, the court had ruled that she could not modify the mortgage on the property, applying the cases holding that a debtor may not modify a mortgage on property in which she resides even if she uses it for other purposes.

After SBRA’s effective date, the debtor amended her petition to elect application of subchapter V. In addition to permitting her to proceed under subchapter V,³⁰² the court addressed the lender’s contention that she could not invoke § 1190(3) because the proceeds from the mortgage had been used to acquire the property.³⁰³

The *Ventura* court concluded that § 1190(3) specifically permits the modification of a residential mortgage if the conditions of subparagraphs (A) and (B) exist. The questions, therefore, were whether the mortgage proceeds were “not used primarily to acquire the real property” (§1190(3)(A)) and were “used primarily in connection with the small business of the debtor” (§1190(3)(B)).³⁰⁴

The court focused on two terms in subparagraph (A). “Primarily,” the court said, means “for the most part,” “of first importance,” or “principally,” rather than “substantial.” The phrase “real property,” the court continued, refers back to the real property that is the debtor’s residence.³⁰⁵

³⁰¹ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev’d on other grounds sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

³⁰² *Id.* at 7-14. Part XIII discusses the court’s ruling on the availability of subchapter V in the case.

³⁰³ The lender also argued that § 1190(3) could not be applied to a transaction arising prior to its effective date. Part XIII discusses the court’s ruling rejecting this contention.

³⁰⁴ *In re Ventura*, 615 B.R. 1, 23 (Bankr. E.D.N.Y. 2020), *rev’d on other grounds sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

³⁰⁵ *Id.* at 24.

Based on these definitions, the court phrased the question of subparagraph (A)’s application in the case before it as “whether the Mortgage proceeds were used primarily to purchase the Debtor’s Residence.”³⁰⁶ The inquiry thus differs from the issue under § 1123(b)(5) (and § 1322(b)(2) in chapter 13 cases) that, under the court’s prior ruling, prohibited modification of the mortgage because the debtor resided in the property, regardless of its other uses. §1190(3), the court explained, “asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor’s residence.”³⁰⁷

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

The *Ventura* court concluded that subparagraphs (A) and (B) directed it “to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor’s business activities.”³⁰⁸

The court proposed five factors to consider in this analysis: “(1) Were the mortgage proceeds used primarily to further the debtor’s business interests; (2) Is the property an integral part of the debtor’s business; (3) The degree to which the specific property is necessary to run the business; (4) Do customers need to enter the property to utilize the business; and (5) Does the business utilize employees and other businesses in the area to run its operations.”³⁰⁹

The court found that the debtor bought the property to operate it as a bed and breakfast, that its primary purpose was the offering of rooms for nightly fees, that the debtor’s LLC provided additional services to guests for additional fees, and that the mortgage proceeds were

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 25.

used to purchase the building that houses the business. The court ruled that the evidence was sufficient to hold a full evidentiary hearing to determine whether the debtor could use § 1190(3) to modify the mortgage.³¹⁰

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

C. Payment of Administrative Expenses Under the Plan

If the court confirms a plan under the cramdown provisions of § 1191(b), § 1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date.³¹¹ Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 502(f).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of the trustee and of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.³¹²

³¹⁰ *Id.*

³¹¹ § 1191(e).

³¹² The permission to pay these priority claims “through the plan” without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. See Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 15-16.

In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 347 n. 82 (Bankr. S.D. Fla. 2020), the court observed that a sub V plan cannot provide for the deferred payment of postpetition rent obligations under a lease of nonresidential real property.

The *Seven Stars* court agreed that § 1191(e) permits deferred payment of administrative expense claims allowed under § 503(b). It concluded, however, that § 365(d)(3), not § 503(b), governs postpetition rent obligations. The court ruled, “As such, even though new Section 1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent.” *Id.* Even if the court permitted the debtor to proceed under subchapter V in its case that began prior to its enactment, the court ruled, it could not confirm a plan that did not provide for full payment of postpetition rent on the effective date of the plan in accordance with earlier orders of the court.

The Consolidated Appropriations Act, 2021 (the “CAA”)³¹³ made temporary changes to § 365(d) dealing with the timely performance of the debtor’s postpetition obligations as lessee under an unexpired lease of nonresidential real property. As Section VI(K) discusses, the temporary amendment added subparagraph (B) to § 365(d)(3) to permit the court to extend the time for the performance of such obligations for up to 120 days in a sub V case if it determined that the debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”³¹⁴

Importantly, CAA also added subparagraph (C) to § 365(d)(3) to provide that, if the court granted such an extension, the obligation “shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).”³¹⁵

³¹³ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020).

³¹⁴ § 365(d)(3)(B), as enacted by CAA § 1001(f)(1)(A)(iii).

³¹⁵ § 365(d)(3)(C), as enacted by CAA § 1001(f)(1)(A)(iii).

The provisions expire on December 26, 2022³¹⁶ but continue to apply in any subchapter V case filed before then.³¹⁷

Because temporary § 365(d)(3)(C) requires treatment of a deferred postpetition lease obligation as an administrative expense for purposes of § 1191(e), it seems that, notwithstanding the *Seven Stars* analysis, a cramdown plan may provide for the deferral of payment of obligations that the court extends. The difficulty with the conclusion is that subparagraph (B) still requires that the court order performance of postpetition obligations within no more than 120 days after the order for relief.

Arguably, a debtor who has not complied with the mandatory requirement of § 365(d)(3)(B) has not satisfied the confirmation requirement of § 1129(a)(2) that the plan proponent comply with all applicable provisions of the Bankruptcy Code. Courts will have to determine whether temporary § 365(d)(3)(C) grants permission to defer payments that the debtor had the obligation to make within the time that § 365(d)(3)(B) requires.

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

1. Review of confirmation requirements in traditional chapter 11 cases and summary of changes for subchapter V confirmation

In a traditional chapter 11 case, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met in a traditional case except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits

³¹⁶ CAA § 1001(f)(2)(A).

³¹⁷ CAA § 1001(f)(2)(B).

so-called “cramdown” confirmation “if the plan does not discriminate unfairly, and is fair and equitable,” with regard to each impaired class that has not accepted it.³¹⁸ Section 1129(b)(2) states the rules for the “fair and equitable” requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)).³¹⁹

The effects of confirmation in a traditional case do not differ depending on whether cramdown confirmation under § 1129(b) occurs.

Section 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual if an unsecured creditor invokes it.³²⁰ Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.³²¹

If all the applicable requirements in § 1129(a) are met in a sub V case except for the projected disposable income rule of paragraph (a)(15), § 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.³²² This paper refers to it as a “consensual plan.”

³¹⁸ § 1129(b)(1).

³¹⁹ § 1129(b)(2).

³²⁰ § 1181(a). For cases applying the applicable § 1129(a) standards, see *In re Hyde*, 2022 WL 2015538 (Bankr. E.D. La. 2022); *In re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020); *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020). See also *In re BCT Deals, Inc.*, 2022 WL 854473 (Bankr. C.D. Cal. 2022) (Court entered confirmation order on debtor’s motion for confirmation in accordance with local rule without a hearing based on absence of opposition to motion after notice of opportunity to object).

³²¹ INTERIM RULE 1007(b).

³²² § 1191.

Section 1191(b) states the rules for cramdown confirmation in sub V cases. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case.³²³ In general, § 1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)).

The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims remain applicable in a sub V case.³²⁴

Importantly, both consensual confirmation and cramdown confirmation require compliance with all requirements of § 1129(a) except those specifically mentioned above. Sections VIII(D) and (E) discuss confirmation issues that have arisen in subchapter V cases under provisions that SBRA did not change.

Cramdown confirmation under § 1191(b) does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as Section VIII(B) discusses.

For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* do not accept the plan. Unless a class consists of only one creditor, a single creditor cannot invoke the projected disposable income requirement, which a

³²³ § 1181(a).

³²⁴ § 1191(c)(1).

single creditor can do in a traditional case even if all impaired classes accept the plan.³²⁵ Section VIII(D)(8) discusses application of the good faith requirement of § 1129(a)(3) in the context of confirmation of a consensual plan when an unsecured creditor objects because the debtor is not paying enough disposable income to creditors.

Official Form B315 contemplates a short confirmation order that identifies the plan and recites that all requirements for confirmation have been met. As in many traditional chapter 11 cases, however, courts in subchapter V cases have entered lengthy and detailed confirmation orders with extensive findings of fact and conclusions of law, even in the absence of objections to confirmation.³²⁶

2. Differences in requirements for and consequences of consensual and cramdown confirmation

In a subchapter V case, the effects of confirmation differ depending on whether confirmation occurs under §1191(a) (where all classes have accepted it) or under §1191(b) (where one or more – or even all – classes have not accepted it).³²⁷

Some effects of consensual confirmation are more advantageous to a debtor – particularly an individual – than the effects of cramdown confirmation. Some effects of cramdown confirmation, however, are more advantageous than consensual confirmation.

³²⁵ § 1129(a)(15). One may view the projected disposable income requirement for cramdown confirmation as protection for a dissenting class of unsecured creditors that substitutes for the inapplicable absolute priority rule. *See In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020). In absolute priority rule theoretical terms, it recognizes “sweat equity” (i.e., future income) as “new value” that permits equity owners to retain their interests. The inability of a single creditor to invoke the projected disposable income rule is consistent with the inability of a single creditor to invoke the absolute priority rule under § 1129(b); both apply only if a class does not accept.

³²⁶ *E.g.*, *In re North Richland Hills Alamo, LLC*, 2022 WL 2134976 (Bankr. N.D. Tex. 2022); *In re Roundy*, 2021 WL 5428891 (Bankr. D. Utah 2021). *In re Abri Health Services, LLC*, 2021 WL 5095489 (Bankr. N.D. Tex. 2021); *In re Triple J Parking*, 2021 Bankr. Lexis 2304 (Bankr. D. Utah 2021).

³²⁷ Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (Part IX); compensation of the trustee (Section IV(E)); deferral of administrative expenses (Section VII(C)); postconfirmation modification of the plan (Section VIII(C)); discharge (Part X); contents of property of the estate (Part XI); and postconfirmation default and remedies (Part XII).

In addition, cramdown confirmation imposes different requirements that provide opportunities for creditors to object to confirmation. Resolution of the objections may require an evidentiary hearing that exposes the debtor to uncertainty and additional legal fees and other expenses required for the debtor to prepare for trial and to prevail.

Counsel for a subchapter V debtor must understand these differences in proposing a plan and engaging in negotiations about it with creditors and the sub V trustee, who must also understand them to fulfill the duty to facilitate a consensual plan.³²⁸

Differences in requirements for confirmation

Whether consensual or cramdown confirmation occurs, confirmation in a sub V case requires satisfaction of all the applicable confirmation requirements of § 1129(a) except for acceptance by all impaired classes (§ 1129(a)(8) and (a)(10)), and, in an individual case, compliance with the projected disposable income requirement of § 1129(a)(15).

Consensual confirmation of a sub V plan under § 1191(a) requires acceptance by all impaired classes, as § 1129(a)(8) mandates. (This necessarily means that the plan complies with § 1129(a)(10), requiring acceptance by at least one class of claims.)

If one or more classes of impaired claims do not accept the plan, cramdown confirmation under § 1191(b) requires that the plan not discriminate unfairly and that it be “fair and equitable” under the provisions of § 1191(c), as Section VIII(B) discusses.

Section 1191(c)(1) requires treatment of a secured claim in compliance with § 1129(b)(2)(A), which applies in a traditional chapter 11 case.³²⁹ Because the typical method for meeting this requirement is periodic payments with a value equal to the value of the

³²⁸ See *In re Louis*, 2022 WL 2055290 (Bankr. C.D. Ill. 2022).

³²⁹ See Section VIII(B)(2).

encumbered property, compliance with this requirement may require an evidentiary hearing with regard to the property's value and the proposed rate of interest.

Section 1191(c)(2) requires compliance with the projected disposable income requirement, which Section VIII(B)(4) discusses. Determination of the issues may require an evidentiary hearing with regard to the amount of the projected disposable income and the period over which the debtor must pay it.

Finally, § 1191(c)(3) requires the court to find either that the debtor will be able to make payments under the plan or that it is reasonably likely that the debtor will do so. If the court determines that it is reasonably likely that the debtor will make plan payments, the plan must also include "appropriate remedies. Section VIII(B)(5) explains these provisions. Resolution of an objection based on the debtor's ability to make plan payments may, like other cramdown issues, require an evidentiary hearing.

Different consequences of consensual and cramdown confirmation

In a subchapter V case, the effects of confirmation differ depending on whether consensual or cramdown confirmation occurs. Section VIII(A)(3) discusses the advantages and disadvantages for the debtor of consensual or cramdown confirmation based on these differences.

Discharge. Discharge occurs immediately upon confirmation of a consensual plan. Discharge does not occur after cramdown confirmation until the debtor completes payments under the plan. A cramdown discharge does not discharge debts on which the last payment is due after the three to five year term of the plan. In the case of any entity, courts disagree about whether a debt excepted from discharge under § 523(a) is excepted from a cramdown discharge,

as they are in an individual case regardless of the type of discharge. Part X discusses these issues.

Property of the estate. Unless the confirmation order or plan provides otherwise, confirmation of a consensual plan vests property of the estate in the debtor, whereas cramdown confirmation results in the retention of property of the estate in the debtor. Moreover, after cramdown confirmation, property of the estate includes property that the debtor acquires after the filing of the petition and postpetition earnings. See Part XI.

Payments under the plan. When cramdown confirmation occurs, the sub V trustee makes payments under the plan, unless the confirmation order or plan provides otherwise. Under a consensual plan, the debtor makes payments. See Part IX.

Termination of services of subchapter V trustee. If the court confirms a consensual plan, the services of the trustee terminate upon the plan's substantial confirmation. In the cramdown situation, the subchapter V continues to serve as trustee. See Part IX.

Deferral of payment of administrative expenses. The debtor may pay administrative expenses, such as compensation for the subchapter V trustee and the debtor's attorneys and other professionals, if the court confirms a plan under the cramdown provisions. A consensual plan cannot defer administrative expenses without the agreement of the administrative expense claimant. See Section VII(C).

Postconfirmation modification of the plan. After substantial consummation of a consensual plan, the debtor may not modify it. The debtor may modify the plan after confirmation under the cramdown provisions within three to five years after confirmation, as the court determines. See Section VIII(C).

The type of confirmation also affects the remedies available to creditors upon postconfirmation default, as Part XII discusses.

3. Benefits to debtor of consensual or cramdown confirmation

Two features of subchapter V reflect a policy of encouragement of consensual plans. One is the unique duty of a subchapter V trustee in § 1183(b)(7) to “facilitate the development of a consensual plan of reorganization.”³³⁰ The other is the requirement in § 1188(c) that the debtor file a report prior to the mandatory status conference that “details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.”

A strategic question is whether the debtor wants consensual confirmation.³³¹ Cramdown confirmation is advantageous to the debtor in one important way: a debtor may seek postconfirmation modification of a confirmed cramdown plan even if it has been substantially consummated, but a debtor cannot modify a confirmed consensual plan after substantial consummation.³³²

A debtor who faces default after cramdown confirmation because of unanticipated postconfirmation business conditions (for example, a material decrease in income or unexpected expenses) may thus seek postconfirmation modification to deal with the issue, but a debtor operating under a confirmed consensual plan cannot. Moreover, a debtor may need to modify a plan for other reasons necessary for or helpful to its business or financial condition.³³³

³³⁰ See Section IV(B)(1).

³³¹ For a discussion of the advantages of consensual confirmation in an individual case, see *In re Louis*, 2022 WL 2055290 at * 14-16 & nn. 11, 12 (Bankr. C.D. Ill. 2022).

³³² See Section VIII(C). Section VIII(C)(1) discusses substantial consummation.

³³³ The debtor in *In re National Tractor Parts, Inc.*, 2022 WL 2070923 (Bankr. N.D. Ill. 2022), sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVID-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA’s claim as a general unsecured claim, payable in quarterly payments.

Because postconfirmation modification may be necessary for or helpful to the debtor's postconfirmation success, a debtor may want to preserve the flexibility of postconfirmation modification through cramdown, rather than consensual, confirmation.

Another potential advantage of cramdown confirmation is that postconfirmation payment of administrative expenses, usually compensation of the subchapter V trustee and the debtor's attorney and other professionals, is permissible in a cramdown plan under § 1191(3).³³⁴ As a practical matter, however, it is likely that the same result can occur under a consensual plan.

If the debtor has proposed a feasible plan that all impaired classes have accepted but does not have the ability to pay administrative expenses in full on its effective date, the subchapter V trustee and debtor professionals will be hard-pressed to thwart confirmation of a consensual plan by insisting on immediate payment in full. The facts that deferral can happen anyway through cramdown confirmation and that the trustee and the debtor are charged with achieving consensual confirmation should lead to their agreement to deferred payment so that the plan complies with § 1129(a)(9)(A).

Several consequences of consensual confirmation are more beneficial to a debtor than cramdown confirmation. Some of these advantages may be achievable through a cramdown plan

The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made *de minimis* payments totaling \$ 1,428.20 to creditors in two classes but had not yet made a \$ 50,000 payment to a creditor in another class or begun quarterly payments to generally unsecured creditors.

The court held that commencement of payments occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

³³⁴ See Section VIII(B)(6).

or may be relatively unimportant. Two of them that a cramdown plan cannot deal with, however, are important – one for individual debtors and one for entity debtors.

In an individual case, an important consequence of cramdown confirmation is that property of the estate under § 1186(a) includes property that the debtor acquires after the filing of the petition and postpetition earnings. This means that, if conversion to chapter 7 occurs after confirmation, the chapter 7 estate includes postpetition property and earnings.³³⁵ The result is the same in a traditional chapter 11 case.³³⁶ Section 1186(a), however, does not apply if consensual confirmation occurs, so an individual debtor retains postpetition property and earnings upon conversion of a case after consensual confirmation.³³⁷

This difference is not important in the case of an entity because the distinction between postpetition and prepetition assets and earnings is immaterial.³³⁸

In the case of an entity, the critical advantage of consensual confirmation is that it is clear that the exceptions to discharge in § 523(a) do not apply. Upon confirmation of a consensual plan, an entity receives a discharge under § 1141(d)(1), and the exceptions to discharge under § 523(a) apply only to an individual under § 1141(d)(2).³³⁹

Cramdown confirmation, however, results in a discharge under § 1192. Section 1192 does not discharge debts “of the kind” specified in § 523(a), which states that a § 1192 discharge does not discharge an “individual debtor” from any of the specified debts. Courts disagree about whether the § 523(a) exceptions apply to the discharge of an entity under § 1192.³⁴⁰

³³⁵ See Section XI(B)(2).

³³⁶ See Section XI(A).

³³⁷ See Section XI(B)(2).

³³⁸ See Section XI(B)(1).

³³⁹ See Section X(A).

³⁴⁰ See Section X(D).

Note that an entity can achieve this advantage of consensual confirmation only if the claim of the creditor asserting an exception to discharge (1) is not in a separate class; and (2) is not so large that the creditor controls acceptance of the class in which it is placed. Rejection by a creditor in a separate class prevents consensual confirmation. If the creditor is in a class with other creditors, such as the class of general unsecured claims, its rejection of the plan can prevent confirmation if the amount of its claim is more than one-third of the amount of all the claims in the class that vote.

Although provisions in a plan or confirmation order cannot provide these advantages in a cramdown situation, they can provide other advantages that automatically accompany consensual confirmation.

Confirmation of a consensual plan results in termination of the sub V trustee's services upon "substantial consummation" and distributions to creditors by the debtor.³⁴¹ The sub V trustee continues to serve after cramdown confirmation and makes payments under the plan, unless the plan or confirmation order provides otherwise.³⁴² The postconfirmation role of the sub V trustee and the trustee's disbursement of funds requires compensation of the trustee, which increases expenses in the case.

This may not matter to the debtor. A carefully drafted plan will provide for the trustee's compensation to be paid from the debtor's plan payments. If so, creditors effectively bear the burden of the trustee's compensation, not the debtor.

For this reason, creditors may support or even encourage payment by the debtor rather than the trustee. Moreover, the sub V trustee may prefer to avoid the ministerial duty of making

³⁴¹ See Section IX(A).

³⁴² See Section IX(B).

disbursements. In short, parties opposed to confirmation of a cramdown plan may nevertheless have no objection to provisions of a plan or confirmation order for the debtor to make disbursements.

Two differences in the consequences of confirmation relating to the discharge may be somewhat less important to the debtor. One difference is that discharge occurs upon confirmation of a consensual plan under § 1141(d)(1)³⁴³ but not until completion of payments after three to five years, as fixed by the court, upon cramdown confirmation under § 1192.³⁴⁴ The other is that debts on which the last payment is due after the three-to-five year period are not discharged under the cramdown discharge under § 1192(1). These differences may be of more concern to an individual debtor than to an entity.³⁴⁵

A significant advantage of consensual confirmation is that the projected disposable income and feasibility components of the fair and equitable rule do not apply. The debtor therefore does not face litigation over those and other potential issues that may arise in cramdown confirmation, such as valuation of a secured creditor's collateral and the appropriate interest rate. Consensual confirmation thus eliminates uncertainty about confirmation and the expense of litigating cramdown issues.

These benefits are potentially achievable in the cramdown context.

A plan under § 1190(1)(C) must in any event include projections with regard to the debtor's ability to make payments as proposed. In many cases it is likely that creditors or the subchapter V trustee will expect commitment of the equivalent of projected disposable income as

³⁴³ See Section IX(A).

³⁴⁴ See Section IX(B).

³⁴⁵ See *In re Louis*, 2022 WL 2055290 at *14 nn. 11, 12 (Bankr. C.D. Ill. 2022) (Noting that discharge occurs immediately upon confirmation in consensual plan and that long-term mortgage debts to be paid by owners of property rather than debtor may not be included in cramdown discharge.).

a condition for support of a consensual plan. If the debtor has addressed the amount of payments to be made to creditors satisfactorily to the sub V trustee and creditors active in the case, projected disposable income, as well as feasibility, may not be significant issues at confirmation.

Similarly, negotiations with secured creditors may result in settlement of valuation and interest rate issues.

Thus, it is possible that careful drafting of the plan, negotiations with objecting parties, and the resolution of objections to confirmation through modification of the plan to address them can result in cramdown confirmation without objection – what might be called “consensual nonconsensual confirmation.” If objections cannot be resolved such that the debtor must litigate them, it is unlikely that consensual confirmation would be possible anyway.

In summary, the primary advantage of cramdown confirmation is the availability of postconfirmation modification. For an individual, the primary disadvantage of cramdown confirmation is the inclusion of postpetition property and earnings as property of the estate if the case later converts to chapter 7.

4. Whether balloting on plan is necessary

Balloting on the plan is obviously necessary if the debtor wants to achieve consensual confirmation under § 1191(a) because all classes of impaired creditors must accept the plan to meet the confirmation requirement of § 1129(a)(8).

When the debtor expects that at least one class of claims – typically a major secured lender in its separate class – will not accept any plan that the debtor can realistically propose, or when the debtor wants cramdown rather than consensual confirmation based on its evaluation of the consequences just discussed, the question is whether balloting is required.

As Section VIII(A)(3) discusses, subchapter V contemplates efforts to achieve a consensual plan by imposing a duty on the sub V trustee to facilitate development of a consensual plan and by requiring the debtor to report at the status conference on the efforts that it has undertaken and will undertake to attain a consensual plan. Courts have been critical of sub V trustees and attorneys for debtors who have not attempted to achieve confirmation of a consensual plan.³⁴⁶

Subchapter V's emphasis on consensual confirmation supports a conclusion that balloting should ordinarily be required and that the debtor should at least try to obtain consensual confirmation. Nevertheless, circumstances may exist where doing so would be a fruitless exercise that does not justify the time and expense of doing so.

One such circumstance arises when a creditor with the ability to prevent consensual confirmation of a plan clearly intends to do so. Because even acceptance by all other impaired classes will not result in consensual confirmation, no legal reason exists for asking them to vote.

A debtor who expects acceptances from other classes, however, may find it advantageous to go through the balloting exercise.

As an initial matter, balloting even in the face of expected rejection eliminates the need for the debtor to explain why balloting should not be required and the efforts it has undertaken to negotiate with the creditor. It shows that the debtor is trying and lets the court see the effort.

In addition, it is always possible that, once the plan is filed, and maybe even after the creditor has rejected it, the creditor may re-evaluate its position and be amenable to further

³⁴⁶ See, e.g., *In re Louis*, 2022 WL 2055290 (Bankr. C.D. Ill. 2022); *In re 218 Jackson LLC*, 631 B.R. 937 (Bankr. M.D. Fla. 2021). In *Louis*, the court observed that the subchapter V trustee had an “absolute duty” to work with the debtor, the debtor’s attorney, and creditors to try to achieve consensual confirmation of a plan. *Louis*, 2022 WL 2055290 at * 18.

negotiations that will resolve its issues. If all other class have accepted the plan, the creditor's acceptance may permit consensual confirmation.

Moreover, acceptance by other creditors may as a practical matter be helpful in convincing the court to confirm a cramdown plan. If cramdown confirmation issues are close calls, a court may be sympathetic to resolving them in favor of confirmation when other creditors have accepted the plan.

The issue is more difficult when the debtor does not want consensual confirmation. It is arguable that the good faith requirement precludes cramdown confirmation when the debtor has not attempted confirmation of a consensual plan.³⁴⁷ It would seem, however, that a debtor's good faith efforts to propose a plan that meets cramdown requirements and that resolves objections of the subchapter V trustee and creditors should satisfy the good faith requirement and permit cramdown confirmation, if that is the type of confirmation that the debtor has determined is in the debtor's best interests. Cramdown confirmation of a plan without balloting that draws no objections or that is modified to resolve them by agreement – a “consensual nonconsensual plan” – is consistent with subchapter V's objectives.

5. Final decree and closing of case

The type of confirmation affects the timing of the entry of a final decree and the closing of the subchapter V case. Section 350(a) provides for the closing of a case “after an estate has been fully administered and the court has discharged the trustee.” Bankruptcy Rule 3022 implements § 350 in a chapter 11 case by providing, “After an estate is fully administered in a

³⁴⁷ See *In re Louis*, 2022 WL 2055290 at *16 (Bankr. C.D. Ill. 2022) (“This Court interprets the provisions of Chapter 11 Subchapter V to require at least some attempt at consensual confirmation for a plan to be put forth in good faith.”).

chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.”

Full administration of a case necessarily includes entry of the discharge and discharge of the trustee.

If the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation,³⁴⁸ and the subchapter V trustee’s services are terminated upon substantial consummation³⁴⁹ of the plan.³⁵⁰ Full administration of a subchapter V case, therefore, may ordinarily occur shortly after confirmation of a consensual plan.

In the cramdown context, in contrast, discharge does not occur until completion of payments under the plan,³⁵¹ and the trustee continues to serve until that time.³⁵² Full administration cannot occur until three to five years after confirmation, depending on the period during which the debtor must make payments.³⁵³

Accordingly, whereas the court may enter a final decree and close a subchapter V case shortly after confirmation of a consensual plan, entry of a final decree and closing of the case after cramdown confirmation must await the completion of plan payments.³⁵⁴

The fact that the subchapter V case after cramdown confirmation must remain open pending completion of plan payments may prompt a debtor to request “administrative closing” of the case to reduce the costs of administration after confirmation and before closing of the case.

³⁴⁸ See § X(A).

³⁴⁹ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

³⁵⁰ See § IV(D)(1).

³⁵¹ See § X(B).

³⁵² See § IV(D)(1).

³⁵³ See § VIII(D)(4)(ii).

³⁵⁴ See *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at *3-5 (Bankr. D. P.R. 2022).

The court denied the debtor’s request to administratively close a subchapter V case in *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 (Bankr. D. P.R. 2022). The court concluded that a case can be closed only when it is fully administered and that the debtor’s concerns about administrative costs were unfounded because the debtor was exempt from paying US. Trustee fees³⁵⁵ and because its duty to file reports under § 308³⁵⁶ and Bankruptcy Rule 2015 terminated upon confirmation. *Id.* at *8.³⁵⁷ See also *id.* at * 6.

B. Cramdown Confirmation Under §1191(b)

1. Changes in the cramdown rules and the “fair and equitable” test

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

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan.³⁵⁸ Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.³⁵⁹

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

³⁵⁵ The court discussed cases dealing with administrative closing of traditional chapter 11 cases of individuals (in which discharge is deferred until completion of payments under the plan) in view of the burden on an individual debtor of paying U.S. Trustee fees for a lengthy time after confirmation if the case remained open. *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at *5-8 (Bankr. D. P.R. 2022).

³⁵⁶ Although § 308 applies only in a small business case, § 1187(b) requires a subchapter V debtor to comply with it.

³⁵⁷ Interim Bankruptcy Rule 2015(a)(6) provides that the duty to file periodic reports in a chapter 11 small business case terminates on the effective date of the plan. Interim Bankruptcy Rule 2015(b) requires a subchapter V debtor to perform the duties prescribed in (a)(6).

³⁵⁸ § 1129(a)(8).

³⁵⁹ § 1129(a)(10).

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

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).³⁶⁰ In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.³⁶¹

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.³⁶² Instead, §1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.³⁶³ Section 1191(c) states a new “rule of construction” for the requirement that a plan be “fair and equitable.”³⁶⁴ It replaces the “fair and equitable” requirements of §1129(b), which do not apply in a subchapter V case.

The debtor may invoke §1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, §1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income test applicable to all debtors.³⁶⁵

³⁶⁰ § 1129(b)(2)(B).

³⁶¹ See 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d]. For competing views of whether the absolute priority rule should apply in a traditional case of an individual, see Brett Weiss, *Absolute-Priority Rule Should Not Apply in Individual Cases*, 40-May AMER. BANKR. INST. J. 20 (2021), and Emily C. Eggmann and Robert E. Eggmann, *Absolute-Priority Rule Should Apply in Individual Chapter 11 Cases*, 40-May AMER. BANKR. INST. J. 21 (2021).

³⁶² § 1181(a).

³⁶³ § 1191(b).

³⁶⁴ § 1191(c).

³⁶⁵ § 1191(d).

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

It does not appear that subchapter V effects any change in the unfair discrimination requirement.³⁶⁶ Section 1191(c) does, however, provide a new “rule of construction” in subchapter V cases for the condition that a plan be “fair and equitable,” to replace the detailed definition of that term that § 1129(b) contains.

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

2. Cramdown requirements for secured claims

Subchapter V does not change existing law about permissible cramdown treatment of secured claims. With regard to a class of secured claims, a subchapter V plan is “fair and equitable” under § 1191(c)(1) if it complies with the standards for secured claims stated in § 1129(b)(2)(A).

Subchapter V does limit the ability of a partially secured creditor with an unsecured deficiency claim to block cramdown confirmation. In a traditional chapter 11 case, an undersecured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a traditional case because of the absence of an accepting impaired class of claims,

³⁶⁶ See Section VIII(D)(1).

which § 1129(a)(10) requires.³⁶⁷ This requirement is inapplicable for cramdown confirmation in a sub V case under §1191(b).

In addition, the creditor in a sub V case cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

Section 1129(b) states different requirements for cramdown confirmation for secured and unsecured claims. Compliance with the absolute priority rule, for example, is not a requirement for confirmation of a plan over a secured creditor’s objection if the unsecured class accepts the plan. The absolute priority rule arises from cramdown requirements relating to unsecured claims in § 1129(b)(2)(B), but it is not in the requirements for cramdown of a secured claim in § 1129(b)(2)(A).

In a sub V case, paragraph (1) of § 1191(c) makes the § 1129(b)(2)(A) cramdown requirements applicable to secured claims, and paragraphs (2) and (3) impose additional requirements, the commitment of disposable income and a finding of feasibility.

It is unclear whether the additional requirements apply when only the secured creditor rejects the plan. Without discussing the issue, the court in *In re Pearl Resources, LLC*, 622 B.R. 236, 267-70 (Bankr. S.D. Tex. 2020), concluded that the plan, accepted by unsecured creditors, complied with the additional requirements in confirming the plan over the objections of secured creditors.

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

Section 1191(c) does not state a “fair and equitable” rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the

³⁶⁷ § 1129(a)(10).

“best efforts” test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.³⁶⁸

Section 1191(c) states that the “fair and equitable” requirement *includes* the factors just mentioned. A plan may also not meet the requirement if it proposes to pay a secured creditor more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.³⁶⁹

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

The projected disposable income (or “best efforts”) requirement is in §1191(c)(2).³⁷⁰ Section 1191(c)(2) states two alternatives for satisfying the test. The same payments that satisfy the projected disposable income test may also satisfy the “liquidation” or “best interest of creditors” test of § 1129(a)(7).³⁷¹

³⁶⁸ The court in *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020), reasoned that the projected disposable income is a substitute for the absolute priority rule. See also *supra* note 325.

³⁶⁹ *In re Topp’s Mechanical, Inc.* 2021 WL 5496560 (Bankr. D. Neb. 2021). The secured creditor in the case had a claim for about \$ 3,765,000 secured by collateral worth about \$ 2,125,000, resulting in an unsecured deficiency claim of about \$ 1,640,000. The creditor elected treatment under § 1111(b)(2). As Section VIII(E)(1) discusses, the requirement for cramdown confirmation of an undersecured claim when the creditor elects § 1111(b)(2) requires payments that (1) have a value equal to the value of the collateral and (2) total the full amount of the claim.

The plan proposed to pay the creditor the full amount of the secured portion of the claim with interest, about \$ 2,625,000. In addition, the plan provided for payment of the unsecured claim, for total payments of about \$ 4,265,000.

The trustee contended that payments of interest on the secured portion of the claim should be taken into account in satisfying the requirement that the creditor receive payments that totaled the full amount of its claim. Under this method, the creditor was entitled to receive only approximately \$ 1,140,000 on its unsecured claim, about \$ 500,000 less than the \$ 1,190,000 the plan proposed to pay. Because the proposed payments to the secured creditor resulted in \$500,000 less being paid to unsecured creditors, the trustee contended, the plan discriminated unfairly against the unsecured class and was not fair and equitable.

The court concluded that the trustee’s interpretation of the cramdown requirements was correct and that, therefore, the plan discriminated unfairly against the unsecured creditors and was not fair and equitable.

³⁷⁰ § 1191(c)(2). Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

³⁷¹ See *Legal Service Bureau, Inc. v. Orange County Bail Bonds (In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022); *In re Hyde*, 2022 WL 2015538 (Bankr. E.D. La., 2022).. The courts did not discuss the issue, but the point is implicit in their rulings. See also Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 7:2 (In a chapter 13 case, “[t]he plan must meet each of the best interest and projected disposable income tests, but the same payments may satisfy both of them. Thus, the debtor must pay the greater of the amount that the best interest test or the projected disposable income test requires.”).

The first is in subparagraph (A). Section 1191(c)(2)(A) requires that the plan provide that all of the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.³⁷²

The second alternative in subparagraph (B) is that the plan provide that the value of property to be distributed under the plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.³⁷³ Courts have confirmed plans under the § 1191(c)(2)(B) alternative that provide for pro rata distributions to unsecured creditors from cash derived from a capital contribution from the debtor's equity owner³⁷⁴ or the postpetition liquidation of an asset³⁷⁵ in an amount not less than the value of the debtor's disposable income.

³⁷² § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

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

Presumably, the amended chapter 13 provision takes account of the fact that the “means test” standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

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

³⁷³ The projected disposable income tests in chapters 11 and 12 also contain this alternative, but the chapter 13 one does not.

³⁷⁴ *In re The Lost Cajun Enterprises, LLC*, 2021 WL 6340185 (Bankr. D. Col. 2021). The court confirmed a plan, over the objection of a creditor, that provided for pro rata cash payments to unsecured creditors on the plan's effective date, funded by a capital contribution from the debtor's sole member, equal to the debtor's projected disposable income for three years. The court did not consider whether the time should be longer.

³⁷⁵ *Legal Service Bureau, Inc. v. Orange County Bail Bonds (In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022). The plan provided for the pro rata distribution to creditors of proceeds realized from the postpetition sale of real property obtained through foreclosure of a deed of trust it held to secure a bail bond. The proceeds exceeded the value of the debtor's disposable income for three years. The court ruled that a three-year period applied because the bankruptcy court had not fixed a longer time. Section VIII(B)(4)(ii) further discusses the case.

The court in *In re Young*, 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021), ruled that individuals who claimed that they had no disposable income could not obtain confirmation of their sub V plan.³⁷⁶

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.³⁷⁷ Like the chapter 12 requirement (and unlike the requirement in traditional chapter 11 cases), it applies to entities as well as individuals.

Key confirmation issues are: (1) How is projected disposable income determined? (2) How does the court determine whether the required period should be longer than three years; and (3) If so, how does the court determine how much longer the period must be?

i. Determination of projected disposable income

The Bankruptcy Code does not define “projected disposable income,” but it defines “disposable income” in chapters 12³⁷⁸ and 13.³⁷⁹ In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.³⁸⁰

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

— the maintenance or support of the debtor or a dependent of the debtor;³⁸¹ or

³⁷⁶ The *Young* court reasoned, “Debtors who elect not to make plan payments should not get the benefit of subchapter V. If making reasonable plan payments while working is unpalatable to the Debtors, they should have filed a chapter 7 case.” *In re Young*, 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021).

³⁷⁷ See § 1225(b). Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. § 1191(c)(2) does not contain this provision, raising the possibility that a creditor could insist on commitment of disposable income to pay more than the allowed amount of the claim. See Brubaker, Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 13. It seems unlikely that Congress could have intended such a result that is inconsistent with the common-sense principle, even if unstated, that payment of the full amount of the claim (perhaps with interest) resolves it.

³⁷⁸ § 1225(b)(2).

³⁷⁹ § 1325(b)(2).

³⁸⁰ § 1129(a)(15).

³⁸¹ § 1191(d)(1)(A).

- a domestic support obligation that first becomes payable after the date of the filing of the petition;³⁸² or
- payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.³⁸³

The definition of disposable income in § 1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2). It is also substantially the same definition as in § 1325(b)(2), except that § 1325(b)(2) defines the income component as “current monthly income” (defined in § 101(10A)) and permits a deduction for charitable contributions. The chapter 11 provision incorporates the chapter 13 definition.³⁸⁴

The definition of “current monthly income” in § 101(10A) specifically excludes Social Security benefits, § 101(10A)(B)(ii)(I), but the subchapter V definition of disposable income does not base the income component on “current monthly income.” One commentator has concluded that Social Security benefits are not taken into account in determining projected disposable income in a subchapter V case.³⁸⁵

Although the definitions of disposable income in all cases are similar, the manner of determining permissible deductions in calculating disposable income differs materially with regard to expenditures for the “maintenance or support” of the debtor and the debtor’s dependents.

³⁸² § 1191(d)(1)(B).

³⁸³ § 1191(d)(2).

³⁸⁴ § 1129(a)(15).

³⁸⁵ Alyssa Nelson, *Are Social Security Benefits “Disposable Income” for the Purposes of Subchapter V?*, 40-Sept Amer. Bankr. Inst. J. 30 (2021).

In chapter 13 cases, the so-called “means test” standards govern the deductions that an “above-median”³⁸⁶ debtor may take in calculating disposable income.³⁸⁷ The means test rules do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.³⁸⁸

Section 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are “reasonably necessary to be expended” for “maintenance or support” in §1191(d)(1) in sub V cases is the same as it is in chapter 12 and below-median chapter 13 cases, and as it was in chapter 13 cases prior to the introduction of the means test standards in BAPCPA.³⁸⁹ The case law on disposable income in such cases should provide guidance in making such determinations.³⁹⁰

³⁸⁶ Generally, an “above-median” debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a “below-median” debtor is one whose income is below the median. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12. The rules for determining the debtor’s status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the “means test” rules for determination of disposable income; and § 1325(b)(4), which defines “applicable commitment period” for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an “above-median” debtor must use the means test rules and pay projected disposable income for five years. A “below-median” debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor’s plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See id.* §§ 4:9, 8:12.

³⁸⁷ § 1325(b)(3).

³⁸⁸ In chapter 11 cases, § 1129(a)(15) states that projected disposable income is “as defined in [§ 1325(b)(2)].” § 1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of “amounts reasonably necessary to be expended” under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in § 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

³⁸⁹ Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor’s dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that § 1191(d)(1) states. For a discussion of application of the “reasonably necessary” standard for expenditures for maintenance and support in chapter 13 cases, *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:28.

³⁹⁰ *E.g., In re Hyde*, 2022 WL 2015538 at * 9 (Bankr. E.D. La. 2022).

With regard to expenditures for the business, income is not “disposable income” under §1191(d)(2) if it is “reasonably necessary to be expended” for expenditures “necessary for the continuation, preservation, or operation” of the business.³⁹¹ The rule contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

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

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.³⁹² As later text discusses, an extension of the period that the debtor must make payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or for expenditures to grow the business. The court in *In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021), permitted an operating reserve based on testimony of the debtor’s principal that the reserve was necessary to protect against shortfalls in cash due to the cyclical nature of the debtor’s income.

³⁹¹ § 1191(d)(2).

³⁹² *See, e.g.*, *Hammrich v. Lovald (In re Hammrich)*, 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve); *In re Schmidt*, 145 B.R. 983 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re Kuhlman*, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re Janssen Charolais Ranch, Inc.*, 73 B.R. 125 (Bankr. D. Mont. 1987) (*dicta*) (reserve is allowable). *But see* *Broken Bow Ranch, Inc. v. Farmers Home Admin. (In re Broken Bow Ranch, Inc.)*, 33 F.3d 1005 (8th Cir. 1994).

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

If the debtor’s disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income³⁹³ but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

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

The projected disposable income test has its genesis in chapter 13, which contemplates periodic, usually monthly, payments to the trustee for disbursement to creditors in accordance with the plan. In some cases, the amount of the monthly payment may increase by a specified

³⁹³ Payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

amount at one or more specified times.³⁹⁴ In any event, chapter 13 plans typically provide for the debtor to pay a regular fixed amount.

While fixed payment plans are the standard in individual cases where material variations in income are not expected, debtors in business cases may be concerned that unpredictable changes in the economy may depress earnings or increase expenses and make it difficult or impossible to pay a fixed amount. Creditors, on the other hand, may expect that, if conditions improve, the debtor should pay more.

Thus, a debtor might propose, or creditors might insist on, the payment of *actual* disposable income over the required period rather than a fixed monthly amount. Variations could include minimum or maximum requirements or some percentage of disposable income in excess of specified amounts.

Such provisions are clearly permissible in a consensual plan that arises from negotiations between the debtors and creditors. The statutory requirements seem flexible enough that a debtor's plan that included them would satisfy the PDI test. Whether a court could impose such provisions is a more difficult question, in part because of difficulties in defining how to calculate projected disposable income when the payment is not fixed and in specifying how the debtor accounts for and reports it.

A debtor must also pay careful attention to the drafting of such a provision. *In re Patel*, 621 B.R. 245 (Bankr. E.D. Cal. 2020), illustrates the issues that arise when a plan provides for payment other than fixed amounts.

³⁹⁴ Such plans are commonly referred to as “step” plans. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:23.

In *Patel*, the chapter 11 plan of the individual debtors, confirmed in 2011, provided for payment to creditors of all of the debtor's "disposable income as defined in § 1129(a)(15)(B)" in quarterly payments over seven years. The plan required reports every 120 days, but the debtor stopped making them after 24 months.

The debtor never made any payments, and an unsecured creditor filed a motion to convert the case to chapter 7 based on the default. The debtor contended that no default existed because there had been no disposable income.

Construing the plan as a contract and applying state contract law, the court concluded that disposable income included income from all sources, not just income from the business, as the debtor argued, and that the debtor had fiduciary or contractual duties under the plan to account for disposable income. Accordingly, although state law ordinarily places the burden on the creditor to show a default, the court concluded that the debtor must show the completion of payments to receive a discharge.

The court concluded that the debtor had not shown that he had not had any disposable income and converted the case to chapter 7.

The determination of objections to confirmation based on the PDI requirement requires the court to receive evidence about their accuracy and reliability, which may include testimony from an accountant or financial advisor as well as the debtor's principal.³⁹⁵

³⁹⁵ *In re The Lost Cajun Enterprises LLC*, 2021 WL 6340185 (Bankr. D. Col. 2021).

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

A projected disposable income test applies in cases under chapter 12³⁹⁶ and 13³⁹⁷ and in traditional chapter 11 cases of individuals.³⁹⁸ Each section prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the “commitment period,” but only chapter 13 specifically uses the term by defining the “applicable commitment period” – the period for which the debtor must use projected disposable income to pay unsecured creditors – as three years for “below-median” debtors and five years for “above-median” debtors.³⁹⁹

For sub V cases, §1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.⁴⁰⁰ The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the chapter 11 and above-median chapter 13 tests.⁴⁰¹

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

In chapters 12 and 13 and in traditional chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a

³⁹⁶ § 1225(b).

³⁹⁷ § 1325(b).

³⁹⁸ § 1129(a)(15). The requirement applies only if an unsecured creditor invokes it.

³⁹⁹ § 1125(b)(4).

⁴⁰⁰ § 1191(c)(2).

⁴⁰¹ The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A), and five years for above-median debtors, § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor wants.⁴⁰² Case law dealing with the length of a plan under the other tests does not deal with the issue that §1191(c)(2) presents.⁴⁰³

⁴⁰² In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

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

In chapter 11 cases, § 1129(a)(15) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

⁴⁰³ The court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years. §§ 1222(c), 1322(d).

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

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

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

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

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* CHAPTER 13 PRACTICE AND PROCEDURE § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under §1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

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

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

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.⁴⁰⁴

Courts will also have to decide how to proceed when a creditor or trustee asks to fix the commitment period for a longer time than proposed in the debtor's plan.⁴⁰⁵ The authority of the court to fix the commitment period implies authority to order more payments than the debtor's plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court's determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

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

Several courts have addressed the issue of the period over which the debtor must pay disposable income to creditors.

⁴⁰⁴ See 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

⁴⁰⁵ Subchapter V does not expressly give the trustee standing to object to confirmation. The trustee's duty to appear and be heard at the confirmation hearing, § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee's views on any confirmation issue to the court.

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

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), which Section VIII(D)(8) discusses in detail, involved a plan that all impaired classes had accepted, so the PDI requirement did not apply. The court rejected the objecting creditor’s contention that the debtor’s failure to propose payments for more than three years established a lack of good faith.

In re Urgent Care Physicians, Ltd., 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), considered arguments by the U.S. Trustee and creditors that the court should require the debtor to make payments for five years instead of the three years that the plan proposed for the plan to be fair and equitable. The court concluded that a three-year term was appropriate.

The legislative history of subchapter V, the court said, indicated that Congress had recognized that small businesses typically have shorter life-spans than large businesses and that it had enacted subchapter V to permit small businesses to obtain bankruptcy relief in a timely, cost-effective manner and remain in business, thereby benefitting not only the owners, but also employees, suppliers, customers, and others who rely on the business.

Congress’s recognition that small businesses typically have shorter life-spans, the court reasoned, “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.” *Id.* at *10. The court added that Congress’s concern for employees, customers, and others, as well as for the small business itself, “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.” *Id.*

The *Urgent Care Physicians* court concluded that a three-year term achieved the proper balance. The court noted that the debtor provided outpatient health care for urgent needs, had deferred payments to insiders and some healthcare equipment payments, and had committed to paying at least its projected disposable income. Extending the term for two more years, the court

continued, would further defer salary restoration to key staff, and further deferring full repayment of equipment charges could jeopardize availability of the equipment. *Id.* at *11.

The court concluded, *id.* at *11 (citation omitted):

While at first blush the simple math of an extended plan term might seem to generate a higher payment to unsecured creditors, the inherent risks to the small business debtor of that extension could defeat the unsecured creditors’ desire for greater recovery. The three-year term here is fair and equitable, as it properly balances the risks and rewards for both the debtor and its creditors. In these circumstances, the Court declines to fix a longer plan period. A longer plan term would disproportionately harm the debtor in forcing it to accrue additional unpaid expenses and potentially emerge from its reorganization saddled with more debt.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), the Bankruptcy Appellate Panel of the Ninth Circuit described the three-year period as a “baseline requirement.” *Id.* at *5. The court explained, *id.*:

As part of the streamlined, flexible process under subchapter V, the Bankruptcy Code sets a baseline requirement that a debtor commit three years of disposable income, while it also affords the bankruptcy court discretion to require more as a condition of finding a plan fair and equitable.

The court observed that the court’s role in setting a period longer than three years is “unique to subchapter V, noting that the period for payment of disposable income in chapter 13 cases is set by statute and in chapter 12 cases by the debtor, *id.* at *5, as earlier text discusses. Because the bankruptcy court had not set a commitment period longer than three years, the court

ruled, the plan satisfied the minimum confirmation requirement if it provided for payment of disposable income based on a three-year period.

The *Orange County Bail Bonds* court affirmed confirmation of the plan because it met the alternative requirement of subparagraph (B) of § 1191(c)(2) that the plan provide for payments having a present value of not less than the debtor's disposable income for three years. Specifically, the plan provided for about \$ 433,000 that the debtor realized from the postpetition liquidation of an estate asset to make payments under the plan, which exceeded its projected disposable income for three years of about \$ 287,000. *Id.* at *6.⁴⁰⁶

⁴⁰⁶ The opinion in *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), states that the liquidation proceeds were about \$ 433,000, *id.* at *3, that the plan proposed to pay the objecting creditor, Legal Service Bureau, Inc., d/b/a Global Fugitive Recovery ("Global"), which the plan separately classified, \$100,000 of those proceeds, *id.*, and that the bankruptcy court's confirmation order required payment to Global of \$127,794.35. *Id.* at *4. The opinion further states that the plan proposed to pay Global from its actual disposable income for the five years after confirmation, but the debtor stated that because it would pay only actual disposable income, it was possible that Global could receive nothing from future earnings or that it might not be paid in full. *Id.* at *3. The debtor projected total disposable income of about \$287,000 over the three-year period after confirmation and about \$493,000 over five years. *Id.*

The BAP opinion further states that, in response to an objection to confirmation that § 1191(c)(2) requires a debtor to commit at least three years of projected disposable income to the plan, the debtor amended the plan to provide that it would not receive a discharge unless it paid all actual disposable income over a five-year period and it paid the largest creditor, separately classified, a minimum of \$181,000 from actual disposable income. *Id.* at *3.

The BAP opinion does not recite what happened to the liquidation proceeds that Global did not receive or the treatment of unsecured claims in the other class.

A review of the plan and confirmation order in the bankruptcy court clarifies the provisions of the plan. *In re Orange County Bail Bonds, Inc.*, Bankruptcy Case No. 8:19-bk-12411-ES (the "Bankruptcy Case").

Although the confirmed plan separately classified Global and general unsecured creditors, it provided for the classes to share pro rata in the liquidation proceeds remaining after payment of priority and administrative claims and in the debtor's actual disposable income. Plan of Reorganization for Small Business Debtor, Bankruptcy Case ECF No. 285 (Mar. 2, 2021), at 1 (¶ C), 3 (¶ 4.01, Class 2 and Class 3 treatment). The provisions for treatment of the two classes are identical except that the provision for Global states that the debtor is pursuing an appeal from the prepetition judgment it obtained. The debtor in the plan valued the distributions that creditors would receive at "approximately" 100 cents on the dollar, *id.* at 2 (Article 1), and the plan provided for payment of interest on the claims in both classes at the federal judgment rate. *Id.* at 3 (¶ 4.01, Class 2 and Class 3 treatment). The plan stated that, after payment of administrative expenses and apriority claims from the liquidation proceeds, Global would receive \$100,000 on its claim and general unsecured creditors would receive pro rata distributions totaling \$3,608.31. *Id.* at 1 (¶ C).

The confirmation order amended the discharge provision of the plan to provide that, unless all claims were paid in full, the debtor would not receive a discharge unless the debtor paid all actual disposable income to creditors for five years and the debtor paid a minimum of \$181,000. Confirmation Order, Bankruptcy Case ECF No. 310 (Apr. 13, 2021), at 6-7 (¶ I). It did not provide for \$181,000 to be paid to Global.

The confirmation order also) included specific directions for disbursement of the liquidation proceeds of \$432,972.95. It provided for payment of allowed fees of the debtor's attorney's and professionals, the allowed fee

5. Requirements for feasibility and remedies for default

SBRA added a feasibility requirement in § 1191(c)(3) as part of the “fair and equitable” test. The Bankruptcy Threshold Adjustments and Technical Corrections Act (“BTATCA”)⁴⁰⁷ amended it to clarify its operation.⁴⁰⁸

of the subchapter V trustee, unpaid postpetition compensation due to the debtor’s principal, and priority claims in the total amount of \$ 300,567.37, leaving a balance of \$132,405.58 for distribution to unsecured creditors. Global received \$127,794.35, and the only two other unsecured creditors received a total of \$4,611.23.

The bankruptcy court confirmed the amended plan, concluding that it met the requirements of subparagraph (A) of § 1191(c)(2). Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 at *9 (B.A.P. 9th Cir. 2022).

The Bankruptcy Appellate Panel ruled that the plan did not meet the requirements of subparagraph A because it did not provide for payment of the debtor’s projected disposable income. “Instead,” the court explained, “it provides for an effective date payment of \$427,972.95 and possible payment of an unknown amount from Debtor’s actual disposable income.” *Id.* at *5.

The BAP rejected the debtor’s argument that the plan complied with subparagraph B because the effective date payment of the liquidation proceeds plus the minimum payment of \$181,000 was greater than projected disposable income over five years.

The court advanced two reasons. First, the plan made discharge contingent on the minimum payments, but it did not require the payment of any specific amount. Second, the effective-date value of the payments could not be determined because the plan did not specify the timing or actual amount of any future payment. *Id.* at *5.

Nevertheless, the BAP concluded that the plan satisfied § 1191(c)(2)(B) because the effective date payment of the liquidation proceeds (about \$433,000) exceeded the debtor’s projected disposable income (about \$287,000) for the minimum three-year period. *Id.* at *6. Therefore, the BAP ruled that the bankruptcy court “did not clearly err in finding that the Plan is fair and equitable to [the objecting creditor]. Although the confirmation order referenced § 1191(c)(2)(A), any such error was harmless. And we may affirm on any ground fairly supported by the record.” *Id.* (citations omitted).

⁴⁰⁷ Bankruptcy Threshold Adjustment and Technical Corrections Act, § 2(f), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”). The amendment applies in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

⁴⁰⁸ Prior to BTATCA, § 1191(c)(3) had three parts.

Subparagraph (3)(A) contained two of them, stated in the alternative. Clause (3)(A)(i) required that the debtor *will* be able to make all payments under the plan, while clause (3)(A)(ii) required only a *reasonable likelihood* that the debtor will be able to make the plan payments. The two alternative provisions made no sense because the first necessarily incorporates the second. (If the debtor will be able to make all payments it must be true that there is a reasonable likelihood that it will.) The first provision is superfluous as a practical matter because the court never has to make a distinction and decide that a debtor will be able to make payments; finding a reasonable likelihood is always sufficient.

The third part of paragraph (3) was subparagraph (B), which required that the plan contain appropriate remedies. It made sense as an independent directive. Moreover, it is connected to subparagraph (A) with “and”; such a connection between two requirements normally means that both must be satisfied.

The puzzling language in subparagraph (A), however, provided the basis for an argument that a drafting error occurred. Thus, it was arguable that former § 1191(c)(3) did not require that the plan provide appropriate remedies if the court concluded that the debtor will be able to make all plan payments.

The three parts made more sense if the remedies requirement applied only when the court concluded there is a reasonable likelihood that the debtor will make payments, not that it will be able to. Under such an interpretation, the alternative requirements are: (1) a finding that the debtor will be able to make payments; or (2) a

As amended by BTATCA, § 1191(c)(3) states two alternative standards.

The first alternative, § 1191(c)(3)(A), requires a finding that the debtor “*will*” be able to make all payments under the plan.

The second alternative requires only a “*reasonable likelihood*” that the debtor will be able to make plan payments, § 1191(c)(3)(B)(i). In this situation, however, § 1183(c)(3)(B)(ii) requires that the plan provide “appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.” Section XII(B) discusses remedies for default in the plan.

A debtor may obtain cramdown confirmation of a plan that does not include “appropriate remedies” upon default, but doing so subjects the plan to the more stringent feasibility requirement. It seems risky to let confirmation depend on a bankruptcy judge’s willingness to make a fine distinction between the two feasibility standards and, more critically, a determination that the debtor satisfies the higher one.

Each of the alternative feasibility standards is higher than the requirement in § 1129(a)(11) that confirmation is “not likely to be followed by liquidation, or the need for further reorganization” of the debtor, unless the plan contemplates it. Although the § 1129(a)(11) requirement remains applicable to subchapter V confirmation as one of the provisions of § 1129(a) that must be satisfied for consensual or cramdown confirmation, a finding that the debtor will make, or is reasonably likely to make, plan payments necessarily means that liquidation or further reorganization will not likely follow.

finding that there is a reasonable likelihood that the debtor will make payments *and* the plan provides appropriate remedies. This reading gives meaning to both parts of subparagraph (A).

BTATCA changed § 1191(c)(3) to resolve the issue by requiring appropriate remedies if there is a “reasonable likelihood” that the debtor will make plan payments but not if the court finds that it will, as the text explains.

The court in *In re Moore & Moore Trucking, LLC*, 2022 WL 120189 (Bankr. E.D. La. 2022), held that a provision in a plan that permitted the objecting secured creditor to foreclose in the event of default was an appropriate remedy that met the requirement of § 1191(c)(3)(B).⁴⁰⁹ In *In re Hyde*, 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), the court concluded that a provision for the debtor and the debtor's non-filing spouse to grant a second mortgage on their home to the trustee for the benefit of creditors in the event of default in payments of projected disposable was an appropriate remedy.

Courts in sub V cases have addressed objections based on feasibility (under the statute prior to the BTATCA amendment) in the context of the facts in the case.

In *In re Ellingsworth Residential Community Association, Inc.*, 2020 WL 6122645 (Bankr. M.D. Fla. 2020),⁴¹⁰ the bankruptcy court confirmed the plan of a homeowner's association over the objection of a creditor that it was not feasible because its funding depended on a proposed assessment of owners that the owners had not yet been approved.

Based on testimony from the president of the association that the plan was feasible and that the homeowners would approve the assessment, the court found that the assessment would be approved and that the debtor would therefore be able to make payments as proposed. As part of its ruling, the court imposed a requirement that the homeowners approve the assessment within four months, in default of which the court would find the debtor in breach of the plan.

⁴⁰⁹ The case arose prior to BTATCA's amendment of the statute. The revised section is § 1191(c)(3)(B)(ii). See *supra* note 408.

⁴¹⁰ In an earlier order, the bankruptcy court had determined that the debtor was eligible for subchapter V even though as a nonprofit homeowner's association it had no profit motive. *In re Ellingsworth Residential Community Association, Inc.*, 619 B.R. 519 (Bankr. M.D. Fla. 2019). The district court agreed with the bankruptcy court in an order affirming the issuance of a scheduling order. *Guan v. Ellingsworth Residential Community Association, Inc.* (*In re Ellingsworth Residential Community Association, Inc.*), 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed*, 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied*, 2022 WL 1131391 (2022).

In *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020), the court confirmed the plan of the jointly administered debtors over the objections of several creditors that the plan was not feasible because its projections with regard to disposable income were speculative and subject to market conditions.

The court observed, *id.* at 269 (footnotes omitted):

The new requirement [of § 1191(C)(3)(A)⁴¹¹] fortifies the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposed it. . . . The feasibility requirement for confirmation requires a showing that the debtor can realistically carry out its plan. Though a guarantee of success is not required, the bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.

The court found that expert testimony regarding the plan’s feasibility was credible and confirmed the plan. In addition, the court found that the plan’s provision for the liquidation of assets in the event of default satisfied the requirement of § 1191(c)(3)(B) that the plan contain appropriate remedies.

Other courts have similarly relied on testimony from an accountant⁴¹² or credible testimony from the debtor’s principal⁴¹³ in determining whether a plan meets the feasibility requirement of § 1191(c)(3)(B)(ii).

In *In re Gabbidon Builders, LLC*, 2021 WL 1964544 (Bankr. W.D. N.C. 2021), the court denied confirmation of the debtor’s plan and converted the case to chapter 7. The debtor planned

⁴¹¹ The case was decided before BTATCA’s amendment of the statute. See *supra* note 408.

⁴¹² *In re Moore & Moore Trucking, LLC*, 2022 WL 120189 (Bankr. E.D. La. 2022).

⁴¹³ *In re Urgent Care Physicians*, 2021 WL 6090985 (Bankr. E.D. Wisc. 2021).

to sell a parcel of real property, to use the proceeds to make some payments to creditors and to purchase a new lot, to construct a house on the new lot and sell it, and to use those proceeds to pay creditors. The plan also proposed monthly payments to creditors from operating income.

The court found that the principal's testimony in support of confirmation was unreliable and conflicting. The court concluded that the evidence did not establish that sale of the property was imminent, that the proposed construction of a new house could occur as proposed, or what the debtor would receive upon its sale. *Id.* at *2-3. Similarly, the court concluded that no evidence supported the debtor's predictions of future income. *Id.* at *4.

Testimony from a debtor's principal was likewise insufficient to establish feasibility in *In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership*, 2021 WL 1679062 (Bankr. N.D. W. Va. 2021). The court questioned the debtor's revenue projections, noting the absence of testimony as to how it would achieve a 50 percent increase over declining historical results. *Id.* at *4.⁴¹⁴

The court in *In re Lupton Consulting LLC*, 2021 WL 3890593 (Bankr. E.D. Wisc. 2021), concluded that the plan was not feasible because the debtor's financial projections submitted by its principal were not reliable in view of historical data and discrepancies with operating reports.

In an individual case, the court in *In re Hyde*, 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), concluded that testimony from the debtor and the debtor's non-filing spouse about the debtor's income from Social Security benefits and part-time work, the non-filing spouse's income and commitment to assist in the funding of the plan, and annual household expenses

⁴¹⁴ The court addressed the feasibility issue after it had decided to dismiss the case for cause, including the failure to explain ambiguities in monthly reports, postpetition payment of unsecured creditors without court approval, failure to file postpetition sales tax returns and pay the taxes, and receipt of a postpetition loan from a company owned by the principal's spouse without court approval. 2021 WL 1679062 at *3.

established that the debtor could realistically carry out the plan providing for payment of projected disposable income for five years.

6. Payment of administrative expenses under the plan

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

C. Postconfirmation Modification of Plan

The rules for postconfirmation modification in §1193 differ depending on whether the court has confirmed a consensual plan under §1191(a) or a cramdown plan under §1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case.⁴¹⁵

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

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

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under §1191(a).⁴¹⁶ The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote.⁴¹⁷ These are the same rules that govern postconfirmation modification in traditional chapter 11 cases under § 1127(b).

Section 1101(2), defines “substantial consummation.” It requires that three events occur. The first is the “transfer of all or substantially all of the property proposed by the plan to be

⁴¹⁵ § 1181(a).

⁴¹⁶ § 1193(b).

⁴¹⁷ § 1193(d).

transferred.” § 1101(2)(A). The second is the “assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan.” § 1101(2)(B). The third is the “commencement of distribution under the plan.” § 1101(2)(C).

Typically, the determining factor for substantial consummation is the commencement of distribution.

In re National Tractor Parts, Inc., 2022 WL 2070923 (Bankr. N.D. Ill. 2022), considered when distributions commence. There, the debtor sought to modify its consensual plan confirmed under § 1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVID-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA’s claim as a general unsecured claim, payable in quarterly payments.

The proposed modification provided for separate classification of the SBA’s claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim under the original plan provisions if it did not.

The United States Trustee objected to modification on the ground that “commencement of distribution under the plan” had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made de minimis payments totaling \$ 1,428.20 to creditors in two classes but had not yet made a \$ 50,000 payment to a creditor in another class or begun quarterly payments to general unsecured creditors.

The *National Tractor Parts* court held that “commencement of distribution” occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

The *National Tractor Parts* court concluded that § 1101(2)(C) is plain and unambiguous. The court explained, *id.* at * 4:

The plain language of [§ 1101(2)(C)] does not require commencement of distribution to every creditor, or every class, or even substantially all creditors or classes. It means, simply, that the process contemplated in the confirmed plan is underway.

The court observed, further, that the language in § 1101(2)(A) and (B) refers to “all or substantially all” of property to be transferred or dealt with by the plan, whereas such language is “conspicuous in its absence from § 1101(2)(C). *Id.* at *4.

National Tractor Parts is consistent with other cases dealing with other cases addressing the issue in traditional chapter 11 cases.⁴¹⁸

⁴¹⁸ *E.g., In re Centrix Fin. LLC*, 394 F. App’x 485, 489 (10th Cir. 2010) (“[The] construction of § 1102(A) as requiring completion of substantially all payments to creditors would render meaningless § 1102(C), which requires only that distributions under the plan be commenced.”) (Unpublished). *In re Wade*, 991 F.2d 402, 406 n. 2 (7th Cir. 1993) (“Section 1101(2) states that substantial consummation is reached when, *inter alia*, distribution has commenced but not necessarily been completed.” (Emphasis in original); *In re JCP Properties, Ltd.*, 540 B.R. 596, 607 (Bankr. S. D. Tex. 2015) (“To require a substantiality of distribution payments rather than a mere existence of distribution payments, where the very same definition expressly includes a substantiality component for transferred property, would render § 1102’s ‘all or substantially all’ a mere surplusage within § 1101(2).”); *In re Western Capital Partners, LLC*, 2015 WL 400536 (Bankr. D. Colo. 2015).

Some courts, however, have concluded that commencement of distribution does not occur merely because the debtor has made some payments under the plan.⁴¹⁹ As one court explained:⁴²⁰

Applying the plain meaning approach of statutory interpretation, it seems that commencement should mean not just the beginning of payments to a single creditor, but the commencement of distribution to all or substantially all creditors.

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

If the plan has been confirmed under §1191(b), §1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the court fixes.⁴²¹ The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of §1191(b).⁴²²

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. In these chapters, postconfirmation modification is permitted at any time prior to the completion of payments under the plan; the modified plan must meet confirmation requirements.⁴²³ Unlike the provisions

⁴¹⁹ *E.g., In re Dean Hardwoods, Inc.*, 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010); *In re Litton*, 222 B.R. 788 (Bankr. W.D. Va. 1998) (holding plan not substantially consummated because one distribution made to one creditor), *aff'd* on other grounds, 232 B.R. 666 (W.D. Va. 1999); *In re Heatron, Inc.*, 34 B.R. 526, 529 (Bankr. W.D. Mo. 1983) (holding plan not substantially consummated 29 months after confirmation when 53% of payments under the confirmed plan had been made). *See also In re McDonnell Horticulture, Inc.* 2015 WL 1344254 at *3 (Bankr. E.D.N.C. 2015) (Noting that “courts in this District have held that distribution of payments under a plan needs to have commenced with respect to ‘all or substantially all’ creditors,” the court concluded that payments had commenced.); *In re Archway Homes, Inc.*, 2013 WL 5835714 at *4 (Bankr. E.D.N.C. 2013) (citing *Dean Hardwoods, supra*, with approval but concluding distributions had commenced.).

The *National Tractors* court characterized this approach as the minority view. *In re National Parts, Inc.*, 2022 WL 2070923 at *5 (Bankr. N.D. Ill. 2022).

⁴²⁰ *In re Dean Hardwoods, Inc.*, 431 B.R. 387, 392 (Bankr. E.D. N.C. 2010).

⁴²¹ § 1193(c).

⁴²² The provisions of § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.

⁴²³ §§ 1229, 1329.

in the other chapters, §1193(c) does not permit modification at the request of creditors or the trustee.⁴²⁴

D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases

As Sections VIII(A) and (B) explain, both consensual and cramdown confirmation require that the plan meet all the requirements of § 1129(a) except those noted. This Section discusses confirmation issues under § 1129(a) that do not involve subchapter V provisions but that have arisen in subchapter V cases.⁴²⁵ Section VIII(E) discusses confirmation and related issues involving secured claims that have arisen in subchapter V cases.

1. Classification of claims; unfair discrimination

A plan must designate classes of claims, with some exceptions such as priority tax claims, and interests, § 1123(a), and specify any class that is not impaired, § 1123(b). Classification is particularly critical if the debtor wants consensual confirmation because consensual confirmation requires that all classes of claims and interests accept the plan or not be impaired. § 1129(a)(8).⁴²⁶ The classification rule in § 1122(a) is that the claims or interests in a class must be “substantially similar.” An issue related to classification is that cramdown confirmation of a subchapter V plan requires, among other things, that the plan not “discriminate unfairly.” §1191(b).

Two cases have considered the classification of secured claims in subchapter V plans.

⁴²⁴ § 1193(c).

⁴²⁵ For a review and application of requirements for confirmation in a subchapter V case, see *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020). See also *In re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020).

⁴²⁶ It is also important in the cramdown context because cramdown confirmation still requires that the plan comply with the provisions of the Bankruptcy Code. § 1329(a)(1). But a court in the cramdown situation might overlook the issue if the treatment of all members of the class complies with the cramdown requirements anyway.

In *In re New Hope Hardware, LLC*, 2020 WL 6588615 (Bankr. N.D. Ga. 2020), the debtor sought confirmation of a consensual plan that put two creditors, each secured by a separate vehicle, in the same class. Only one of them accepted the plan. The court concluded that, because each creditor had rights in different collateral, the claims were not substantially similar, and the classification therefore violated § 1122(a). *Id.* at * 3.

In *In re Olson*, 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), however, the court confirmed a plan that provided for a class of “miscellaneous secured claims.”

In re Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020), involved cramdown confirmation of a sub V plan that provided different treatment for two classes of unsecured claims. One class consisted of disputed unsecured claims of a group of creditors that totaled approximately \$ 360,000; the other class included all other unsecured claims of approximately \$ 50,000.

The plan provided for creditors in each class to receive payments of 59 percent of their claims from disposable income over five years, but the method of payments differed. The undisputed creditors were to receive equal monthly payments. The payments for the disputed creditors, however, were adjusted to reflect the seasonal nature of the debtor’s business, which was the sale of retail outdoor sporting goods in South Lake Tahoe, California.⁴²⁷ Further, the plan provided for the payments on the disputed claims to be made into a reserve account pending determination of the objections to the claims. *Id.* at 6.

⁴²⁷ Payments for the months of April through June and September through November were twice as much as payments for the months off January through March and July, August, and December.

The *Fall Line Tree Service* court concluded that the differences in treatment were “rationally related to the rights of the parties and to seasonal cash flow realities of the Lake Tahoe recreation market” and ruled that the plan did not discriminate unfairly. *Id.* at 6.

Unfair discrimination may also occur when a plan proposes to pay an undersecured creditor who exercises the § 1111(b)(2) election⁴²⁸ more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.⁴²⁹

2. Acceptance by all classes and effect of failure to vote

Consensual confirmation requires acceptance by all impaired classes of claims and interests. § 1129(a)(8). This includes holders of equity interests if the plan impairs them. *In re New Hope Hardware, LLC*, 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020).

If a creditor does not vote on the plan, the question is whether the creditor is deemed to have accepted the plan.

In *In re Olson*, 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), the court concluded that holders of impaired claims that did not vote were bound by the classes that accepted the plan and confirmed it in the absence of any accepting vote in one class. The court relied on *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267-68 (10th Cir. 1988). Other bankruptcy courts in the Tenth Circuit have reached the same result.⁴³⁰

The court in *In re New Hope Hardware, LLC*, 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), reached the opposite conclusion. The court reasoned that, in the absence of acceptance by

⁴²⁸ Section VIII(E)(1) discusses the § 1111(b)(2) election.

⁴²⁹ *In re Topp’s Mechanical, Inc.* 2021 WL 5496560 (Bankr. D. Neb. 2021). Section VIII(B)(3) discusses the case in the context of the “fair and equitable” requirement of § 1191(c).

⁴³⁰ *In re The Lost Cajun Enterprises, LLC*, 2021 WL 6340185 at * 7 (Bankr. D. Col. 2021); *In re Roundy*, 2021 WL 5428891 at * 2 (Bankr. D. Utah 2021); *In re Robinson*, 632 B.R. 208, 218 (Bankr. D. Kansas 2021).

the impaired class of equity interests, the plan did not comply with the mandate of § 1129(a)(8) that the class either accept the plan or not be impaired.⁴³¹

3. Classification and voting issues relating to priority tax claims

A debtor often owes taxes to the Internal Revenue Service as well as to state and local tax authorities that are entitled to priority under § 507(a)(8). Section 1129(a)(9)(C) requires that a plan pay the claims over a period ending not later than five years after the entry of the order for relief in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than “convenience class” creditors paid in cash as § 1122(b) permits). A priority tax claim must be paid with interest at the rate that applicable nonbankruptcy law requires. § 511.

Holders of priority tax claims often do not vote on chapter 11 plans that comply with § 1129(a)(9)(C). It does not appear that acceptance by a priority tax claimant is an additional requirement for confirmation under § 1129(a). Section 1123(a)(1) expressly excludes priority tax claims from its requirement that the plan designate classes of claims, thus recognizing that voting by such creditors is not required. The court in *In re New Hope Hardware, LLC*, 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), confirmed a plan that provided for treatment of a priority tax claim in compliance with § 1129(a)(9)(C) even though the tax claimant did not accept the plan.⁴³²

Although § 1123(a)(1) does not require classification of a priority tax claim, chapter 11 plans often provide for them in a class. Better practice is to place each taxing authority in its own class or to state the treatment for each one separately.

⁴³¹ The court nevertheless confirmed the plan based on acceptances by all of the holders of equity interests that occurred at the confirmation hearing.

⁴³² *Accord, In re Louis*, 2022 WL 2055290 at * 17 (Bankr. C.D. Ill. 2022).

4. Timely assumption of lease of nonresidential real estate

Section 365(d)(4)(A) provides for the automatic rejection of a lease of nonresidential real property unless it is assumed within the time it specifies. The court may, prior to the expiration of the deadline, extend it for 90 days, for cause. § 365(d)(4)(B). If the lease is rejected, the debtor must immediately surrender the leased property to the lessor. § 365(d)(4)(A).

The Consolidated Appropriations Act, 2021 (the “CAA”) temporarily amended § 365(d) to change the deadline for assumption from 120 days to 210 days after the order for relief and to permit an extension of the time for an additional 90 days.⁴³³ On December 28, 2022, the deadline reverted to 120 days, which may be extended for up to 90 days.⁴³⁴

In *In re Motif Designs, Inc.*, 2020 WL 7212713 (Bankr. S.D. Mich., 2020), the sub V debtor obtained an extension of time to file its plan but had not sought to assume the lease. The plan, however, provided for the debtor to continue to occupy the property for about four months after the confirmation hearing. Because the plan provided for occupancy of the property in violation of § 365(d)(4), the court denied confirmation because the plan did not meet the requirement of § 1129(a)(1) that the plan comply with the applicable provisions of the Bankruptcy Code.

⁴³³ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f)(1)(B), 134 Stat. 1182, 3219 (December 27, 2020).

⁴³⁴ *Id.* § 1001(f)(2)(A).

5. The “best interests” or “liquidation” test of § 1129(a)(7)

Section 1129(a)(7)(A)(ii) requires that a creditor who has not accepted the plan must receive under the plan property with a value that is not less than what the creditor would receive if the debtor were liquidated under chapter 7.

In re Young, 2021 WL 1191621 (Bankr. D. N.M. 2021), determined that a plan did not comply with this requirement based on its finding that the fees of a chapter 7 trustee would be less than the anticipated costs of liquidating property under a plan.

In re Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020), discusses evidentiary issues in connection relating to the liquidation analysis.

The *Fall Line Tree Service* court rejected an objecting creditor’s argument that purchased goodwill, arising from the debtor’s earlier acquisition of its business from the creditor, should be included in the liquidation analysis under Generally Accepted Accounting Principles. The court concluded, “[P]urchased goodwill in the original sale of the going concern that has since devolved into this chapter 11 case is not an asset for purposes of hypothetical chapter 7 liquidation analysis.” *Id.* at 4.

The court also rejected the creditor’s assertion that the debtor’s monthly operating reports showed that the value of its inventory was understated, ruling that such reports are not probative of inventory value. The admissible evidence, the court continued, showed that the debtor had used book value at actual wholesale cost in its liquidation analysis, which the court thought was actually more than a chapter 7 liquidation would produce. *Id.* at *4.

6. Voting by holder of disputed claim

In re Fall Line Tree Service, Inc., 2020 WL 7082416 at *2 (Bankr. E.D. Cal. 2020), serves as a reminder that only the holder of an *allowed* claim is entitled to vote on a chapter 11

plan under § 1126(a).⁴³⁵ Bankruptcy Rule 3018(a) permits the court, after notice and a hearing, to allow a claim temporarily in an amount that the court deems proper for the purpose of accepting or rejecting a plan, but the creditor had not sought that relief.⁴³⁶

7. Individual must be current on postpetition domestic support obligations

The confirmation requirement of § 1129(a)(14) is that an individual debtor have paid all amounts payable on a domestic support obligation (“DSO”) “that first became payable” after the petition date. It makes no exception when a debtor’s inability to pay a postpetition DSO is due to circumstances beyond the debtor’s control. *In re Sullivan*, 626 B.R. 326, 334 (Bankr. D. Colo, 2021).⁴³⁷

8. Application of § 1129(a)(3) good faith requirement in context of consensual plan when creditor objects because debtor is not paying enough disposable income

In a traditional chapter 11 case of an individual, § 1129(a)(15) requires a plan to provide for the debtor to pay projected disposable income, or its value, for the longer of five years or for the term of the plan, if an unsecured creditor objects. The requirement applies even if the class of unsecured creditors has accepted the plan.

This rule does not apply in a sub V case. Section 1129(a)(15) is inapplicable, §1181(a), and neither consensual confirmation under §1191(a) nor cramdown confirmation under §1191(b) requires that the plan comply with § 1129(a)(15).

⁴³⁵ Section 1126(a) states, “The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.”

⁴³⁶ The creditor in *Fall Line Tree Service* was the only creditor in the class, rejected the plan, and objected to its confirmation. The fact that the court disregarded its claim for voting purposes, therefore, did not affect the result in the case.

⁴³⁷ The problem for the debtor in *Sullivan* was that his monthly obligations for alimony and child support were \$ 16,835 and his gross monthly income was \$ 7,600. The debtor was seeking to modify those obligations in the divorce case and proposed to modify his plan at a later time to accommodate a future ruling by the divorce court. In the meantime, he proposed to pay what he hoped the modified amounts would be. *Sullivan*, 626 B.R. 326, 334. In addition to ruling that § 1129(a)(14) prevented confirmation, the court noted, “Nor was the chapter 11 process meant to create a long-term shelter for debtors while they await the outcome of contested divorce litigation.” *Id.* at 6.

Consensual confirmation under §1191(a) requires compliance only with the applicable provisions of § 1129(a). Accordingly, consensual confirmation requirements do not include a projected disposable income test.

Cramdown confirmation in a sub V case similarly does not require compliance with § 1129(a)(15), but §1191(c)(2) does require payment of projected disposable income for a minimum of three, and a maximum of five, years, as the court determines.⁴³⁸

The issue is how the good faith requirement of § 1129(a)(3) applies to an objection to confirmation of a consensual plan when the debtor could pay more than the plan provides. A similar issue arises in chapter 13 cases when the debtor could pay more than the projected disposable income test of § 1325(b) requires.

Objections based on good faith arise in chapter 13 cases, for example, when the debtor proposes to retain an expensive home, car, or other luxury item (and use income to pay the debts they secure instead of paying unsecured creditors) or if the debtor receives social security benefits.⁴³⁹ The chapter 13 projected disposable income rules permit a deduction for payments on secured claims⁴⁴⁰ and exclude social security benefits. The argument is that good faith requires a debtor to surrender expensive luxury items rather than pay for them or that the debtor's social security benefits permit the debtor to pay more, even though the proposed payments comply with the projected disposable income test.⁴⁴¹ The same "good faith" objection exists in the context of a consensual plan in a sub V case, when the projected income test similarly does not apply.

⁴³⁸ See Section VIII(B)(4).

⁴³⁹ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:34, 8:59.

⁴⁴⁰ See *id.* §§ 8:29, 8:56, 8:59.

⁴⁴¹ See *id.* § 4:34.

Courts have taken various approaches in chapter 13 cases.⁴⁴² Appellate courts have rejected a “best efforts” approach to good faith (under which good faith requires that a debtor use “best efforts” to pay creditors).⁴⁴³ Instead, courts use a “totality of the circumstances” test in which ability to pay is one of many factors.⁴⁴⁴

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), examined the issue in a subchapter V case. There, the debtor’s plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan,⁴⁴⁵ but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate.

The debtor, with estimated pre-tax annual income over the three-year period ranging from \$ 360,000 to \$ 525,000, projected monthly expenses of \$ 16,000, including \$ 9,000 to pay the mortgage on his residence (in which he alone would reside), and related taxes, maintenance, and utilities. The plan provided for payments of \$ 488,061.82 over three years, of which \$ 159,500 would be available for distribution to unsecured creditors after payment of administrative expenses, priority tax claims, a priority domestic support obligation claim, and prepetition mortgage arrearages.

The creditor asserted that good faith in an individual chapter 11 case required the debtor’s “best effort” to repay creditors. In view of the debtor’s luxurious lifestyle, the creditor argued that the debtor should be required to add two years of payments from income for the benefit of

⁴⁴² See *id.* § 8:26.

⁴⁴³ See *id.* § 4:31.

⁴⁴⁴ See *id.* § 4:32.

⁴⁴⁵ Six creditors, holding claims totaling \$ 1,871,481.51 (84.6%), accepted the plan. Two creditors, holding claims totaling \$ 340,035.15 (15.4%) rejected it.

unsecured creditors, which would add \$ 144,000 to the amount unsecured creditors would receive.

The court noted that courts analyze the good faith requirement of § 1129(a)(3) based on the “totality of the circumstances.” In addition, the court observed, the good faith requirement “should be construed narrowly, particularly when raised by a dissenting creditor whose class has voted to accept the plan.” *Walker*, 628 B.R. 9, 16.

The court expressed its concerns that “a robust application of the good faith doctrine creates a risk that the court’s analysis will lapse into an inquiry that ‘may clothe subjective moral judgments with the force of law’”⁴⁴⁶ and that “a broad application of the good faith requirement also would ‘create an undue risk of judicial usurpation of the legislative power to determine the scope of and eligibility for [bankruptcy] relief.’”⁴⁴⁷

The *Walker* court thus rejected the suggestion that good faith under § 1129(a)(3) inflexibly requires a debtor’s “best effort” to make every possible resource available to repay creditors. The court reasoned that the rejection of such a rule in a sub V case involving consensual confirmation under § 1191(a) is especially relevant because § 1129(a)(15) is not applicable. The court stated, 629 B.R. at 17-18 (citation omitted):

The omission of § 1129(a)(15) from the confirmation requirements under § 1191(a) sends a clear legislative message that decision whether a plan’s funding justifies confirmation should be resolved by the creditor voting process and chapter 11’s fundamental policy of “creditor democracy.” When the affected creditors support confirmation of a plan, the

⁴⁴⁶ *In re Walker*, 628 B.R. 9, 17 (Bankr. E.D. Pa. 2021), *quoting In re Glunk*, 342 B.R. 717, 731 (Bankr. E.D. Pa. 2006) (*quoting Sarasota, Inc. v. Weaver*, 2004 WL 2514290, at *3 (E.D. Pa. Nov. 5, 2004) (*quoting In re Woodman*, 287 B.R. 589, 592 (Bankr. D. Me. 2003), *aff’d* 2003 WL 23709465 (D. Me. Sept. 19, 2003), *aff’d* 379 F.3d 1 (1st Cir. 2004)).

⁴⁴⁷ *Id.* at 17, *quoting In re Glunk*, 342 B.R. 717, 732 (Bankr. E.D. Pa. 2006).

court generally should be circumspect about overriding the expressed will of the voting creditors based on the good faith requirement of 11 U.S.C. § 1129(a)(3). This narrow application of 11 U.S.C. § 1129(a)(3) is especially apt in a case under subchapter V.

The court agreed that the debtor could pay more to creditors and noted, “Any court should have serious concerns about approving an individual’s reorganization plan in which the debtor proposed to live alone in a large residence, while paying arguably unnecessary carrying costs – roughly \$ 9,000 per month – thereby reducing the available distribution to creditors.” *Walker*, 628 B.R. 9, 18.

If it were a creditor, the court continued, it might reject the plan “absent more evidence that the Debtor is making some tangible sacrifices in order to repay his debts.” *Id.* at 18. But the court emphasized, “[T]he subjective reaction of a bankruptcy judge to a debtor’s proposed plan is not the test by which good faith is measured under 11 U.S.C. § 1129(a)(3).” *Id.* at 18.

Instead, the court explained, “[T]he good faith determination requires objective consideration of the totality of the circumstances. In the end, the critical issue is whether a plan adheres sufficiently to Bankruptcy Code policy and is sufficiently fair to warrant a finding that it was proposed in good faith.” *Id.* at 18.

The court found it “extremely significant” that the unsecured class of creditors had voted overwhelmingly in support of the plan. The court reasoned, “Presumably, these creditors made a business judgment that any misgivings they may have regarding the Debtor’s lifestyle and the likely accompanying reduction in their potential distribution under the Plan were outweighed by the benefits conferred by the Plan.” *Id.* at 18.

The *Walker* court also took into account the fact that the debtor had voluntarily put additional money into the plan that the projected disposable income test applicable to cramdown

confirmation would not necessarily require. The additional funding arose from the fact that the debtor's payments included the commitment of preconfirmation earnings and that disposable income as predicted did not account for the full postpetition income tax liability on anticipated future earnings. 629 B.R. at 15.

In effect, these two adjustments resulted in \$ 170,000 more in projected disposable income than the amount than the statute required. Accordingly, the debtor argued, the plan provided for more money to be paid to unsecured creditors than they would receive if the debtor paid adjusted disposable income for five years.

The court agreed that reference to the amount that a debtor would have to pay under the projected disposable income test of § 1191(c)(2) in the cramdown situation was helpful in evaluating good faith in connection with confirmation of a consensual plan, even though the test does not apply. *Id.* at 15. The court concluded that the debtor's voluntary commitment of additional money, which the strict statutory requirements would not require, supported a finding of good faith. *Id.* at 18.

The court overruled the good faith objection, *id.* at 19:

[W]hile it may be true that the Debtor could provide a greater distribution to creditors . . . the plan is neither so unfair or offensive to basic notions of justice nor so inconsistent with bankruptcy policy as to warrant court intervention to overrule the will of voting creditors.

E. § 1129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases

Although the cramdown requirements in § 1129(b) do not apply in subchapter V cases, § 1181(a), the provisions of § 1129(b)(2)(A) govern determination of what is "fair and equitable" with regard to secured claims for purposes of cramdown confirmation under § 1191(c)(1). This

Section discusses issues relating to cramdown treatment of secured claims in subchapter V cases that involve the cramdown standards in § 1129(b)(2)(A) that apply to secured claims in subchapter V cases and other sections of the Bankruptcy Code that SBRA did not affect.

1. The § 1111(b)(2) election

The § 1111(b)(2) election comes into play when a secured creditor is undersecured in that its claim exceeds the value of the property in which it has a lien. Before discussing its operation and effects, it is useful to review the general rule for allowance of secured claims in a bankruptcy case under § 506(a).

Section 506(a) provides that an allowed claim of a creditor secured by a lien on property in which the estate has an interest is secured “to the extent of the value of such creditor’s interest in the estate’s interest in such property . . . and is an unsecured claim to the extent that the value of such creditor’s interest . . . is less than the amount of such allowed claim.” Simply put, § 506(a) gives the secured creditor a secured claim equal to the value of the encumbered property and an unsecured claim for the deficiency. Bankruptcy professionals colloquially refer to this result as the “bifurcation” of the claim into a secured claim and an unsecured claim.⁴⁴⁸ If the secured obligation is “nonrecourse” – *i.e.*, the debtor is not personally liable, and the creditor can collect its debt only from the encumbered property – the creditor does not have an unsecured claim in the case.

Assume, for example,⁴⁴⁹ that a secured creditor has a claim of \$ 100,000 secured by property worth \$ 30,000. Under § 506(a), bifurcation results in the creditor having two claims: a

⁴⁴⁸ See generally *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:5.

⁴⁴⁹ The example is taken from the excellent explanation of § 1111(b) in *In re Body Transit, Inc.*, 619 B.R. 816, 831-33 (Bankr. E.D. Pa. 2020).

secured one for \$ 30,000 and an unsecured one for \$ 70,000. If the claim is non-recourse, the creditor has no unsecured claim.

Section 1111(b) modifies the treatment of secured claims in chapter 11 cases in two ways.

First, § 1111(b)(1) provides that a secured claim will be allowed or disallowed under § 506(a) regardless of whether the creditor has recourse against the debtor. The effect is that a nonrecourse secured creditor has an allowed unsecured claim against the debtor.

Second, § 1111(b)(2) permits a secured creditor to elect to have its entire claim treated as a secured claim, with two exceptions discussed later. In the example, therefore, the electing secured creditor has a secured claim of \$ 100,000 and no unsecured claim.

Whether the undersecured creditor makes the election may make a significant difference in how much it must receive for the plan to comply with cramdown requirements.

Section 1129(b)(2)(A) states three alternative ways to satisfy the “fair and equitable” requirement for cramdown confirmation with regard to a secured claim. They apply in a sub V case under § 1191(c)(1).⁴⁵⁰

The most common alternative, in clause (i) of § 1129(b)(2)(A), is for the secured creditor to retain its liens and receive deferred cash payments. Alternatively, a plan is “fair and equitable” if it provides for sale of the encumbered property and attachment of liens to the proceeds, § 1129(b)(2)(A)(ii), or for the realization by the creditor of the “indubitable equivalent” of the claim, § 1129(b)(2)(A)(iii).

The specific statutory language with regard to permissible cramdown treatment of a secured claim through deferred cash payments is: the creditor must receive “deferred cash

⁴⁵⁰ See Section VIII(B)(2).

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 [the creditor's] interest in the estate's interest in such property." § 1129(b)(2)(A)(i)(II).

The somewhat complicated language effectively states two requirements. First, the deferred cash payments must total at least the amount of the allowed secured claim. Second, the *value* of the stream of payments must be equal of the value of the encumbered property. The second requirement requires application of an appropriate present value interest or discount rate. For purposes of the example, we assume it is six percent.

If the creditor in the example does not make the § 1111(b)(2) election, application of the cramdown rules is straightforward: the plan must propose to pay the entire amount of the secured claim, \$ 30,000, with interest at six percent. Payment of the claim in full satisfies the first part of the test, and the provision for interest satisfies the second one. Thus, a plan could amortize \$ 30,000 over, say, five years at six percent interest, in monthly payments of \$ 580, a total of \$ 34,800. The plan must treat the deficiency claim of \$ 70,000 as an unsecured claim, usually included in the class of general unsecured claims.

Such a provision would not, however, satisfy the first cramdown requirement if the creditor elected § 1111(b)(2). The total of payments is only \$ 34,800, \$ 65,200 short of the amount of the allowed secured claim, \$ 100,000.⁴⁵¹

⁴⁵¹ This assumes that the interest payments of \$ 4,800 count in satisfying the total of payments requirements. It is not clear that they do. See *In re Body Transit, Inc.*, 619 B.R. 816, 833, n. 25 (Bankr. E.D. Pa. 2020), citing 7 COLLIER ON BANKRUPTCY ¶ 1111.03[5][b].

The court in *In re Topp's Mechanical, Inc.* 2021 WL 5496560 (Bankr. D. Neb. 2021), after explaining the competing views, adopted the majority view, concluding that "the interest component of a debtor's stream of payments may serve a dual purpose of satisfying the allowed claim of the creditor and providing present value to the creditor." *Id.* at *6. Because the debtor's plan proposed to pay the secured creditor more than it was entitled to receive as a result of the § 1111(b)(2) election, the debtor had less money to pay to unsecured creditors, who had not accepted the plan. The court therefore ruled that the plan discriminated unfairly and was not fair and equitable. Section VIII(B)(3) discusses the case in the context of the "fair and equitable" requirement of § 1191(c).

Payment of the claim over five years would require an additional \$ 1,087 per month, a total monthly payment of \$ 1,667.

A longer amortization period would lower the monthly payment because there is more time to pay the claim and because more interest is paid. The following chart shows payment schedules that would satisfy both § 1129(b)(2)(A)(II) requirements (amounts rounded except monthly payment on last line). Whether a court would conclude that the longer lengths of time are “fair and equitable” is, of course, another question.

Payment Schedules Providing for Payments Totaling \$ 100,000 With a Value of \$ 30,000						
Amortization Period	Payment On \$30,000	Interest Paid at 6%	Total of Payments (\$ 30,000 + Interest payments)	Remaining Balance (\$ 100,000 – (d))	Monthly Payment on Remaining Balance ((e)/months)	Total Monthly Payment (b) + (f)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
5 years	\$ 580	\$ 4,800	\$ 34,800	\$ 65,200	\$ 1,067	\$ 1,667
10 years	\$ 333	\$ 9,968	\$ 39,968	\$ 60,032	\$ 500	\$ 883
15 years	\$ 253	\$ 15,568	\$ 45,568	\$ 54,432	\$ 302	\$ 555
20 years	\$ 215	\$ 21,583	\$ 51,583	\$ 48,417	\$ 202	\$ 417
25 years	\$ 193	\$ 27,987	\$ 57,987	\$ 42,013	\$ 140	\$ 333
30 years	\$ 180	\$ 34,751	\$ 64,751	\$ 35,249	\$ 98	\$ 278
53 yrs, 4 mos	\$ 156.43	\$ 70,113	\$ 100,113	\$ 0.00	\$ 0.00	\$ 156.43

Section 1111(b)(1)(B) states two exceptions to the availability of the § 1111(b)(2) election.

One of the exceptions applies when the encumbered property is sold under § 363 or is to be sold under the plan. If the creditor has recourse against the debtor, the § 1111(b)(2) election is not available when the property is being sold. § 1111(b)(1)(B)(ii).

The other exception applies when the undersecured creditor’s interest in the encumbered property is of “inconsequential value.” § 1111(b)(1)(B)(ii).

In a traditional chapter 11 case, a secured creditor for strategic purposes may want to retain a large unsecured deficiency claim so that it controls the vote of the unsecured class. This may give the secured creditor a “blocking position” to prevent confirmation because, unless other classes exist, a debtor cannot meet the requirement of § 1129(a)(10) that at least one impaired class of claims accept the plan.

Because subchapter V permits confirmation even if no class accepts, a secured creditor does not have a blocking position regardless of whether it makes the § 1111(b) election. Especially if a nominal distribution to unsecured creditors is likely, a secured creditor in a sub V case may conclude that making the § 1111(b) election will enhance its recovery and negotiating position.

Three courts have considered a creditor’s right to make the § 1111(b) election in a subchapter V case. The issue was whether the creditor could not invoke the election because its interest was “inconsequential.” The cases are required reading for judges and practitioners dealing with § 1111(b) elections in subchapter V cases.⁴⁵²

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), involved a taxi business that owned a single taxi medallion in which its only creditor held a security interest to secure a debt of \$ 576,927. The debtor contended that the value of the medallion was \$ 90,000; the creditor claimed it was worth \$ 200,000.

The court noted that courts have taken different approaches to determining whether property is of inconsequential value, but concluded that, under any approach, it was impossible

⁴⁵² See generally Thomas C. Scherer and Whitney L. Mosby, *The Applicability of the § 1111(b) Election in a Small Business Case*, 40 AMER. BANKR. INST. J. 12 (May 2021).

to conclude that the medallion's value was inconsequential, whether it was worth \$ 90,000 or \$ 200,000. *Id.* at * 3. The court then reviewed the different approaches.

The “most obvious approach,” the court said, it to determine and apply the plain meaning of the word “inconsequential.” Nothing that various dictionaries defined the word as “irrelevant,” “of no significance,” “unimportant”, and “able to be ignored,” the court concluded as “an abstract matter” that neither value was inconsequential. 2020 WL 5806507 at *3.

The court acknowledged that “some context is required,” and that “[a]n item of a certain value might be relatively ‘inconsequential’ to a multi-billion dollar company.” 2020 WL 5806507 at *3. But the court could not conclude that the value of the medallion was “irrelevant,” “of no significance,” or something that is “able to be ignored” when it was the debtor's most important and valuable asset, essential to its reorganization, regardless of its value. *Id.*

The court noted that, if the debtor owned the medallion outright and proposed to abandon it under § 554 (which permits abandonment of an asset that is “of inconsequential value or benefit to the estate”), it could not conceivably be treated as having inconsequential value. The court found no justification for giving the term a different meaning in § 1111(b) than it has in § 554. 2020 WL 5806507 at *3.

The *VP Williams Trans* court then considered the view that the value of the asserted security interest should be compared to the value of the collateralized asset. Under this approach, a junior security interest that is “almost completely out-of-the-money” has inconsequential value. 2020 WL 5806507 at *4.⁴⁵³ The court saw no difference between this view and valuation in the abstract but concluded that it did not matter in the current case because

⁴⁵³ The court cited *McGarey v. MidFirst Bank (In re McGarey)*, 529 B.R. 777 (D. Ariz. 2015).

the creditor held the only security interest in the collateral and, therefore, the value of its lien equaled the value of the collateral.

Next, the *VP Williams Trans* court discussed the view that the court should compare the value of the security interest to the amount of the debt.⁴⁵⁴ Under this approach, the court explained, a secured claim might have inconsequential value if the collateral is worth only a small fraction of the total claim. The court questioned application of this view when the value of the collateral is not small by itself but is significantly less than the debt. 2020 WL 5806507 at *4.

To illustrate, the court assumed that only one secured creditor with a \$ 200,000 debt holds a security interest in collateral worth \$ 100,000, which would not be “inconsequential.” The result should not be different, the court reasoned, when the claim is \$ 2,000,000 because the value of the collateral, and therefore the value of the secured claim, is the same. The court observed that denying the § 1111(b)(2) election to the \$ 2 million claimant would result in a debtor having greater rights to retain and use collateral “against the secured creditor’s will” when the debtor’s economic interests are actually far more out-of-the-money. 2020 WL 5806507 at *4.

Under yet another approach, the *VP Williams Trans* court continued, a secured claim may be deemed inconsequential if the § 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 § 1129(b)(2)(A)(i), discussed above.⁴⁵⁵ The court reasoned that this view conditioned a creditor’s right to the § 1111(b)(2) election on the debtor having a feasible way to deal with it.

⁴⁵⁴ The court cited *In re Wandler*, 77 B.R. 728, 733 (Bankr. N.D. 1987).

⁴⁵⁵ The court cited *In re Wandler*, 77 B.R. 728, 733 (Bankr. N.D. 1987) (Holding that collateral worth \$ 15,000 was “inconsequential” in context of claim of \$ 390,000 and reasoning that payments having a nominal amount of \$ 390,000 but an actual current value \$ 15,000 would not be realistic).

The court found nothing in the statute to suggest that “‘feasibility’ from the debtor’s perspective was intended to be a limit on a creditor’s right to invoke section 1111(b).” 2020 WL 5806507 at *4.

Finally, the *VP Williams Trans* court considered and rejected the analysis of the *Body Transit* court, discussed below, that took policy considerations into account in making the “inconsequential value” determination. Later text discusses the court’s reasoning, following discussion of *Body Transit*.

After its discussion of the various approaches to the determination of “inconsequential value,” the *VP Williams Trans* court concluded that the case before it was not difficult because the creditor’s interest was not inconsequential under any of them. 2020 WL 5806507 at *6.

In *In re Body Transit, Inc.*, 619 B.R.816, 835 (Bankr. E.D. Pa. 2020), the court ruled that the correct methodology is to compare the value of the lien position to the total amount of the claim.

The court reasoned that the statutory text of § 1111(b)(1)(B)(ii) “explains how to value [the creditor’s interest in the collateral] and then directs the court to determine whether the value is inconsequential. The statutory text does not state how to make that second determination of ‘inconsequentiality.’” 619 B.R. at 835. To make the second determination, the court continued, the court must “compare the value of the collateral to something else, and the statutory text offers no guidance there.” *Id.*

The court concluded that the proper comparison is between the value of the collateral to the total amount of the claim. The court stated, *id.* at 835, *quoting* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[3][a] (footnotes omitted):

Section 1111(b) is intended to preserve creditors' nonbankruptcy rights, not enhance them.... Since “inconsequential” is not synonymous with “zero,” plain meaning would suggest that “inconsequential value” has to include something more than zero value. This leads to the view that a creditor whose lien is almost, but not quite, out-of-the-money should be treated as if [it] were wholly unsecured, which is for practical purposes the status the creditor would likely ascribe to itself outside of bankruptcy with collateral of little or inconsequential value. Put another way, it [sic] if the collateral's value is inconsequential when compared to the total debt owed to the creditor, the creditor should be treated as unsecured, not secured [for purposes of § 1111(b)(1)(B)].

The court then turned to consideration of whether the creditor's interest was of “inconsequential value” when the value of the collateral was \$ 80,000, 8.2 percent of the amount of the secured debt, \$ 970,233. The court stated, 619 B.R. at 836:

[T]he “inconsequential value” determination is not a bean counting exercise; the determination cannot be based solely on a mechanical, numerical calculation. Some consideration must be given to the policies underlying both the right to make the § 1111(b) election and the exception to that statutory right. In other words, while “the numbers” provide an important starting point in deciding how much value is “inconsequential,” the court also must consider other relevant circumstances presented in the case and make a holistic determination that takes into account the purpose and policy of the statutory provisions that govern the reorganization case.

Under this analysis, the court concluded that the value of the creditor's interest was inconsequential and that it could not make the § 1111(b)(2) election.

In the *Body Transit* court’s view, the purpose of the § 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. 619 B.R. at 833. The court reasoned that the case before it involving a fitness club and exercise equipment as collateral “does not resemble the classic fact pattern that Congress designed § 1111(b) to prevent. [The creditor] is not a secured creditor being cashed out during a temporary decline in the value of its collateral, with the Debtor seeking to retain such collateral and obtain the windfall benefit of a market correction in the foreseeable appreciation that restores value to the collateral.” 619 B.R. at 836.

Rather, the court found, any increase in the value of the debtor’s enterprise would most likely be “attributable to some combination of market forces, the entrepreneurial efforts and acumen of the Debtor’s principal and, perhaps, the investment of additional capital.” *Id.* at 836.

These circumstances, the *Body Transit* court reasoned, supported the conclusion that the collateral was of “inconsequential value” within the meaning of § 1111(b)(1)(B)(i). The court also found support for its conclusion in the purposes and policies underlying subchapter V. *Id.* at 837.

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), discussed earlier, rejected consideration of the policies that *Body Transit* invokes.

With regard to the intended purpose of the § 1111(b)(2) election, the court reasoned, “Section 1111(b) is not conditioned on a temporary decline in collateral value; it is available to secured creditors who are not happy with a value that a debtor has proposed, and who are not happy with the prospect of having to live with a judge’s decision as to what the value of the collateral is.” *Id.* at 5.

The *VP Williams Trans* court reasoned that the desire of Congress to foster small business reorganization had no bearing on the interpretation of § 1111(b). “Congress also desire to foster other forms of chapter 11 reorganizations,” the court said, “but section 1111(b) applies in all chapter 11 cases, including subchapter V. If Section 1111(b) was supposed to give way in a subchapter V case, or to have a different application in such a case, that was for Congress to say, and Congress did not do so.” 2020 WL 5806507 at *6.

The third case is *In re Caribbean Motel Corp.*, 2022 WL 50401 (D. P.R. 2022). The creditor held a claim of about \$ 3.1 million secured by collateral worth \$ 550,000, about 15% of its claim. Without determining which approach to use, the court concluded that the value of the collateral was not inconsequential. *Id.* at *5-6.

2. Realization of the “indubitable equivalent” of a secured claim -- § 1129(b)(2)(A)(iii)

One of the ways for a plan to meet the “fair and equitable” requirement for cramdown treatment of a secured claim under § 1129(b)(2)(A) (applicable in subchapter V under § 1191(c)(1)) is to provide for the creditor to realize the “indubitable equivalent” of its claim. The court in *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020), examined and applied this provision in confirming a subchapter V plan of jointly administered debtors over the objection of creditors holding statutory mineral property liens under Texas law.

The total of the creditors’ claims was \$ 1,151,287 million. Their statutory liens extended to all of the debtors’ gas and oil properties, valued at approximately \$ 35 million. The plan provided that the creditors: (1) would retain their liens on one property, valued at \$ 7,440,000; (2) would release their liens on all other properties; and (3) would receive pro rata payments from disposable income on a quarterly basis for two years. The plan further provided that, if the claims were not paid in full, with interest, in two years, the debtors would sell portions of the

retained collateral to pay the claims in full. In addition, the plan provided that, if the debtors did not pay the claims in full within 34 months, the creditors would receive a lien in the debtor's interest at that time in another property. *Id.* at 248-49.

The creditors rejected the plan and objected to its confirmation. Among other things, they argued that the plan was not fair and equitable because it did not provide for them to retain their existing liens and did not provide the indubitable equivalent of their claims. 622 B.R. at 266-67.⁴⁵⁶ The court overruled their objections and confirmed the plan.

The court explained that the indubitable equivalent requirement is tied to a "claim," not to the property securing the claim. Thus, the court rejected the argument that the plan could not modify their lien rights in any fashion and still meet the indubitable equivalent standard 622 B.R. at 270.

The court then addressed the creditors' argument that the plan did not meet the indubitable equivalent requirement because it reduced their 29 to 1 value-to-debt equity cushion to a 6 to 1 cushion. The court provided the following review of case law, 622 B.R. at 271-72 (original footnotes omitted):⁴⁵⁷

The Fifth Circuit has expressly recognized that one accepted method of providing indubitable equivalence is the exchange of collateral. Whether the indubitable equivalent offered is equivalent is a matter left to the discretion of the bankruptcy court in its careful

⁴⁵⁶ The creditors also objected on the grounds that the plan did not meet the disposable income requirement of § 1191(c)(2) and the feasibility requirements of § 1191(c)(3). 262 B.R. at 266. The court concluded that the plan met these requirements and that it provided adequate remedies for default. *Id.* at 267-70.

⁴⁵⁷ In footnotes to the first paragraph of the quoted text, the court cited: *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Walat Farms, Inc.*, 70 B.R. 330, 336 (Bankr. E.D. Mich. 1987) ("a bankruptcy court is permitted, indeed required, to make these determinations on a case by case basis and to order confirmation of a plan which indubitably protects and pays the claim of an objecting creditor"); *In re Swiftco, Inc.*, 1988 WL 143714 (Bankr. S.D. Tex. 1988); and *In re Philadelphia Newspapers, LLC*, 418 B.R. 548, 568 (E.D. Pa. 2009), *aff'd* 599 F.3d 298 (3d Cir. 2009).

In re Philadelphia Newspapers ruled that a plan providing for the sale of the creditor's collateral without permitting the creditor to credit bid satisfied the indubitable equivalent requirement. The Supreme Court later ruled to the contrary in *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 132 S.Ct. 2065 (2012). The Supreme Court concluded that the specific requirement for credit bidding in § 1129(b)(2)(A)(ii), which permits cramdown when a plan provides for the sale of collateral, precluded an interpretation of the indubitable equivalent standard that permitted sale without credit bidding.

reliance upon sufficient facts. Courts should not accept offers of indubitable equivalence lightly and should insist on a high degree of certainty. Moreover, indubitable equivalence is a flexible standard. The indubitable equivalent standard requires a showing that the objecting secured creditor will receive the payments to which it is entitled, and that the changes forced upon the objecting creditor are completely compensatory, meaning that the objecting creditor is fully compensated for the rights it is giving up. For example, the Fifth Circuit has stated that the “[a]bandonment of the collateral to the class would satisfy indubitable equivalent, as would a replacement lien on similar collateral.”

In *Investment Company of The Southwest*, [341 B.R. 298, 325 (B.A.P. 10th Cir. 2006),] the court recognized that a debtor may be permitted to use some portion of the equity cushion in collateral to help implement a plan without violating the indubitable equivalent standard, as long as the secured creditor remains over-secured beyond a reasonable doubt and has sufficient protection. Courts have approved plans that did not pay a secured lienholder all of its collateral sale proceeds, as long as the court is satisfied that there will always be more value in the remaining collateral than the lender's lien amount.⁴⁵⁸ Courts also have routinely held that a partial surrender of collateral to an over-secured creditor provides such creditor with the indubitable equivalent of its claim.⁴⁵⁹ A sister Court approved a plan over the objection of a secured creditor finding the debtor had provided the indubitable equivalent because the secured creditor remained over-secured beyond a reasonable doubt and had sufficient payment protection over the life of the plan.⁴⁶⁰ In essence, in the bankruptcy context, the indubitable equivalent means that the treatment afforded the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim, and also insure the integrity of the creditor's collateral position.⁴⁶¹

Applying these standards, the court concluded that the plan provided “virtual certainty” that the claims would be paid in full and that the 6 to 1 value-to-debt ratio provided an equity cushion that was sufficient adequate protection. 622 B.R. at 272.

The court rejected the creditors’ arguments that a plan could not modify a Texas statutory mineral lien under any circumstances and that lien-stripping may not be accomplished under any

⁴⁵⁸ The court cited: *In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987) (Concluding that it was unlikely that creditor's claim would ever become even partially unsecured and that plan provided secured creditor with variety of safeguards and fair interest rates); and *Affiliated Nat'l Bank-Englewood v. TMA Assocs., Ltd. (In re TMA Associates, Ltd.)*, 160 B.R. 172, 174 (D. Colo. 1993).

⁴⁵⁹ The court cited *In re May*, 174 B.R. 832, 838–839 (Bankr. S.D. Ga. 1994).

⁴⁶⁰ The court cited *In re SCC Kyle Partners, Ltd.*, 2013 WL 2903453 (Bankr. W.D. Tex.2013).

⁴⁶¹ The court cited 4 COLLIER ON BANKRUPTCY ¶ 506.03.

circumstances, concluding that § 1123(a)(5)(E) permits a plan to modify any lien as long as it complies with § 1129(b)(2)(A).⁴⁶²

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

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

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

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other than § 1129(a)(15),⁴⁶³ the court must confirm the plan.⁴⁶⁴ Confirmation of a consensual plan under §1191(a) leads to the termination of the trustee's service under §1183(c)(1) when the plan has been "substantially consummated."⁴⁶⁵ The debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest.⁴⁶⁶

⁴⁶² The court cited *In re Bates Land & Timber, LLC*, 877 F.3d 188 (4th Cir. 2017), which permitted cramdown confirmation of a plan providing for a secured creditor to receive property valued at \$ 13.7 million and cash of \$ 1 million on its \$ 14.6 million claim in exchange for the release of prepetition collateral.

The *Pearl Resources* court distinguished two cases on which the creditors relied, *In re CRB Partners, LLC*, 2013 WL 796566 (Bankr. W.D. Tex. 2013), and *In re Swiftco, Inc.*, 1988 WL 143714 (Bankr. S.D. Tex. 1988). The court noted that these cases ruled that the plans did not provide the indubitable equivalent of the creditors' claims because of an insufficient equity cushion or reasonable doubt as to payment but recognized that liens could be modified.

⁴⁶³ Section 1129(a)(15) states chapter 11's projected disposable income requirement, which applies only in the case of an individual. See Section VIII(B)(4).

⁴⁶⁴ § 1191(a).

⁴⁶⁵ § 1183(c)(1).

⁴⁶⁶ § 1183(c)(2).

Under § 1101(2), “substantial consummation” generally occurs upon “commencement of distribution under the plan.”⁴⁶⁷ Unless the plan implicates other requirements for substantial consummation, the sub V trustee’s service terminates under § 1183(c)(1) when the first payment under the plan occurs.

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

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

When the court confirms a cramdown plan, § 1194(b) provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise.⁴⁶⁸ Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.⁴⁶⁹

Because the sub V trustee must make payments under a cramdown plan, the trustee’s service does not terminate upon its substantial consummation.⁴⁷⁰ The trustee’s service continues, at a minimum, until the trustee has made the required disbursements. Subchapter V does not specify when the trustee’s service is terminated under a cramdown plan. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge,

⁴⁶⁷ § 1101(2)(C). “Substantial consummation” under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A) and (2) assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(B). Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

⁴⁶⁸ § 1194(b). Curiously, paragraph (b) of § 1194 is titled “Other Plans,” even though it applies exclusively to plans confirmed under the cramdown provisions of § 1191(b) and no other provisions of § 1194 deal specifically with payments under a consensual plan confirmed under § 1191(a).

⁴⁶⁹ § 1226(c), 1326(c).

⁴⁷⁰ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

as Section X(B) discusses. That seems to be the appropriate time for the trustee or the debtor to request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.⁴⁷¹

Section 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.⁴⁷² The statute contains no standards for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because §1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee. In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.⁴⁷³ Courts vary as to whether the debtor may make direct payments to other types of creditors.

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated

⁴⁷¹ See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-16 (“Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee’s final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee.”).

⁴⁷² § 1194.

⁴⁷³ W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:10.

and postpetition payments due on leases or executory contracts that are being assumed. In such instances, the trustee usually disburses the amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the plan does not modify.⁴⁷⁴

Some courts require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.⁴⁷⁵ In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as Section VIII(B)(4) discusses.

The court in *In re Spindler*, 623 B.R. 543 (Bankr. W.D. Wis. 2020), permitted a chapter 12 debtor to make direct payments to a mortgage lender under a plan that provided for the re-amortization of the debt in monthly payments over 30 years.

The court reviewed three approaches to direct payments that courts have taken in chapter 12 cases. One view is that the Bankruptcy Code prohibits direct payments on impaired or modified claims,⁴⁷⁶ while a second allows debtors to pay secured creditors directly, regardless of their impaired status.⁴⁷⁷ *Id.* at 546-47.

Most courts adopt a third approach that permits direct payments depending on the circumstances of the case.⁴⁷⁸ *Id.* at 547. In deciding whether to permit direct payments, the

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ The court cited *Fulkrod v. Savage (In re Fulkrod)*, 973 F.2d 801 (9th Cir. 1992) and *In re Marriott*, 161 B.R. 816 (Bankr. S.D. Ill. 1993).

⁴⁷⁷ The court cited *Wagner v. Armstrong (In re Wagner)*, 36 F.3d 723 (8th Cir. 1994) and *In re Crum*, 85 B.R. 878 (Bankr. N.D. Fla. 1988).

⁴⁷⁸ The court cited *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Speir*, 2018 WL 3814276 (Bankr. N.D. Miss. Aug. 8, 2018); *Westpfahl v. Clark (In re Westpfahl)*, 168 B.R. 337 (Bankr. C.D. Ill. 1994); *In re Golden*, 131 B.R. 201 (Bankr. N.D. Fla. 1991); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); and *In re Pianowski*, 92 B.R. 225 (Bankr. W.D. Mich. 1988).

Spindler court explained, these courts consider some or all of the factors that *In re Pianowski*, 92 B.R. 225 (Bankr. W.D. Mich. 1988) identified: (1) the past history of the debtor; (2) the business acumen of the debtor; (3) the debtor's post-filing compliance with statutory and court-imposed duties; (4) the good faith of the debtor; (5) the ability of the debtor to achieve meaningful reorganization absent direct payments; (6) the plan treatment of each creditor to which a direct payment is proposed to be made; (7) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (8) the legal sophistication, incentive and ability of the affected creditor to monitor compliance; (9) the ability of the trustee and the court to monitor future direct payments; (10) the potential burden on the chapter 12 trustee; (11) the possible effect on the trustee's salary or funding of the U.S. Trustee system; (12) the potential for abuse of the bankruptcy system; and (13) the existence of other unique or special circumstances.

The *Spindler* court noted that *In re Aberegg*, 961 F.2d 1307 (7th Cir. 1992), concluded that chapter 13 debtors could make direct payments in some cases and that *Aberegg* took a pragmatic approach to direct payment of mortgages that extend beyond the term of the plan, finding that it would be counterproductive to require debtors to make payments through the trustee until completion of plan payments and then to arrange for direct payments thereafter. *Spindler*, 623 B.R. at 547.

The *Spindler* court adopted the majority approach and, based on the circumstances of the case, permitted the direct mortgage payments.⁴⁷⁹ Among other things, the court noted that the debtor had negotiated payment terms with the lender and that it did not make sense to require the payment method to change at the end of the plan. *Id.* at 548-49.

⁴⁷⁹ The court also permitted, without objection, direct payment of a student loan.

When the subchapter V trustee makes payments under the plan, the trustee will be entitled to compensation for that service. To avoid this expense, a debtor may propose that the debtor, rather than the subchapter V trustee, make all payments under the plan. Creditors may support such a procedure because, at least in theory, they can receive the benefits of the reduced cost. A subchapter V trustee may prefer that the debtor make payments because it relieves the trustee of a potentially tedious administrative burden and reduces the risk of nonpayment for such additional services.

Although chapter 13 caselaw, as earlier text discusses, generally does not permit the debtor to make all payments under a plan, subchapter V does not expressly prohibit it. Moreover, the chapter 13 situation is distinguishable because the chapter 13 trustee receives compensation based on a commission on disbursements the trustee makes, whereas the subchapter V trustee generally bills on an hourly basis.

Anecdotal evidence and a few cases (that do not discuss the issue)⁴⁸⁰ indicate that at least some courts are permitting the debtor to make all payments under the plan in the absence of any objection.

The fact that the subchapter V trustee does not make payments under the plan does not, however, terminate the subchapter V trustee's services.⁴⁸¹

C. Unclaimed Funds

When a disbursement to a creditor occurs in a bankruptcy case but the creditor does not timely claim it, § 347 governs the disposition of the unclaimed property.⁴⁸² Unclaimed property typically arises when a check is mailed to the creditor at its address shown on its proof of claim

⁴⁸⁰ See, e.g., *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at * 2 (Bankr. D. P.R. 2022).

⁴⁸¹ E.g., *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at * 8 (Bankr. D. P.R. 2022).

⁴⁸² SBRA amended § 347 to provide for disposition of unclaimed funds in subchapter V cases, SBRA § 4(a)(5), and the CARES ACT made a technical amendment to it. CARES Act §1113 (a)(4)(B).

or the debtor's records, but the creditor has changed its address or the creditor simply does not negotiate the check.

Disposition of unclaimed funds in a subchapter V case depends on who makes the distribution.

For distributions that the subchapter V trustee makes, § 347(a) requires that, 90 days after the final distribution, the trustee stop payment on any check remaining unpaid and pay the money into the court for disposition under chapter 129 of title 28. The applicable provisions of chapter 129 direct the Court to disburse unclaimed funds to the "rightful owners," 28 U.S.C. § 2041, upon "full proof of the right thereto." 28 U.S.C. § 2042. Accordingly, a creditor may later seek to recover the unclaimed funds. This is the same rule that applies to a trustee's disbursements in cases under chapters 7, 12, and 13.

For payments that the debtor makes, § 347(b) provides that any funds that remain unclaimed at the expiration of the time allowed to claim the funds become property of the debtor or of the entity acquiring the assets of the debtor under the plan. This rule also applies in chapter 9 and traditional chapter 11 cases and to distributions that a debtor or party other than the trustee makes in chapter 12 cases.

Section 347(b) does not prescribe the method by which the time to claim the funds is determined. A well-drafted plan, therefore, should establish the deadline, or the debtor or other party may request that the court fix one. Plans in traditional chapter 11 cases that do not provide for full payment of unsecured creditors often provide that no further distributions will be made to

creditors who do not timely claim their distribution and for the pro rata distribution of unclaimed funds to creditors who have claimed their distributions.⁴⁸³

X. Discharge

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

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

Section 1141(d) governs discharge in a traditional chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan. It does not apply when the court confirms a cramdown plan.⁴⁸⁴

Section 1141(d)(5) does not apply in a sub V case.⁴⁸⁵ The omission is material only in an individual case because (d)(5) applies only when the chapter 11 debtor is an individual. Section 1141(d)(5) has two primary effects in an individual case.⁴⁸⁶

⁴⁸³ If funds in the final distribution are unclaimed, the provision might result in an administrative burden if the amount of unclaimed funds is insufficient to make a meaningful distribution to other creditors. A plan could resolve this problem by providing that, if the unclaimed funds in the final distribution are below a specified threshold, the funds will become property of the debtor instead of being distributed to creditors.

⁴⁸⁴ § 1181(c).

⁴⁸⁵ § 1181(a).

⁴⁸⁶ Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.

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

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B)

First, § 1141(d)(5) prohibits entry of a discharge order until the individual has completed payments under the plan unless the court orders otherwise for cause.⁴⁸⁷

Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable.⁴⁸⁸

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under § 1191(a).⁴⁸⁹ Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

A plan may provide for so-called “lien-stripping” of a junior lien on the debtor’s property. “Strip-off” of a junior lien may occur if the property’s value is less than the amount of senior liens; “strip-down” reduces the amount of the lien to the value of the property in excess of the amount of the senior liens. In a chapter 13 case, lien-stripping does not occur until the end of the case, when the debtor receives a discharge.⁴⁹⁰ In a subchapter V case, however, consensual confirmation of a plan may result in immediate stripping of the lien.⁴⁹¹

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in

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

⁴⁸⁷ § 1141(d)(5)(A).

⁴⁸⁸ § 1141(d)(5)(B).

⁴⁸⁹ *In re Vega Cruz*, 2022 WL 2309798 (Bankr. D. P.R. 2022). The individual debtor also does not have to deal with the § 522(q) issues discussed *supra* note 486 although they rarely arise.

⁴⁹⁰ § 1325(a)(5)(B)(i)(I). *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:11. *See also id.* § 21:23 (discussing whether “strip-off” or “strip-down” may occur when a chapter 13 debtor completes payments under a plan but is not entitled to a discharge).

⁴⁹¹ *In re Vega Cruz*, 2022 WL 2309798 (Bankr. D. P.R. 2022).

§ 502(g) (claims from the rejection of an executory contract or unexpired lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan.⁴⁹²

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.⁴⁹³ Only an individual is entitled to a discharge in a chapter 7 case.⁴⁹⁴ An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.⁴⁹⁵

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order.

Section X(C)(1) discusses exceptions to the § 1141(d)(1)(A) discharge.

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

When the court confirms a cramdown plan, § 1141(d) does not apply, except as provided in § 1192.⁴⁹⁶ Instead, the debtor receives a discharge under § 1192.

Section 1192 provides for discharge to occur “as soon as practicable” after the debtor completes all payments due within the first three years of the plan, “or such longer period not to

⁴⁹² § 1141(d)(1)(A).

⁴⁹³ § 1141(d)(3).

⁴⁹⁴ § 727(a)(1).

⁴⁹⁵ § 727(a).

⁴⁹⁶ § 1181(c).

exceed five years as the court may fix.”⁴⁹⁷ Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with cramdown confirmation under §1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The cramdown discharge under §1192 discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions that Section X(C)(2) discusses, unless § 1141(d), the plan, or the confirmation order provides otherwise.

The §1192 discharge also applies to “all other debts allowed under [§ 503] and provided for in the plan.”⁴⁹⁸ Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;⁴⁹⁹ compensation of the trustee and professionals employed by the trustee and the debtor;⁵⁰⁰ and claims for goods the debtor received within 20 days of the filing.⁵⁰¹ The discharge provision recognizes that a plan confirmed under §1191(b) may provide for the payment of administrative expenses through the plan.⁵⁰²

C. Exceptions to Discharge in Subchapter V Cases

Exceptions to a subchapter V discharge differ depending on whether the court confirms a consensual plan under § 1191(a) or cramdown confirmation occurs under § 1191(b).

⁴⁹⁷ § 1192. Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. § 1192 contains no provision for an earlier discharge.

⁴⁹⁸ § 1192.

⁴⁹⁹ § 503(b)(1).

⁵⁰⁰ § 503(b)(2).

⁵⁰¹ § 503(b)(9).

⁵⁰² § 1191(e). Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under § 1191(b). *See* Section VI(C).

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

1. Exceptions to discharge after consensual confirmation

As Section X(A) explains, § 1141(d) applies in a subchapter V case after confirmation of a consensual plan, except for the provisions of § 1141(d)(5) that govern the discharge of an individual in a traditional case.

The discharge that § 1141(d)(1)(A) grants upon confirmation has two exceptions.

First, in the case of an individual, § 1141(d)(2) provides that the discharge does not discharge any debt of the kind specified in § 523(a). No such exceptions apply to the discharge of an entity in a traditional or subchapter V case.

Second, § 1141(d)(6) provides that the discharge does not discharge an entity⁵⁰³ from any debt: (1) of the kind specified in § 523(a)(2)(A) or (B)⁵⁰⁴ that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid (§ 1141(d)(6)(B)). Although § 1141(d)(6) does not apply to an individual, the debts it excepts in § 1141(d)(6)(A) are debts in § 523(a) that § 1141(d)(2) excepts from an individual discharge, and the definition of excepted debts in § 1141(d)(6)(B) is identical to the definition of tax debts excepted under § 523(a)(1)(C).

Section X(C)(3) discusses procedural requirements for determination of whether a debt is excepted under § 523(a)(2), (4), or (6).

⁵⁰³ Section 1141(d)(6) uses the term “corporation.” Section 101(9) broadly defines “corporation” to include most business entities.

⁵⁰⁴ § 523(a)(2) applies to debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by: (A) false pretenses, false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition or (B) use of a written statement respecting the debtor’s or an insider’s financial condition that is materially false, on which the creditor relied, and that the debtor made or published with intent to deceive.

2. Exceptions to discharge after cramdown confirmation

As Section X(A) discusses, § 1141(d) does not apply when cramdown confirmation occurs under § 1191(b). Instead, § 1192 governs the discharge in that circumstance.

Section 1192 provides for two exceptions to discharge.

First, §1192(1) states that the discharge does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court.⁵⁰⁵ Any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation.⁵⁰⁶

Accordingly, the § 1192(1) exception provides that the discharge does not apply to debts on which the final payment is due after completion of payments under the plan, which is when the debtor receives a cramdown discharge. Chapters 12 and 13 similarly except such debts because they likewise provide for discharge at the end of the plan term.⁵⁰⁷ Because the debtor has a continuing obligation to make payments on such debts after completion of plan payments and discharge, such debts are excepted from discharge.

Second, §1192(2) excepts any debt “of the kind specified in [§ 523(a)].”⁵⁰⁸ The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual, but not an entity, under § 1141(d)(2) when the court confirms a consensual plan. Section X(D) discusses the issue of whether the § 523(a) exceptions apply to the discharge of an entity upon cramdown confirmation.

⁵⁰⁵ § 1192(1).

⁵⁰⁶ See Section VIII(B)(4)(ii).

⁵⁰⁷ See *infra* note 552.

⁵⁰⁸ § 1192(2).

Section X(C)(3) discusses procedural requirements for determination of whether a debt is excepted under § 523(a)(2), (4), or (6).

3. Procedure for determination of exceptions to discharge under § 523(a)(2), (4), or (6)

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge under subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is nondischargeable. Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting. If the debtor does not list the creditor, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of a proof of claim and a timely request for the determination, unless the creditor had actual notice of the deadlines in time to do so.⁵⁰⁹ The clerk's office must give at least 30 days' notice of the deadline.⁵¹⁰

D. Whether § 523(a) Exceptions Apply to Cramdown Discharge of Entity

1. Statutory language and background

Section 1192(2) excepts debts from the cramdown discharge “of the kind specified in § 523(a).” Unlike § 1141(d)(2), which makes the § 523(a) exceptions applicable after consensual confirmation only to an individual, § 1192(2) does not limit the applicability of the § 523(a) exceptions after cramdown confirmation to individuals. This language indicates that the exceptions also apply in entity cases.

⁵⁰⁹ § 523(a)(3).

⁵¹⁰ The Official Forms for the notice of the filing of a sub V case (Form B309E2 for cases of individuals and Form B309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.

The language of § 523(a), however, leads to a different conclusion. As amended by SBRA, the preamble to § 523(a) is:

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

SBRA added the italicized “1192” to the list of other sections, which are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.

As amended, therefore, § 523(a) states, “A discharge under section . . . 1192 . . . does not discharge an individual debtor from any debt” that § 523(a) lists. The implication of this language is that § 1192(2)’s reference to debts “of a kind specified” in § 523(a) includes only debts that § 523(a) excepts, which are only debts of individuals. In other words, although § 1192(2) states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of an entity has no operative effect because § 523(a), as amended, applies only to individuals.

SBRA’s amendment to include § 1192 in § 523(a) seems superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), § 1192(2) alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a § 1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the § 1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and “any debt

that is otherwise nondischargeable.”⁵¹¹ The use of the words “otherwise nondischargeable” logically refers to § 523(a), which applies only to individuals.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law, as Section X(D)(2) discusses – one would expect the House Judiciary Committee Report to point that out. It does not.⁵¹² To the contrary, the Report’s explanation that the exceptions are for “any debt that is otherwise nondischargeable” demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Two bankruptcy cases decided under chapter 12, however, support the conclusion that the § 523(a) exceptions may apply to a §1192 discharge of an entity.⁵¹³ The chapter 12 discharge provisions have the same language as §1192, and the prefatory language of § 523(a) as amended refers to them and §1192 in the same way.⁵¹⁴

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

⁵¹¹ H.R. REP. NO. 116-171, at 8.

⁵¹² Retired Bankruptcy Judge A. Thomas Small, Jr., submitted testimony in support of the legislation. Judge Small’s explanation of the § 1192 discharge similarly made no reference to the § 523(a) exceptions to the discharges of non-individuals. *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), available at https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

⁵¹³ *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re JRB Consol., Inc.*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

⁵¹⁴ The chapter 12 discharge provision applicable when a debtor completes plan payments, § 1228(a), excepts from discharge any debt “of a kind specified” in § 523(a). § 1228(a)(2). A debtor may receive a so-called “hardship” discharge under certain conditions even if the debtor does not complete plan payments under § 1228(b). Section 1228(c)(2) uses the same language to except such debts from a hardship discharge.

In *In re JRB Consolidated, Inc.*,⁵¹⁵ the court reasoned that the operative language in § 1228(a)(2) (“debts of the kind” specified in § 523(a)) “does not naturally lend itself to also incorporate the meaning ‘for debtors of the kind’ referenced in § 523(a).”⁵¹⁶ Instead, the court concluded, “debts of the kind” is limited to the types of debts that the subparagraphs of § 523(a) identify.⁵¹⁷ Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.⁵¹⁸

The court in *In re Breezy Ridge Farms, Inc.*,⁵¹⁹ adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)⁵²⁰ apply to debts “of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)” that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms.⁵²¹ The *Breezy Ridge Farms* court explained that its interpretation harmonized the provisions of § 1228 and § 523(a):

Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.⁵²²

⁵¹⁵ *In re JRB Consol.*, 188 B.R. at 373.

⁵¹⁶ *Id.* at 374.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.

⁵²⁰ Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. See Section X(A).

⁵²¹ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.

⁵²² *Id.*

Commentators⁵²³ and courts have disagreed about whether the § 523(a) exceptions are applicable to the cramdown discharge of an entity. The next section examines the competing rulings.

2. Judicial debate over application of § 523(a) exceptions to cramdown discharge of an entity

Four bankruptcy judges – two in the same district – have ruled that the exceptions to discharge in § 523(a) apply only in an individual case and, therefore, that no § 523(a) exceptions to a § 1192 cramdown discharge of a corporation (or other entity⁵²⁴) exist.⁵²⁵ Reversing one of the decisions, the Fourth Circuit in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), concluded that § 1192(2) excepts debts that are listed in § 523(a) from the cramdown discharge of both individual and corporate debtors. The debate involves analysis of legislative history and the context of the statutes in support of the competing textual analyses.

Rulings of the bankruptcy courts that § 523(a) exceptions are inapplicable to entity discharge

The bankruptcy court in *Cleary Packaging*⁵²⁶ adopted and expanded the rationale of *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc.*

⁵²³ Compare, e.g., 5 NORTON BANKRUPTCY LAW AND PRACTICE § 107:19; James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, NORTON BANKR. L. ADVISER, Oct. 2019, Part IX (exceptions are applicable to discharge of sub V entity) with Richard P. Cook, *Discharges in Subchapter V: What Has Changed? What Remains the Same? Are Elephants Hiding in Mouseholes?*, 41-Jun Am. Bankr. Inst. J. 24 (June 2022) (exceptions should not be applicable to discharge of sub V entity).

⁵²⁴ “Corporation” is a defined term in the Bankruptcy Code, § 101(9) and includes, among other things, a limited liability company. E.g., *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 36 F.4th 509, 512 n. 1 (4th Cir. 2022). The text uses “corporate” or “corporation” interchangeably with “entity”.

⁵²⁵ *Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc., 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 Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021).

⁵²⁶ *Cantwell-Cleary Co., Inc., 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).

Crabcake Factory USA), 626 B.R. 871 (Bankr. D. Md. 2021), the first case to address the issue.

Two later bankruptcy court opinions follow the approach of these cases.⁵²⁷

The bankruptcy courts focused on the text of § 523(a) and invoked two principles of statutory construction to support the conclusion that the discharge exceptions apply only to an individual. The first is the familiar rule that the plain meaning of the text governs interpretation of the bankruptcy statutes unless such an interpretation produces an absurd result.⁵²⁸ The second is that “every word must be given meaning so that no word in a statute is rendered superfluous.”⁵²⁹

For the bankruptcy courts, the critical text is in the preamble of § 523(a), which states that a discharge *under § 1192* discharges *an individual debtor* from all debts except the 21 types of listed debts. This clear and unambiguous language makes the exceptions applicable only to the § 1192 discharge of the debtor.

A contrary interpretation, the bankruptcy courts continue, would render SBRA’s amendment of § 523(a) to insert § 1192 superfluous. Section 1192(2) states that a § 1192 discharge does not discharge a debt “of the kind specified in § 523(a).” For the exceptions in § 523(a) to apply to discharges of individuals and entities under § 1192(2), it is not necessary to add § 1192 to § 523(a).

⁵²⁷ *Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021);

⁵²⁸ *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871, 875-76 (Bankr. D. Md. 2021), *citing* *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

⁵²⁹ *Id.* at 876. The court cited: *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (A court should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”); and *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, — U.S. —, 137 S.Ct. 1002, 1010 (2017) (“We thus begin and end our inquiry with the text, giving each word its ‘ordinary, contemporary, common meaning.’” (quoting *Walters v. Metro. Ed. Enter., Inc.*, 519 U.S. 202, 207, (1997))).

The reference to § 1192 in § 523(a) must mean something, and “the only reasonable meaning is that Congress intended to limit application of the § 523(a) exceptions in a Subchapter V case to individuals.”⁵³⁰ In other words, the only function of the addition of “§ 1192” to the qualifying language of § 523(a) “is to limit application of § 523(a) to individual debtors in Subchapter V cases.”⁵³¹ “This is not simply the logical reading of the statute but also it is the result mandated by common principles of statutory construction.”⁵³²

Under this textual analysis, the *Cleary Packaging* bankruptcy court concluded, “When giving effect to every word of the statute, the plain language of Section 523(a) is unequivocal and confirms that the exceptions to a debtor’s discharge, including a discharge under Section 1192, apply only to an individual.”⁵³³ The bankruptcy court in *Satellite Restaurants* put it this way: “[T]he Code, read holistically and in accordance with common principles of statutory interpretation, limits the application of section 523 in Subchapter V cases to individual debtors.”⁵³⁴

The Fourth Circuit ruling: § 523(a) exceptions apply to entity discharge

The Fourth Circuit’s contrary analysis in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. 2022), focuses on the text of § 1192(2) “as the provision that specifically governs discharges” in a subchapter V case. *Id.* at 515.⁵³⁵ The

⁵³⁰ Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re Satellite Restaurants, Inc. Crabcake Factory USA*), 626 B.R. 876 (Bankr. D. Md. 2021).

⁵³¹ Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re Cleary Packaging LLC*), 630 B.R. 466, 472 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

⁵³² Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re Cleary Packaging LLC*), 630 B.R. 466, 472 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

⁵³³ Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re Satellite Restaurants, Inc. Crabcake Factory USA*), 626 B.R. 871, 876 (Bankr. D. Md. 2021).

⁵³⁴ Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re Cleary Packaging LLC*), 630 B.R. 466, 472 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re Satellite Restaurants, Inc. Crabcake Factory USA*), 626 B.R. 871 (Bankr. D. Md. 2021).

⁵³⁵ More accurately, § 1192(2) governs only one set of exceptions to discharge when the court confirms a cramdown plan under § 1191(a). It has no application when the court confirms a consensual plan under § 1191(a).

critical language of § 1192(2) is that it excepts “*any debt . . . of the kind*” specified in § 523(a).

The Fourth Circuit concluded that use of the word “debt” was decisive because “it does not lend itself to encompass the ‘kind’ of *debtors* discussed in the language of § 523(a).” *Id.* (original emphasis).

The Fourth Circuit explained, “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). 36 F.4th at 515 (original emphasis). This interpretation of “of the kind,” the court continued, is in line with the ordinary dictionary meanings of “kind” as “category” or “sort.”

The court summarized its ruling, 36 F.4th at 515 (original emphasis):

[W]hile § 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).

To the extent that tension existed between the language of § 523(a) addressing individual debtors and the language of § 1192(2) addressing both individual and corporate debtors, the court added, the more specific language of § 1192(2) dealing only with subchapter V discharges should govern over the more general provisions of § 523(a) that reference other discharges under the Bankruptcy Code. 36 F.4th at 515.

The bankruptcy courts support their interpretation with analysis of legislative history, the underlying objectives of subchapter V, and the historical structure and objectives of the Bankruptcy Code. The Fourth Circuit finds support for its conclusion in the context of § 1192(2)

within the Bankruptcy Code, in the structure of the Bankruptcy Code, and in considerations of “fairness and equity.”

Reasoning of the bankruptcy courts to support their interpretation

The bankruptcy courts, reviewing the legislative history of subchapter V that earlier text discusses, found nothing that indicated that Congress intended to expand the exceptions to discharge in § 523(a) to a corporation.⁵³⁶

In addition, the bankruptcy courts noted the well-settled law that the pre-SBRA version of § 523(a) did not apply to a chapter 11 discharge of a corporation.⁵³⁷ Indeed, in enacting the Bankruptcy Code in 1978, Congress expressly considered and rejected the approach of one of the former reorganization chapters under the Bankruptcy Act, Chapter XI, that provided for objections to the discharge of a corporation.⁵³⁸

The bankruptcy court in *Cleary Packaging*⁵³⁹ pointed out that, according to one bankruptcy scholar, the exceptions in chapter XI cases to a corporation’s discharge for fraud and other debts “posed a substantial impediment to the ability of certain debtors to reorganize” under chapter XI, and the corporate discharge provisions in chapter 11 (the single reorganization chapter that replaced former Chapters X, XI, and XII) reflected “the considered judgment that

⁵³⁶ Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re Cleary Packaging LLC*), 630 B.R. 466, 473 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re Satellite Restaurants, Inc. Crabcake Factory USA*), 626 B.R. 871, 878 (Bankr. D. Md. 2021).

⁵³⁷ Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re Satellite Restaurants, Inc. Crabcake Factory USA*), 626 B.R. 871, 876-77 (Bankr. D. Md. 2021) (collecting and discussing cases).

⁵³⁸ Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re Cleary Packaging LLC*), 630 B.R. 466, 473-74 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

⁵³⁹ Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re Cleary Packaging LLC*), 630 B.R. 466, 474 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

any corporate discharge exception ‘would leave an undesirable uncertainty surrounding reorganizations that is unacceptable.’”⁵⁴⁰

The court noted that the only exception to the discharge of a corporation in a traditional chapter 11 case is in § 1141(d)(6).⁵⁴¹ Section 1141(d)(6) provides a limited exception for debts of a kind specified in §523(a)(2) owed to (1) a domestic governmental unit or to a person resulting from an action under the False Claims Act or similar state statute and (2) taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat.⁵⁴² It took eight years for that provision to be enacted.⁵⁴³

From this, the bankruptcy court in *Cleary Packaging* concluded, “[T]he 1978 Code represented an intentional and decisive change by Congress with respect to the scope of a corporate debtor’s discharge.” 630 B.R. 474. Accordingly, the court reasoned, “[T]he suggestion that Congress incorporated [21] new exceptions to discharge for small corporations in a bill [the SBRA] that was introduced in April 2019, and signed into law by the President in August 2019, seems not only improbable but also contradicts years of bankruptcy law and policy. ‘Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.’” 630 B.R. at 475.⁵⁴⁴

⁵⁴⁰ *Id.* at 474, quoting Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764-66 (2005) (internal notes and citations omitted). See also *Cleary Packaging*, 630 B.R. at 475, n. 12.

⁵⁴¹ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466, 475 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

⁵⁴² See generally Roger S. Goldman, et al., *Discharging False Claims Liability in Bankruptcy, Section 1141(d)(6)(A) of the Bankruptcy Code: An Incentive to Settle FCA Cases?*, 23 No. 1 Health Law 40 (American Bar Association 2010).

⁵⁴³ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466, 475 & n. 17 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

⁵⁴⁴ The court quoted *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

Simply put, the bankruptcy courts conclude that Congress did not intend that § 1192(2) change established law regarding exceptions to an entity's chapter 11 discharge.

The *Cleary Packaging* bankruptcy court also concluded that the scope of the chapter 11 discharge should be the same in all chapter 11 cases. The court explained, 630 B.R. at 475:

Although the entities at issue in a Subchapter V case are smaller than those in most traditional chapter 11 cases, the state law structure of these entities and their need for a balance sheet restructuring are akin to larger chapter 11 cases. These entities act in the same general manner and should be subject to the same potential liabilities through the chapter 11 process. In fact, history has shown that individuals running very large corporations are capable of using the entity for improper purposes, yet the entity receives a discharge in chapter 11 if its plan is confirmed. It seems incongruent that Congress would penalize a smaller entity for similar individual conduct.

The *Cleary Packaging* bankruptcy court also noted that the § 523(a) exceptions do not apply to a discharge granted upon confirmation of a consensual plan under § 1191(a) – an outcome determined by class voting, not the actions of individual creditors. Thus, if enough creditors in a class including a creditor who claims a nondischargeable debt accept it (and all other impaired classes accept it), consensual confirmation under § 1191(a) discharges the allegedly nondischargeable claim. 630 B.R. at 476.

The court concluded, “[A]ny such result is arbitrary and undermines the equality principles of creditor treatment under the Code.” 630 B.R. at 476.

The *Cleary Packaging* bankruptcy court summarized its ruling as follows, *id.* at 476:

The nature and purpose of the discharge are different for corporate debtors, and those differences must, in this Court's opinion, be respected in Subchapter V.

The Court is persuaded by Congress' rejection of prior exceptions to discharge for corporate debtors and, more importantly, the plain language that Congress used in section 523(a) to confine those exceptions to individual debtors. Absent clear and unambiguous direction from Congress to deviate from that approach, the Court finds that an entity's discharge under section 1192 of the Code is unimpeded by section 523(a) of the Code.

The Fourth Circuit’s reasoning in support of its interpretation

The Fourth Circuit in *Cleary Packaging* did not address the bankruptcy court’s analysis of legislative history, the history of exceptions to discharge in chapter 11 cases, or the need for consistency in the scope of the discharge of an entity in subchapter V and chapter 11 cases. Instead, the court made four points about “the context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code’s structure” that supported its interpretation. 36 F.4th at 515.

Fourth Circuit’s analysis of distinctions in discharge provisions

The Fourth Circuit’s first point is that “Congress conscientiously defined and distinguished the kinds of debtors” covered by the discharge provisions in chapters 7, 11, and 13. 36 F.4th at 516. Entities cannot get a discharge in chapter 7 and 13 cases; in traditional chapter 11 cases, Congress “explicitly distinguished” individual and corporate discharges by excluding different debts from each. In contrast, the court concluded, “Congress purposefully addressed both individual and corporate debtors when defining the right of discharge in Subchapter V proceedings.” *Id.*

As an initial matter, the discharge provisions of chapters 7 and 13 are irrelevant to the issue. Chapter 7 is a liquidation proceeding, so a corporation effectively no longer exists after the filing of a chapter 7 case. The reason for denying a discharge to an entity in a liquidation case is to avoid trafficking in corporate shells and bankrupt partnerships.⁵⁴⁵ Section 727(a)(1) clearly and simply distinguishes individuals and entities by providing that such entities do not

⁵⁴⁵ 5 Norton Bankruptcy Law and Practice § 86:2 (“Beyond removing what was often a meaningless extension of the discharge provisions, the purpose of Code § 727(a)(1) is to avoid the trafficking in corporate shells and in bankrupt partnerships. Consistent with this purpose, the discharge provisions of Chapter 11 similarly deny discharge to debtors who are not individuals if the confirmed Chapter 11 plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under Code § 727(a) if the case were a Chapter 7 case.”) (Citing H.R. Rep. No. 95-595 (1977); S. Rep. No. 95-989 (1978)).

receive a discharge. The same prohibition exists in a chapter 11 case when a corporation liquidates assets and does not remain in business. § 1141(d)(3).

An entity cannot receive a chapter 13 discharge because an entity cannot be a chapter 13 debtor under § 109(e).⁵⁴⁶ Chapter 13 distinguishes between entities and individuals by making only individuals eligible for chapter 13, not through a discharge provision.

The distinctions in the operation of the discharge provisions of chapter 7 and 13 between individuals and entities, therefore, shed no light on the interpretation of chapter 11 and subchapter V provisions that deal with exceptions to discharge.

A review of the structure of the discharge provisions of § 1141(d) and § 1192(2) helps to understand the Fourth Circuit's point about distinctions between exceptions to discharge for individuals and debtors in chapter 11 and subchapter V cases.

Section 1141(d) provides for a discharge in a traditional case (and after consensual confirmation in a sub V case) upon confirmation in one paragraph applicable to all debtors (§ 1141(d)(1)(A)) and excepts debts specified in § 523(a) from an individuals' discharge in another. (§ 1141(d)(2)). In a subchapter V case, § 1192(2) excepts debts in § 523(a) without limiting its application to individuals. The Fourth Circuit's conclusion is that Congress must have intended that the § 523(a) exceptions apply to all debtors because § 1192(2) did not limit the exceptions to individuals as § 1141(d)(2) does.

The structures of § 1141(d) and § 1192(2) support the Fourth Circuit's interpretation but they do not compel it. The legislative history of subchapter V and the history of the enactment of Chapter 11 without any exceptions to a corporation's discharge that the bankruptcy courts

⁵⁴⁶ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 12:6.

examined demonstrate that Congress did not intend that § 1192 apply to all debtors in a way that is materially different from the way that the discharge provisions of § 1141(d) apply to all debtors, as later text discusses in more detail.

Fourth Circuit’s concern about reconciliation with § 1141(d)(6)

The Fourth Circuit’s second point is that the bankruptcy court’s interpretation would “create difficulty in reconciling § 523(a) with § 1141(d)(6).” 36 F.4th at 516. The Fourth Circuit did not elaborate on its concern.

Section 1141(d)(6) provides that the discharge does not discharge an entity⁵⁴⁷ from any debt: (A) of the kind specified in § 523(a)(2)(A) or (B)⁵⁴⁸ that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (B) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid (§ 1141(d)(6)(B)). Although § 1141(d)(6) does not apply to an individual, the debts it excepts in § 1141(d)(6)(A) are debts that are nondischargeable in an individual case under § 523(a)(2), and the debts in § 1141(d)(6)(B) are identical to debts excepted under § 523(a)(1)(C).

Two possible concerns involving § 1141(d)(6) arise from the bankruptcy court’s interpretation.

First, if § 1192(2) does not except debts of an entity after cramdown discharge, the discharge will discharge debts that § 1141(d)(6) excepts, because § 1141(d) does not apply in the

⁵⁴⁷ Section 1141(d)(6) uses the term “corporation.” Section 101(9) broadly defines “corporation” to include most business entities.

⁵⁴⁸ § 523(a)(2) applies to debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by: (A) false pretenses, false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition or (B) use of a written statement respecting the debtor’s or an insider’s financial condition that is materially false, on which the creditor relied, and that the debtor made or published with intent to deceive.

case of cramdown confirmation under § 1181(c). If consensual confirmation occurs, however, such debts are excepted because § 1141(d) governs the discharge.

The fact that an entity could escape nondischargeability of a § 1141(d)(6) debt through cramdown confirmation but not through consensual confirmation supports the conclusion that the § 523(a) exceptions must apply after cramdown confirmation because the § 523(a) exceptions encompass debts described in § 1141(d)(6). In this situation, under the bankruptcy court's interpretation, an entity has an incentive to seek cramdown confirmation rather than consensual confirmation so that it receives a broader discharge.

This anomalous result with regard to limited types of debts does not provide a persuasive basis for concluding that Congress intended to except *all* types of § 523(a) debts from discharge in order to preserve exceptions for a few. While § 1141(d)(6) debts rarely arise in reported chapter 11 cases, the problem of exceptions to discharge in entity cases is widespread. The fact that the bankruptcy court's interpretation gives an entity a broader discharge in cramdown cases with regard to types of debts that rarely arise does not indicate that Congress intended to depart from the intentional and deliberate elimination of exceptions to discharge in entity cases, as later text explains.

The second issue involves the specific language of § 1141(d)(6)(A). That subparagraph provides that it does not discharge debts owed to certain creditors "of the kind specified" in § 523(a)(2)(A) or (B).

Again, a review of the statutes helps to clarify the issue.

Section 523(a) states that a discharge under § 1141 and § 1192 (and others) does not discharge an individual debtor from the listed debts. Section 1192(2) excludes debts "of the kind

specified” in § 523(a). Under the bankruptcy court’s interpretation, the inclusion of § 1192 in § 523(a)(2) means that § 1192(2) does not except debts of an entity.

Application of the bankruptcy court’s interpretation to § 1141(d)(6)(A) would mean that § 1141(d)(6) likewise does not except debts of an entity from a discharge in a traditional chapter 11 case under the following syllogism:

1. Both § 1192(2) and § 1141(d)(6)(A) except debts “of the kind specified” in § 523(a).
2. Section 523(a) states that discharges under the listed sections, including § 1141 and § 1192, do not discharge “an individual debtor” from the debts it lists.
3. The bankruptcy court’s conclusion that the exception to a § 1192 discharge for debts “of the kind specified” in § 523(a) does not apply to an entity because § 523(a) applies only to the discharge of an individual also applies to a § 1141 discharge.

A determination that § 1141(d)(6) does not except debts of an entity contradicts its express language that it excepts the listed debts from the discharge of a corporation. Accordingly, the conclusion from this exercise is that the bankruptcy court’s interpretation of § 523(a) as limiting exceptions to discharge in § 1192(2) to individuals cannot be correct because the same interpretation makes no sense when applied to § 1141(d)(6)(A).

The bankruptcy courts do not discuss the point, but their interpretation does not necessarily require the result that the foregoing discussion posits. Section 1141(d)(6) expressly states that it provides exceptions to the debts of corporations and was enacted as a stand-alone amendment to § 1141(d). The bankruptcy court’s interpretation cannot override the express provisions of § 1141(d)(6)(A) to except the debts it describes by reference to § 523(a) from a corporate discharge.

Further, the bankruptcy courts' interpretation can be reconciled with § 1141(d)(6)(A) based on differences in the context of § 1141(d)(6)(A) and in the circumstances of its enactment and the enactment of amendments to § 523(a) in 1986 and 2019 that added, respectively, the discharge provisions of chapter 12 and subchapter V. Context of the statutes and the circumstances of their enactment make it appropriate to interpret the same words differently in § 1141(d)(6)(A) than in § 1192(2).

As originally enacted in 1978, § 523(a) referenced only a chapter 7 discharge, a chapter 11 discharge, and the so-called “hardship” discharge in a chapter 13 case under § 1328(b).⁵⁴⁹ The limitation of the exceptions to debts of an individual at that time had no effect on the discharge of an entity. An entity could not be a chapter 13 debtor, and it could not get a chapter 7 discharge. Section 1141(d)(2) specifically excepted debts in § 523(a) only from the chapter 11 discharge of an individual. Chapter 12 did not exist.

In 1986, Congress enacted chapter 12 as a temporary provision⁵⁵⁰ and amended § 523(a) to include the chapter 12 discharge provisions.⁵⁵¹ Chapter 12 was modelled on chapter 13,⁵⁵²

⁵⁴⁹ In a chapter 13 case, a debtor receives a discharge under § 1328(a) upon completion of plan payments. As originally enacted, § 1328(a) excepted only one type of debt listed in § 523(a) from discharge, obligations for alimony and other support in § 523(a)(5). It was, therefore, called a “superdischarge” because only one exception to discharge applied. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.*

⁵⁵⁰ Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 255, Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986). After several extensions, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) made it a permanent part of the Bankruptcy Code.

⁵⁵¹ Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 257(n), Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986).

⁵⁵² Chapter 12 closely resembles chapter 13. In both chapters 12 and 13, creditors do not vote. The confirmation standards are similar, but different from those in chapter 11. Limits on the term of the plan exist in both chapters. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due. § 1322(b)(5) (chapter 13); § 1222(b)(5) and (9). Although a chapter 11 plan may provide for the cure of a default, it does not contain specific provisions for payments on long-term debt beyond the term of the plan. In fact, chapter 11 contains no limit on the term of the plan.

and its provisions for the exception of debts from discharge tracked the two exceptions to a chapter 13 discharge.⁵⁵³

One exception is for certain long-term debts on which the final payment is due after the final payment under the plan.⁵⁵⁴ Because the debtor has a continuing obligation to make payments on such debts after completion of plan payments and discharge, such debts are excepted from discharge.

The second exception is for debts “of a kind specified” in § 523(a).

Under the chapter 12 discharge provisions standing alone, the § 523(a) exceptions to discharge in chapter 12 cases are not limited to discharges of individuals. But Congress also enacted, in the same legislation, an amendment to § 523(a) to add the chapter 12 discharge

Sections 1222(b)(5) and 1322(b)(5) are the same. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due.

In chapter 12 cases, § 1222(b)(9) permits payment of allowed secured claims “consistent with” § 1225(a), but over a period of time longer than the term of the plan. Section 1225(a) is the chapter 12 analog of § 1325(a)(5) in chapter 13 cases. Both permit payment of an allowed secured claim with payments having a value of the allowed amount of the secured claim. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 5:10, 5:14. In a chapter 13 case, however, payments under this type of treatment must be completed within the plan term. *Id.* § 5:13.

⁵⁵³ More precisely, the exceptions in the chapter 12 discharge provisions are the same as the exceptions to the “hardship discharge” in chapter 13, with one exception based on a different provision in chapter 12 that permits payment of allowed secured claims beyond the term of the plan.

In a chapter 13 case at the time of temporary enactment of chapter 12, a debtor received a so-called “superdischarge” upon completion of plan payments in a chapter 13 case under § 1328(a), subject to only one exception in § 523(a)(5) for alimony and support obligations. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.* §§ 21:13, 21:16, 21:17.

A chapter 13 debtor who did not complete all plan payments could receive a so-called “hardship” discharge under § 1328(b) under certain conditions. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 21:8. Under § 1328(c), the hardship discharge of § 1328(b) is subject to exceptions for all of the debts in § 523(a). See *id.* § 21:18.

Like chapter 13, chapter 12 provides for both “completion” and “hardship” discharges. § 1228(a) (completion discharge); § 1228(b) (hardship discharge). Unlike chapter 13, however, both chapter 12 discharges are subject to all exceptions in § 523(a). § 1228(a)(2) (completion discharge); § 1228(c)(2) (hardship discharge).

The chapter 12 discharge provision differs from the chapter 13 hardship discharge provision in that it also excepts debts “provided for” in the plan under § 1222(b)(9), discussed *supra* note 552. These provisions recognize that, if a debtor will make payments on a debt beyond the term of the plan and after discharge, the debtor must remain liable on such a debt.

⁵⁵⁴ § 1228(a)(1) (completion discharge); § 1228(c)(1) (hardship discharge). See *supra* note 552.

sections to the list of discharges. As amended, therefore, § 523(a) stated that a chapter 12 discharge “does not discharge an individual debtor from any debt” that it lists.

In enacting subchapter V, Congress did the same thing with respect to the cramdown discharge in § 1192. First, it modelled the exceptions to the cramdown discharge on the exceptions in chapter 12. Specifically, § 1192(1) excepts debts on which the last payment is due after the plan’s term (which is when entry of discharge occurs after cramdown confirmation), and § 1192(2) excepts debts “of the kind specified” in § 523(a). Second, it added § 1192 to the list in § 523(a).

The bankruptcy courts’ interpretation in the subchapter V context is that the addition of § 523(a) must mean something, and what it means is that only debts of an individual are excepted from discharge. The same analysis means that the 1986 chapter 12 legislation also resulted in application of the exceptions in § 523(a) only to individuals (contrary to the rulings of two bankruptcy courts in chapter 12 cases discussed above).

The bankruptcy courts’ interpretation is subject to debate for other reasons, but its interpretation is not irreconcilable with § 1141(d)(6)(A).

The Fourth Circuit’s correct premise is that this reading of “of the kind specified” in § 1192 makes no sense when applying § 1141(d)(6)(A). But this does not mean that the same words must have the same effect in § 1141(d)(6)(A), or even that the meaning of the words that makes sense in § 1141(d)(6)(A) requires that they be interpreted the same way in § 1192 (or in the chapter 12 discharge provisions).

The reason is that § 1141(d)(6)(A) was enacted in 2019 as a stand-alone provision that makes a specific exception to the chapter 11 discharge of a corporation. It clearly states an exception that is applicable to a corporation regardless of how it describes the debts that are

excepted. It addressed a specific problem involving a specific category of debts to be excepted from a corporate discharge.

In contrast, § 1192(2) was enacted in connection with an amendment to § 523(a) in the same way that § 523(a) had been amended in 1986 upon enactment of chapter 12. Although enactment of § 1192(2) and the accompanying amendment to § 523(a) occurred after enactment of § 1141(d)(6)(A), its purpose and effect are the same as those in the chapter 12 legislation enacted in 1986. Determination of the meaning of the subchapter V legislation, therefore, properly involves consideration of the meaning of chapter 12 legislation that preceded § 1141(d)(6)(A), without regard to how the same language applies in § 1141(d)(6)(A).

The chapter 12 discharge provisions in § 1228 and corresponding amendment to § 523(a) were part of comprehensive legislation to deal with the reorganization of family farmers that, unlike chapter 13, permitted entities to file such cases. The similar subchapter V provisions were a part of comprehensive legislation to facilitate the reorganization of small businesses that modified important aspects of chapter 11. How congress used the same words in another specific context does not properly inform their interpretation in the context of comprehensive legislation. Conversely, the meaning of the words in the comprehensive legislation does not require the same meaning in a statute with limited effect where a different meaning is clear.

In other words, the bankruptcy courts' reading of the effect of the limitation of exceptions in § 523(a) to individuals with regard to the general effect of discharges that it lists does not mean that the same reading is applicable when a specific statute – § 1141(d)(6)(A) – references specific subparagraphs of § 523(a)(2) to describe debts that are clearly intended to be excepted from a corporate discharge.

Fourth Circuit’s discussion of exceptions in chapter 12 cases

The third structural point the Fourth Circuit advances, which it describes as “more telling,” is “Congress’s importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings.” 36 F.4th at 516. Citing the chapter 12 cases that earlier text discusses,⁵⁵⁵ the Fourth Circuit observed that, under the language of the chapter 12 discharge provisions materially identical to § 1192, those courts had determined that the § 523(a) exceptions applied to an entity’s chapter 12 discharge.

The proposition that subchapter V is “conceptually similar” to chapter 12 is imprecise. Although subchapter V resembles chapter 12 in some ways, it is significantly different in others.⁵⁵⁶ Critically, subchapter V is part of chapter 11, and its requirements for confirmation incorporate most of the requirements of § 1129(a). Thus, more accurately, subchapter V uses chapter 11 as its base and then incorporates some of chapter 12’s structure.⁵⁵⁷

Nevertheless, because the language of the discharge exceptions in chapter 12 and § 1192(2) is identical, the holdings in the chapter 12 cases support the Fourth Circuit’s ruling. In fact, the Fourth’s Circuit’s textual analysis is similar to the textual analysis those courts used. Otherwise, the cases add little enlightenment about the proper interpretation of the statutes in question. All they do is reach the same result as the Fourth Circuit for the same reasons.

The bankruptcy court in *Cleary Packaging* addressed the chapter 12 cases and distinguished them based on two important differences between chapter 12 and subchapter V.

⁵⁵⁵ *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re JRB Consol., Inc.*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

⁵⁵⁶ See Part I.

⁵⁵⁷ As the court observed in *In re Trepetin*, 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020): Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute’s Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

630 B.R. at 472 & n. 9.⁵⁵⁸ First, subchapter V is an alternative for a business entity and applies to a much broader array of entities than those eligible for chapter 12 as family farmers and fishers. Second, subchapter V incorporates the discharge provisions of § 1141(d) in the context of a consensual plan. Unlike the chapter 12 discharge provision, § 1141(d) distinguishes between individual and corporate discharges.

The *Cleary Packaging* bankruptcy court concluded, “The lack of such distinction within Chapter 12 considered in conjunction with the narrowly circumscribed type of entity that may be a Chapter 12 debtor renders analogy between the two discharge provisions unpersuasive.” 630 B.R. at 472, n. 9, *quoting United States ex rel. Minge v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430 (S.D.N.Y. 2014).

Further, the bankruptcy court in *Cleary Packaging* noted that the plain language of the chapter 12 provision “could support a result different than that reached by the courts” in the chapter 12 cases. 630 B.R. at 472.

In short, although the chapter 12 cases support the Fourth Circuit’s decision in the sense that they are consistent with it, they provide no additional basis for it. They support the Fourth Circuit’s ruling only if their textual analysis is correct – the question before the Fourth Circuit – and if their reasoning and holdings appropriately apply in the subchapter V context. The much wider availability of subchapter V than chapter 12 requires a fresh examination of the statutory language in the subchapter V context.

Fourth Circuit’s consideration of purposes of subchapter V

⁵⁵⁸ The court in *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871, 877 (Bankr. D. Md. 2021) similarly distinguished the chapter 12 cases.

The fourth point in the Fourth Circuit’s review of context and structure is the consideration of subchapter V’s “juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter.” 36 F.4th at 517. The court observed that a primary goal of subchapter V is to simplify chapter 11 for small businesses and to reduce administrative costs for them. To do so, the court said, “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.” *Id.*

The Fourth Circuit followed this statement with three sentences dealing with discharge provisions. The sentences, with commentary, are:

1. “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.” 36 F.4th at 517.

Specifically, § 1141(d)(1)(A) describes the debts that are discharged, and § 1141(d)(2) states that the discharge does not discharge an individual debtor from any debt excepted from discharge under § 523.⁵⁵⁹ The distinction reflects the simple proposition that an individual should not be able to use chapter 11 to obtain benefits that are not available in other chapters.

⁵⁵⁹ Section 1141(d)(5) makes three other distinctions between the discharge of individual and entity debts. Section 1141(d)(5), which does not apply in subchapter V, § 1181(1), deals only with individual debtors and provides for (1) deferral of discharge until completion of plan payments; (2) the grant of a so-called “hardship discharge” under certain conditions for a debtor who has not completed plan payments; and (3) the court to grant the discharge if it finds no reasonable cause to believe that § 522(q)(1) is applicable and that no proceeding is pending in which the debtor may be found guilty of a felony as described in § 522(q)(1)(A) or liable for a debt as described in § 522(q)(1)(B). Similar provisions with regard to § 522(q) apply to the grant of a discharge under chapters 7 (§ 727(a)(12)), 12 (§ 1228(f)), and 13 (§ 1328(h)). For a discussion of the chapter 13 provision, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:5.

Section 522(q)(1) limits the value of the exemption an individual debtor utilizing the nonbankruptcy exemptions under § 522(b)(3)(A) may take in a residence, homestead, of burial plot if the debtor has committed a felony that, under the circumstances, demonstrates that the filing of the case is an abuse of the Bankruptcy Code or

2. “In contrast, § 1192 provides benefits to small business debtors, regardless of whether they are individuals or corporations.” *Id.*

This correctly states the operation of § 1192 as the court interpreted it. But whether the benefits are or should be the *same* is the issue before the court. Logic does not permit a premise that is the result of the reasoning.

3. “Thus, an important purpose for Subchapter V would be frustrated were we to adopt [the bankruptcy court’s] interpretation of §§ 1192(2) and 523(a), which would treat individuals and corporations differently.” *Id.*

This conclusion raises two questions. What is the “important purpose” for subchapter V that concerns the court? How is it frustrated by different provisions for the discharge of debts?

The Fourth Circuit’s opinion states earlier that Congress enacted subchapter V “with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses.” 36 F.4th at 517. This is the universally recognized objective of subchapter V.

But if that is the “important purpose,” it is clear that making an entity’s discharge subject to exceptions frustrates, rather than furthers, that purpose. As later text explains, the reasons that led Congress to eliminate exceptions to discharge of an entity when it enacted chapter 11 in 1978 require the same result in a subchapter V case.

The implication of the Fourth Circuit’s reasoning, however, is that the court considers the “important purpose” to be that the same discharge exceptions in § 1192(2) apply to individuals

if the debtor owes a debt arising from a violation of state or federal securities laws, from any civil remedy under 18 U.S.C. § 1964, or from any criminal act, intentional tort, or willful misconduct that caused serious physical injury or death to another individual, in the preceding five years.

and entities alike. If so, a ruling that different exceptions apply to entities obviously frustrates that purpose.

Again, however, whether § 1192(2) makes a distinction is the issue before the court. The court is deciding that the same treatment is an important purpose, but the fact that its ruling *has* that result does not provide a reason *why* that should be the result or why the same treatment is important. In other words, logic requires that a conclusion that an important purpose of § 1192 is identical treatment of individuals and entities rest on something more than the determination that § 1192 has that result.

Fourth Circuit’s consideration of “equity and fairness” and elimination of the absolute priority rule

The Fourth Circuit also supported application of the § 523(a) exceptions to discharge to a corporation based on considerations of “equity and fairness” arising from elimination of the absolute priority rule. 36 F.4th at 517. After noting that elimination of the absolute priority rule allows an entity’s owners in a subchapter V case to retain their ownership interests “at the expense of and over the objection of creditors,” the court stated, *id.* (original emphasis):

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.

The Fourth Circuit then concluded, *id.*

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.

The Fourth Circuit thus connected the cramdown discharge provision with elimination of the absolute priority rule and concluded that making a distinction with regard to exceptions to

discharge would (1) undermine the balancing of its elimination by adding an additional layer of fairness and equity; (2) make no sense; and (3) create perverse incentives.

Discussion of the Fourth Circuit’s analysis of subchapter V’s juxtaposition with traditional chapter 11 provisions and its related consideration of fairness and equity requires a review of related economic and legal issues that the business reorganization of an entity presents, including the operation and effect of the absolute priority rule and its elimination in subchapter V cases and the discharge of an entity.

Review of reorganization, absolute priority rule, and exception to discharge principles

A reorganization case under any chapter involves two basic economic issues that inform analysis of confirmation and discharge matters. The first is how much money can the debtor generate to pay creditors. The second is how that money is allocated among them. Bankruptcy principles require allocation to pay the value of secured claims, to pay administrative and priority claims in full, and to pay unsecured creditors what is left. A fundamental principle is equal treatment of similarly situated creditors.

Theoretically, the amount that an entity can pay is unlimited: it can just keep making payments until everyone is paid in full. In the meantime, however, the entity has a financial structure that makes no sense because it remains insolvent, and equity has no prospect of any return for the time it takes to pay its debts in full.

Reorganization solves an *entity’s* financial structure by restructuring the balance sheet to reduce debt to a manageable amount. If the proposed restructuring is unacceptable to a class of unsecured creditors, the theory of the absolute priority rule is that the reorganized entity’s value is then allocated among its stakeholders – creditors and owners – in accordance with their

priorities.⁵⁶⁰ Because creditors have priority over owners, creditors under the absolute priority rule receive the ownership interests to the exclusion of existing owners, except in the rare instance where the reorganized entity is worth more than the amount of the debt.

Reorganization under these principles does not work if the reorganized entity remains liable for a nondischargeable debt. Professor Brubaker summarized the problem of exceptions to the discharge of a corporation in reorganization cases under chapter XI (one of the predecessors of chapter 11):⁵⁶¹

A corporate debtor could be denied a chapter XI discharge [under the prior Bankruptcy Act] altogether if the debtor had “been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of an individual] bankrupt.” Moreover, chapter XI provided that confirmation of a plan of arrangement discharged a corporate debtor “from all ... unsecured debts and liabilities provided for by the arrangement,” but expressly excluded from this discharge “such debts as ... are not dischargeable” in an individual debtor's ordinary bankruptcy case.

The corporate discharge exceptions in chapter XI – particularly the discharge exception for fraud debts – posed a substantial impediment to the ability of certain debtors to reorganize under that chapter. Of course, cases precipitated by massive fraud (where the debtor's fraud liability could easily exceed the going concern value of the debtor's business) could not be successfully prosecuted under chapter XI, as the non-dischargeability of fraud debt would preclude any attempt to even address the source of the business's financial distress. Even more significantly, though, the presence of the discharge exceptions supplied, to any creditor who could assert colorable allegations of fraud, a credible threat to “opt out” of the chapter XI restructuring, in an attempt to receive a greater recovery than other creditors. Consequently, the chapter XI discharge exceptions invited holdout creditor problems of the sort that plague non-bankruptcy workouts and that are the very impetus for a federal bankruptcy reorganization process (that can fully bind dissenters to a restructuring plan).

⁵⁶⁰ The priority discussion here involves only the priority of unsecured creditors over equity interests. Although a secured creditor has a “priority” over unsecured creditors in that it has collateral to secure its debt, and unsecured creditors in a liquidation case cannot generally be paid from that liquidation of a creditor’s collateral until the secured creditor receives full payment, that type of “priority” is irrelevant to the absolute priority rule. Priority claims under § 507 are likewise irrelevant to the issue because they must be paid in full. § 1129(a)(9). For simplicity, the discussion does not include consideration of issues that arise when one class of unsecured creditors is subordinated to the claims of another unsecured class.

⁵⁶¹ Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764 (2005) (internal notes and citations omitted).

As previous text discusses, and as the bankruptcy court in *Cleary Packaging* recognized, Congress enacted chapter 11 in 1978 with no exceptions to the discharge of a corporation's debts because *any* corporate discharge exception "would leave an undesirable uncertainty surrounding reorganizations that is unacceptable."⁵⁶²

The existence of nondischargeable debts of an entity, therefore, is related to the basic economic questions of how much a debtor can pay and how it is allocated. If the nondischargeable debt is large enough that the debtor cannot generate enough money to pay it within a reasonable time, reorganization is not possible. If reorganization is possible, the need to pay the nondischargeable debt in full affects the allocation of the money available to pay debts.

The absolute priority rule is only tangentially related to the question of what the debtor can pay. It does not apply if what the debtor can pay is enough to be acceptable to the class of unsecured creditors so that their acceptance makes it inapplicable. It is not related at all to the allocation of available money among creditors. The absolute priority rule, rather, involves allocation of the debtor's value between creditors and owners.

What the absolute priority rule affects is the ability of a debtor, especially a small business, to reorganize.

In one sense, ownership interests in an insolvent entity have no value because the entity's assets exceed its value. If a reorganization plan obligates the debtor to pay creditors an amount for *pro rata* distribution equal to the net liquidation value of the company (*i.e.*, the value of the debtor as a going concern less the amount of secured and priority debt), the reorganized debtor

⁵⁶² Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 474 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022), *quoting* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764-66 (2005).

has a net worth of zero. Creditors arguably lose nothing if existing owners retain the ownership interests that have no value.

Absolute priority rule principles, however, prescribe value to ownership interests in an insolvent entity and require that, in the absence of payment in full, the creditors become the owners of the reorganized debtor even in the circumstances just described unless – as a class – they accept a plan that provides otherwise.

Creditor ownership of a publicly-traded corporation is one thing. Creditor ownership of a private small business is another. It is unlikely that a market for the equity interests in a privately held business will exist. Creditors typically are not interested in holding a minority interest in a private company that they cannot readily turn into cash.

Moreover, the owners of a small business are usually its managers. In many instances, the value of a small business is dependent on the services that they provide. If reorganization means that they will lose their ownership interests, they may elect not to pursue reorganization in the first place. And if they do but are unable to restructure without retaining ownership, they may well abandon the effort or let the creditors as the new owners manage the business.

These real-life considerations are the bases for elimination of the absolute priority rule in entity cases under subchapter V. Simply put, its elimination permits the reorganization of small businesses that would otherwise not be possible or even attempted.

In accordance with the underlying premises of the absolute priority rule that equity in an insolvent entity has value and that creditors are its equitable owners, subchapter V substitutes the projected disposable income requirement for it. At bottom, the value of a corporation is its earning capacity. Instead of giving creditors the right to own the entity if they reject the plan, subchapter V gives them its earnings for a three to five year period, as the court determines. As

such, it turns the ownership interest that unsecured creditors could otherwise claim under the absolute priority rule into cash in a way that could not be accomplished under the absolute priority rule in a small business context.

Analysis of the Fourth Circuit's "fairness and equity" rationale

These principles guide analysis of the Fourth Circuit's conclusion that considerations of fairness and equity require exceptions to an entity's discharge in view of elimination of the absolute priority rule.

The Fourth Circuit's consideration of equity and fairness and its connection of exceptions to discharge with elimination of the absolute priority rule begins with the premise that elimination of the absolute priority rule allows an entity's owners to retain their ownership interests "at the expense of and over the objection of creditors." 36 F.4th at 517.

The court's premise is partially correct in that it is true that elimination of the absolute priority rule means that a *class* of creditors in a subchapter V case no longer has the ability to insist on full payment as a condition of the owners' retention of their interests. But a *single* creditor never had the right to invoke the absolute priority rule unless its claim was large enough to control the class vote.

Elimination of the absolute priority rule in subchapter V cases does not necessarily mean that owners retain their interests "at the expense" of creditors. In a subchapter V case, as earlier text discusses, ownership interests in the debtor are likely to have no realizable value. Reorganization usually depends on continued management by existing owners and therefore requires their retention of ownership. The liquidation value of assets often is less than the amount of debt that the assets secure. Retention of ownership interests that have no realizable value hardly comes at the expense of creditors.

In its consideration of fairness and equity, the Fourth Circuit connected elimination of the absolute priority rule to exceptions to an entity's discharge and concluded that treating an entity's discharge differently from an individual's would (1) undermine the balance of elimination of the absolute priority rule by adding an additional layer of fairness and equity; (2) make no sense; and (3) create perverse incentives. 36 F.4th at 517.

The connection of discharge exceptions to elimination of the absolute priority rule is not an appropriate one.

Recall that the absolute priority rule is a requirement in traditional cases that unsecured creditors may invoke collectively if their class rejects that plan. A creditor cannot invoke it on its own behalf if its class of creditors accepts the plan. It protects classes of creditors, not individual one creditor.

In contrast, nondischargeable debt involves only the creditor who holds it. Nondischargeability of a creditor's debt may improve *that* creditor's position, but it provides no benefits to *other* creditors.

Limitations on dischargeability of debts that favor some creditors does not balance the elimination of the absolute priority rule that affects all creditors.

Moreover, elimination of distinctions between individuals and entities for the exception of debts from discharge cannot possibly add an "additional layer of fairness and equity" for any creditors except those with nondischargeable debts. Nondischargeability of a particular debt does not affect determination of the debtor's PDI – the key determinant of how much the debtor must pay unsecured creditors. All it does is leave the debtor with an obligation to pay the nondischargeable debt because it cannot restructure it.

Indeed, the existence of a nondischargeable debt in a reorganization case is in most circumstances adverse to the interests of unsecured creditors generally.

First, it results in competition for available funds between unsecured creditors with dischargeable debts and those with nondischargeable debts. In general, any chapter 11 plan (including all subchapter V plans, whether consensual or cramdown) must treat similarly situated creditors the same. The fact that a debt is nondischargeable presumably will not increase its share of projected disposable income in a subchapter V case.⁵⁶³ At best, the plan may be able to deal with the nondischargeable debt by payment of the remaining balance after application of its pro rata share of PDI in payments that begin when the period for payment of PDI ends.

This situation creates an incentive for a debtor to minimize payments to creditors with dischargeable debts. Every dollar not paid to creditors generally is a dollar that is available to pay the nondischargeable debt. Conversely, every dollar paid on the nondischargeable debt in excess of a *pro rata* share of disposable income is a dollar that is not paid to unsecured creditors generally.

Second, the existence of nondischargeable debt increases the probability of liquidation. When a feasible plan is otherwise possible, liquidation generally results in a lower recovery for unsecured creditors than payments under a plan.

To the extent that application of exceptions to discharge in subchapter V affects any balance, it tips the scale in favor of the creditor whose debt is excepted from discharge and against creditors whose debts are not dischargeable.

⁵⁶³ The general rule in chapter 13 cases is that a plan must treat a nondischargeable claim in the same manner as other unsecured claims. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 7:10 – 7:14.

The Fourth Circuit did not elaborate on its observation that the discharge of an entity's debts with no exceptions "would make no sense and indeed would create adverse incentives." As earlier text explains, discharge without exceptions furthers the prospects for a successful reorganization and results in equality of treatment for creditors in a traditional case. For these reasons, Congress eliminated exceptions to the discharge of an entity when it enacted chapter 11 in 1978.

A subchapter V case is no different. Depending on the amount of a nondischargeable debt, its existence is likely to doom reorganization of a small business and result in its liquidation.

A subchapter V debtor may be able to manage nondischargeable debts if, collectively, they are relatively immaterial in relation to its total debts. For example, assume a debtor with \$300,000 of unsecured debt that will pay \$ 75,000 in projected disposable income over three years to unsecured creditors – a 25 percent distribution.

This debtor could probably pay a nondischargeable debt of, say, \$ 50,000. The debtor could pay the unpaid balance of \$ 37,500 by continuing PDI payments at the same level for an additional year and a half. Owners may elect to pursue reorganization in this situation, reasoning that retention of ownership rather than liquidation is worth the additional cost.

On the other hand, it is arguable that this debtor should be required to pay projected disposable income to creditors for five years rather than three, thereby increasing what they receive. The additional money that unsecured creditors receive is money that would otherwise be paid on the nondischargeable debt, so it increases the cost of the reorganization from the owners' standpoint. At some point, owners will decide that it is better for them to start over in other employment or a new venture than to devote the fruits of their efforts to payment of debt.

In contrast, assume that a debtor has \$ 5 million in unsecured debt, including a nondischargeable judgment of \$4.7 million, and projected disposable income over five years of \$280,000. Creditors receive a distribution of about 5.6 percent, and the nondischargeable debt is reduced to about \$4,436,800. It would take this debtor over 16 years to pay the rest of the nondischargeable debt based on its currently projected income. It is not realistic to expect that owners will sign on for this type of work. Liquidation is inevitable.

For creditors with the objective of putting the debtor out of business, that is a welcome result. It is a disaster for owners who have invested their time and money in the business, and it adversely affects employees who lose their jobs, customers who rely on the business, and creditors who will be paid less (and often nothing) when liquidation occurs.

The same result can occur with regard to relatively small nondischargeable debts if there are enough of them. Further, once a creditor's strategy of asserting a nondischargeable debt succeeds, the predictable result is that more creditors will assert such claims. Indeed, creditors will have a significant incentive to do so. A debtor must defend even non-meritorious claims, increasing administrative expenses and, necessarily, what creditors receive.

The Fourth Circuit's conclusion that discharge of a subchapter V entity without exceptions would "make no sense" and "create perverse incentives" is, therefore, suspect.

The availability of exceptions to an entity's discharge threatens the ability of a debtor to reorganize. It encourages the assertion and prosecution of exceptions to discharge, resulting in litigation that requires time that could otherwise be devoted to reorganization efforts and money for attorney's fees and expenses that would otherwise be available for creditors.

Moreover, if the result of a nondischargeable judgment is liquidation, the nondischargeable debt receives only its pro rata share of any net proceeds of liquidation.

Anecdotal experience teaches that the liquidation of a small business most often results in pennies on the dollar for unsecured creditors and, in many cases, nothing at all.⁵⁶⁴ The entire nondischargeability dispute becomes meaningless.

The bankruptcy courts' interpretation is the better one

The interpretations of the statute by the bankruptcy courts and the Fourth Circuit are both plausible, as the Fourth Circuit acknowledged in describing the question as a “close one.”⁵⁶⁵

Based on the legislative history of subchapter V and the historical background of the treatment of exceptions to the discharge of a corporation in traditional chapter 11 cases, the interpretation of the bankruptcy courts is the better one because it accurately reflects Congressional intent.

Exceptions to an entity's discharge in a subchapter V case create the same problems as exception of debts from a traditional chapter 11 discharge, whether the plan is consensual or not, that Congress addressed in 1978 by eliminating exceptions to an entity's discharge in a chapter 11 reorganization.

Perhaps Congress in 2019 had a different view of exceptions to an entity's discharge in the case of cramdown confirmation in a subchapter V case than the Congress in 1978. But it is difficult to conclude that, in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of small businesses by, among other things, eliminating the absolute priority rule in a cramdown situation, Congress in 2019 intended to re-introduce all the problems with exceptions to the discharge of a corporation that it eliminated over 50 years earlier.

⁵⁶⁴ This consideration may have been of no concern to the creditor in *Cleary Packaging*. An employee of the creditor, apparently related to some of the creditor's former owners, left to organize the debtor and compete with it, resulting in litigation and a judgment against the debtor and the former employee for over \$4.7 million. The creditor's objective in the subchapter V case could have been to put a competitor out of business through liquidation.

⁵⁶⁵ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 36 F.4th 509, 512 (4th Cir. 2022).

Rather, in view of the facts that nothing in the legislative history of subchapter V mentions such a drastic change and parts of it indicate, to the contrary, that the existing structure would be continued, the better conclusion is that Congress did not intend that the exceptions to discharge in § 523(a) apply to the discharge of an entity under § 1192.

Two final observations about the effect of a subchapter V cramdown discharge without exceptions are appropriate.

First, a concern underlying the issue is the legitimate notion that a debtor should not be able to escape the consequences of fraud or other misconduct through the subchapter V process. After all, the classic formulation of the “fresh start” policy of the bankruptcy laws recognizes that bankruptcy relief is for the “honest but unfortunate debtor.”⁵⁶⁶ The same question exists in traditional chapter 11 cases, but Congress nevertheless provided for the elimination of nondischargeable debts when it enacted chapter 11, with one later exception in § 1141(d)(6).

The response is that an entity’s discharge in a reorganization case serves a different function than the “fresh start” discharge that an individual receives. In short, discharge of an entity without exceptions rests on the need for finality of a confirmed plan. Discharge without exceptions is essential for the reorganization of the entity, rather than its liquidation, in accordance with chapter 11’s creditor equality principles that require equal treatment of similarly situated creditors.⁵⁶⁷

Second, as earlier text discusses, a conclusion that an entity’s debt is excepted from an entity’s discharge does not mean that it will be paid in full. If reorganization fails for reasons discussed above and liquidation occurs, the creditor will receive only its *pro rata* share of the

⁵⁶⁶ Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

⁵⁶⁷ See Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 761 (2005) Professor Brubaker discusses this point in detail. *Id.* at 761-62.

proceeds from liquidation after satisfaction of secured claims, administrative claims, and priority claims.

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

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.⁵⁶⁸ Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, §1186 provides that, if the court confirms a plan under the cramdown provisions of §1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.⁵⁶⁹ Section 1186 applies to debtors that are entities as well as individuals.

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

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

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).⁵⁷⁰

⁵⁶⁸ § 1181(a).

⁵⁶⁹ § 1186.

⁵⁷⁰ § 541.

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

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

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,⁵⁷¹ unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).⁵⁷² Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.⁵⁷³ In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.⁵⁷⁴

The rules in chapter 11 cases of individuals were the same as in chapter 7 cases before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA.”) Thus, property that an individual chapter 11 debtor acquired after the filing of the case and earnings from postpetition services were not property of the estate (with limited exceptions as noted above).

⁵⁷¹ Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.

⁵⁷² § 541(a)(6).

⁵⁷³ *Id.*

⁵⁷⁴ §§ 1207(a), 1306(a).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,⁵⁷⁵ and earnings from postpetition services,⁵⁷⁶ both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.⁵⁷⁷ Section 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).⁵⁷⁸ Section 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of

⁵⁷⁵ § 1115(a)(1).

⁵⁷⁶ § 1115(a)(2).

⁵⁷⁷ § 1181(a).

⁵⁷⁸ § 1186(a).

creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

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

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

Section 1186 deals with property of the estate when cramdown confirmation occurs under § 1191(b). It provides that property of the estate consists of property of the estate under § 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of § 1186 when it applies begins with an explanation of what happens when it does not, *i.e.*, when the court confirms a consensual plan under § 1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.⁵⁷⁹

The vesting of property of the estate in the debtor means that the automatic stay regarding acts against property terminates. Section 362(c)(1) provides, “[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate.”⁵⁸⁰ Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.⁵⁸¹

⁵⁷⁹ §§ 1227(b), 1327(b).

⁵⁸⁰ § 362(c)(1).

⁵⁸¹ § 1141(b).

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

Section 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1141(b) provides for vesting of property of the estate in the debtor upon confirmation. Section 1186, however, keeps the property in the estate when cramdown confirmation occurs.

The purpose seems to be to maintain judicial supervision of a debtor’s assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation⁵⁸² and makes payments under the plan,⁵⁸³ and discharge does not occur until the debtor has completed payments for the specified period.⁵⁸⁴

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.⁵⁸⁵ Section 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these

⁵⁸² See Section IV(D)(1).

⁵⁸³ See Section IX(B).

⁵⁸⁴ See Section X(B).

⁵⁸⁵ “[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statutes should prevail over older or more general ones.” *United States v. Lara*, 181 F.3d 183, 198 (1st Cir. 1999) (citing *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) and *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)); accord, e.g., *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); *Tug Allie-B, Inc., v. United States*, 273 F.3d 936, 941, 948 (11th Cir. 2001); *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1373 (11th Cir. 1999); *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); see 2B Sutherland Statutory Construction § 51:2 (7th ed. 2019-20 Supp.).

concepts, the provisions of §1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

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

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

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

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.⁵⁸⁶ The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

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

⁵⁸⁶ *E.g.*, *In re Copeland*, 609 B.R. 834 (D. Ariz. 2019); *In re Meier*, 550 B.R. 384 (N.D. Ill. 2016); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re Hoyle*, 2013 WL 3294273 (Bankr. D. Idaho June 28, 2013); *In re Tolkin*, 2011 WL 1302191 (Bankr. E.D.N.Y. Apr. 5, 2011), *aff'd sub nom.* *Pagano v. Pergament*, 2012 WL 1828854 (E.D.N.Y. May 16, 2012); *accord, e.g.*, *In re Lincoln*, 2017 WL 535259 (Bankr. E.D. La. Feb. 8, 2017); *In re Gorniak*, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re Vilaro Colón*, 2016 WL 5819783 (Bankr. D.P.R. Oct. 5, 2016). *Contra, e.g.*, *In re Markosian*, 506 B.R. 273, 275-77 (9th Cir. BAP 2014); *In re Evans*, 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. 2021), answered this question affirmatively. There, the U.S. Trustee sought dismissal of the individual's sub V case because the debtor lost \$ 4,000 playing slot machines during the first month after he filed the case. At the time of the hearing, the debtor had filed a plan that all classes of creditors had accepted. The debtor testified that he would no longer be gambling while he was in bankruptcy because, once his plan payments began, he would have no disposable income to do so.

The court concluded that the postpetition gambling did not constitute gross mismanagement of the estate that would provide cause for dismissal under § 1112(b)(4)(B) because the debtor had disclosed it in his monthly report and because nothing showed that the loss was material or had an adverse impact on the estate or its creditors. *Id.* at *7-8.

The court then observed that the gambling loss could not be gross management of the estate because, in a subchapter V case, the debtor's postpetition earnings were not property of the estate. *Id.*

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?⁵⁸⁷

⁵⁸⁷ Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. See generally W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

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

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, §1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.⁵⁸⁸

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

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

⁵⁸⁸ § 1186.

XII. Default and Remedies After Confirmation

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

A. Remedies for Default in the Confirmed Plan

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

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in §1191(c)(3)(B)(ii) may provide the source of remedies for default. When the court concludes only that there is a “reasonable likelihood” that the debtor will be able to make plan payments, cramdown confirmation under § 1191(c)(3)(B)(ii) requires that the plan provide “appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.”⁵⁸⁹ The only specific remedy in § 1191(c)(3)(B)(ii) is “the liquidation of nonexempt assets.” The requirement for appropriate remedies does not apply if the court finds that the debtor *will* be able to make

⁵⁸⁹ See Section III(B)(5).

plan payments, but debtors who seek cramdown confirmation of a plan that does not contain them subject themselves to the higher feasibility standard.⁵⁹⁰

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

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

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

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

⁵⁹⁰ See Section III(B)(5).

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

Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or “for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.”⁵⁹¹ If removal of the debtor in possession occurs after the trustee’s service has been terminated upon substantial consummation⁵⁹² of a consensual plan confirmed under §1191(a), §1183(c)(1) provides for reappointment of the trustee.

Section 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. Section 1183(c)(5)(B) authorizes the trustee to operate the business of the debtor, but the trustee’s duties do not include liquidation of the debtor’s assets. Nothing in subchapter V appears to authorize the trustee to do so.

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

Property of the estate issues arise when reappointment of the trustee based on the debtor’s default occurs after confirmation of a consensual plan under §1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan

⁵⁹¹ § 1185(a). Section V(C) discusses removal for cause.

⁵⁹² Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

or confirmation order provides otherwise.⁵⁹³ If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no “debtor in possession” to be removed.

Under this view, §1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the estate remains property of the estate under §1186⁵⁹⁴) or because the plan or confirmation order so provides.

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

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.⁵⁹⁵ Moreover, if the plan was a consensual one confirmed under §1191(a), postconfirmation modification under §1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan).⁵⁹⁶ Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

⁵⁹³ See Section XI(B).

⁵⁹⁴ See Section XI(B).

⁵⁹⁵ § 1193(b).

⁵⁹⁶ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.⁵⁹⁷

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes "material default by the debtor with respect to a confirmed plan."⁵⁹⁸ Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.⁵⁹⁹

1. Postconfirmation dismissal

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

⁵⁹⁷ § 721.

⁵⁹⁸ § 1112(b)(4)(N).

⁵⁹⁹ § 702(d).

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under § 1191(a).⁶⁰⁰ Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.⁶⁰¹

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.⁶⁰² Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the case is dismissed prior to the entry of discharge.⁶⁰³ Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

⁶⁰⁰ See Section X(A).

⁶⁰¹ E.g., *National City Bank v. Troutman Enterprises, Inc.* (*In re Troutman Enterprises, Inc.*), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) (“[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt.”); *In re T&A Holdings, LLC*, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) (“[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan.”); *In re Potts*, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).

⁶⁰² § 1192.

⁶⁰³ Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a “hardship” discharge, §§ 1228, 1328. Chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by BAPCPA. In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. See *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663, 668-69 (M.D. Fla. 2018) (Collecting cases holding that chapter 12 or 13 confirmed plan is no longer binding upon dismissal). But see *Weise v. Community Bank of Central Wisconsin* (*In re Weise*), 552 F.3d 584 (7th Cir. 2009).

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

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

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

The court in *In re Akamai Physics, Inc.*, 2022 WL 1195631 (Bankr. D. N.M. 2022), addressed the effect of dismissal or conversion after confirmation of a consensual plan under § 1191(a) that deferred discharge until completion of plan payments.⁶⁰⁴ The plan provided for pro rata payments to unsecured creditors from the greater of \$10,000 per month or the debtor’s “Disposable Income as defined in 11 U.S.C. § 1191(d).” *Id.* at *2.

Consensual confirmation occurred after the debtor resolved the objection of the U.S. Trustee that the plan was not feasible by including a provision in the confirmation order for the court to entertain a postconfirmation motion to dismiss or convert if the debtor did not generate any operating income within 120 days after confirmation. *Id.* at *2.

Although the debtor had timely made plan payments (through sales of assets or loans from its principal), it did not generate any operating income within 120 days. After concluding that the U.S. Trustee had not established cause for dismissal or conversion under § 1112(b)(4), *id.* at *3-5, the court considered the effect that the confirmed plan could have on the rights of the parties if it granted the motion, reasoning that the effect of dismissal or conversion is an issue to consider in determining a motion to dismiss or convert. *Id.* at *5.

The court determined that, in a traditional chapter 11 case, confirmation binds the reorganized debtor and creditor to the terms of the plan, reverts property of the estate in the reorganized debtor, and discharges preconfirmation claims. The chapter 7 estate after conversion, therefore, has no assets because the plan vested all estate property in the debtor, the court explained, so conversion does not help creditors. Dismissal, the court continued, has no materially greater benefit because it does not “undo” the plan, which remains binding. *Id.* at *5.

⁶⁰⁴ When the court confirms a consensual subchapter V plan under § 1191(a), § 1141(d) governs the discharge. See Section X(A). Section 1141(d)(1)(A) provides that confirmation discharges the debtor unless the plan or confirmation order provides otherwise.

The court concluded, *id.* at *6:

In most standard chapter 11 cases with confirmed plans of reorganization, neither conversion nor dismissal materially benefits creditors. Instead, a creditor's remedy is to sue the debtor in state court to enforce the creditor's rights under the chapter 11 plan.

The *Akamai Physics* court then noted that a different rule applies to confirmed plans under chapters 12 and 13 and in individual cases under chapter 11, in which dismissal or conversion “negates the confirmation order and the plan, restoring parties to the *status quo ante*. *Id.* at 6. The court advanced two policy reasons for the distinction.

First, substituting disposable income for the absolute priority rule and other creditor protections in chapter 11 is a major benefit to creditors. If the debtor fails to make payments as the plan requires, the plan should not be binding. *Id.*

Second, discharge does not occur upon dismissal or conversion of such cases unless the debtor has completed plan payments. *Id.*

The court reasoned that a subchapter V cramdown plan is similar to plans in chapters 11, 12, and 13 that require payment of projected disposable income and deferral of discharge until completion of plan payments. The court suggested, therefore, that dismissal or conversion of a subchapter V case after cramdown confirmation might negate the plan. *Id.* at *6.

The court concluded that no reason existed “to think that ‘consensual’ subchapter V plans would be treated differently than typical chapter 11 plans.” *Id.* at *7. In the case before it, however, the plan deferred discharge until completion of all plan payments, a key provision that also exists in disposable income plans under other chapters. Later dismissal or conversion, the court stated, might require it to determine whether such a “hybrid” plan would survive or be negated. *Id.*

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause: (1) § 349(b)(1) provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and (2) § 349(c) reverts property of the estate in the entity in which such property was before the filing of the case.⁶⁰⁵

2. Postconfirmation conversion

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under §1191(a), but not when cramdown confirmation occurs under §1191(b) because §1186 keeps property in the estate.⁶⁰⁶

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not reconvert property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.⁶⁰⁷ Other courts have ruled that property of the estate

⁶⁰⁵ § 349.

⁶⁰⁶ See Section XI(B).

⁶⁰⁷ E.g., *Bell v. Bell* (*In re Bell*), 225 F.3d 203, 216 (2d Cir. 2000); *National City Bank v. Troutman Enterprises, Inc.* (*In re Troutman Enterprises, Inc.*), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("Property which reverted in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case."); *Lacy v. Stinky Love, Inc.* (*In re Lacy*), 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re L & T Machining, Inc.*, 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re Sundale, Ltd.*, 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re Canal Street Limited Partnership*, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re K*

upon conversion consists of property owned by the debtor at the time of commencement of the case,⁶⁰⁸ on the confirmation date,⁶⁰⁹ or on the date of conversion.⁶¹⁰

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

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

An alternative argument is that the provision in §1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that §1185(a) requires the revesting of property of the estate upon removal of the debtor in possession after

& M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz. 1997); *Carter v. Peoples Bank and Trust Co. (In re BNW, Inc.)*, 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.*, 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. “[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor’s pre-confirmation estate. . . .”); *In re TSP Indus., Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990). *See also* *Pioneer Liquidating Corp. v. United States Trustee (In re Consol. Pioneer Mortgage Entities)*, 264 F.3d 803 (9th Cir. 2001) (holding that “language and purpose” of liquidating plan demonstrated that assets vested in debtor upon confirmation revested in estate upon conversion); 6 NORTON BANKRUPTCY LAW AND PRACTICE § 114:13 (discussing different approaches to revesting of assets upon conversion after confirmation).

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

⁶⁰⁸ *Smith v. Lee (In re Smith)*, 201 B.R. 267 (D. Nev. 1996), *aff’d* 141 F.3d 1179 (9th Cir. 1998).

⁶⁰⁹ *Carey v. Flintridge Lumber Sales, Inc. (In re RJW Lumber Co.)*, 262 B.R. 91 (Bankr. N.D. Ca. 2001).

⁶¹⁰ *In re Midway, Inc.*, 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

default under a consensual plan; otherwise, § 1185(a) has no effective operation in that circumstance. If so, the same result follows if conversion occurs.

In *In re Akamai Physics, Inc.*, 2022 WL 1195631 (Bankr. D. N.M. 2022), discussed in detail in Section XII(C)(1), the court suggested that property of the estate that vests in the debtor under a consensual plan in a subchapter V case confirmed under § 1191(a) is not property of the chapter 7 estate upon postconfirmation conversion. With regard to conversion after cramdown confirmation under § 1191(b), however, the court suggested that conversion negates the binding effect of the plan because discharge does not occur until the completion of plan payments. *Id.* at *6.

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

XIII. Effective Dates and Retroactive Application of Subchapter V

Section 5 of SBRA provides:

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

This language does not restrict application of subchapter V to cases filed on or after the effective date of February 19, 2020. It thus differs from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which provided that most of its provisions did not apply “with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act.”⁶¹¹

⁶¹¹ Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).

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

As later text discusses, courts upon enactment of SBRA had to decide whether SBRA applied retroactively and, if so, whether a debtor could amend its petition to elect subchapter V when mandatory deadlines for the status conference⁶¹² and the filing of a plan⁶¹³ had expired.

The provisions in the Bankruptcy Threshold Adjustment and Technical Correction Act ("BTATCA")⁶¹⁴ for retroactive application of the \$7.5 million debt limit for subchapter V eligibility present a similar issue when mandatory deadlines have passed in a pending case where a debtor ineligible for subchapter V becomes eligible under BTATCA. As Section III(B) explains, the temporary increase in the debt limit to \$7.5 million under the CARES Act, as amended, expired on March 27, 2022. BTATCA, effective June 21, 2022, reinstated the \$7.5 million. BTATCA provided for application of the \$7.5 million limit (and other technical amendments to the eligibility requirements) in any case commenced on or after March 27, 2020 that was pending on the date of enactment.⁶¹⁵ A debtor otherwise eligible for subchapter V with debts in excess of the debt limit of \$ 3,024,725 applicable on that date but not in excess of \$ 7.5 million who filed a case between March 27 and June 20, 2022 could not elect subchapter V but became an eligible subchapter V debtor on June 21, 2022. The issue is whether the debtor may

⁶¹² See Section VI(C).

⁶¹³ See Section VI(D).

⁶¹⁴ Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").

⁶¹⁵ BTATCA § 2(h)(2).

amend the petition to elect subchapter V in cases filed during this time if a mandatory deadline has passed.

A number of cases have addressed retroactive application of SBRA. This caselaw may provide guidance in the determination of retroactive application of the BTATCA amendments.

One court rejected the debtor’s argument that SBRA applied retroactively to pending cases, concluding, “Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect.”⁶¹⁶ The court observed that to rule otherwise would create a “procedural quagmire” in that the debtor would be unable to comply with the statute’s requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA’s effective date. The debtor’s failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.⁶¹⁷

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.⁶¹⁸ Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor’s amendment to the petition to elect subchapter V in an existing case means

⁶¹⁶ *In re Double H Transportation, LLC*, 614 B.R. 553 (Bankr. W.D. Tex. 2020).

⁶¹⁷ *Id.* at 554.

⁶¹⁸ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev’d on other grounds sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re Moore Properties of Person County, LLC*, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re Progressive Solutions, Inc.*, 615 B.R. 894 (Bankr. C.D. Cal. 2020). *Accord*, *In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La. 2020); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

that the case proceeds under subchapter V unless and until the court orders otherwise;⁶¹⁹ the court need not approve the election.⁶²⁰

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.⁶²¹

⁶¹⁹ See Section III(A).

⁶²⁰ *In re Body Transit, Inc.*, 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020) (treating objection to debtor's motion for authority to proceed under subchapter V as an objection to amendment of the petition to make the election); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 900-01 (Bankr. C.D. Cal. 2020).

⁶²¹ *In re Ventura*, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom. Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (Bankr. E.D. N.Y. 2022) ("Given that the Debtor's case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor."); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 899-900 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord, In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020).

In *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020), the court considered whether to extend the statutory deadlines for the debtor's report, status conference, and filing of a plan after it had granted the debtor's motion to convert his pre-SBRA chapter 7 case to chapter 11. In permitting the debtor to proceed under subchapter V and extending the deadlines, the court reasoned, *id.* at *6-7:

The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.

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

Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to

The opposite view is that the inability of a debtor to meet the statutory deadlines when it elects subchapter V after they have expired is not due to a circumstance beyond its control. Because the debtor makes the election after the deadlines expired, the circumstances are within the debtor's control.⁶²² If the debtor makes the election after expiration of the deadlines and the court does not extend them, the election is nevertheless effective, and the debtor is in default of the deadlines. Thus, the court may dismiss the case under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.⁶²³

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC*.⁶²⁴ The *Moore Properties* court and others⁶²⁵ have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*⁶²⁶ in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case. The court in *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020), concluded that the *Trepetin* approach to extension of the deadlines in a case converted from chapter 7 to chapter 11 was the proper one. The court denied the debtor's motion to convert to chapter 11, however, because under that approach the court would decline to extend the time to file a plan. In *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable. *Id.* at *9.

⁶²² *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020).

⁶²³ *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020). Query whether a debtor may amend the petition to withdraw the election in this situation.

⁶²⁴ *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).

⁶²⁵ *In re Ventura*, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re Body Transit, Inc.*, 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020).

⁶²⁶ *Landgraf v. USI Film Products*, 511 U.S. 244, 264-71 (1994).

One canon, said the *Landgraf* Court, is that “a court is to apply the law in effect at the time it renders its decision.”⁶²⁷ The conflicting one is that “[r]etroactivity is not favored in the law,” and “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”⁶²⁸

The *Landgraf* Court explained that the presumption against retroactive application arises from “[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly,” and from the principle that “settled expectations should not be lightly disrupted.”⁶²⁹ The presumption against retroactivity particularly applies, the Court reasoned, to “new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.”⁶³⁰ The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee’s appeal after a bench trial was pending, did not apply to the employee’s action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank*.⁶³¹ At issue in *Security Industrial Bank* was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest in exempt personal property.⁶³² The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

⁶²⁷ *Id.* at 264, quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974).

⁶²⁸ *Id.* at 264, quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

⁶²⁹ *Id.* at 265.

⁶³⁰ *Id.* at 271. Among other cases, the Court cited *United States v. Security Industrial Bank*, 459 U.S. 70, 79-82 (1982), which the text discusses next.

⁶³¹ *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

⁶³² 11 U.S.C. § 522(f)(1)(B).

The Court in *Security Industrial Bank* recognized that the Constitution’s bankruptcy clause⁶³³ “has been regularly construed to authorize the retrospective impairment of contractual obligations”⁶³⁴ but that the bankruptcy power could not be exercised “to defeat traditional property interests” because the bankruptcy power is subject to the Fifth Amendment’s prohibition against taking private property without compensation.⁶³⁵ The Court thus recognized a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.⁶³⁶

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that “[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.”⁶³⁷

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created “none of the taking or retroactivity concerns” that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank*.⁶³⁸ With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not “alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights.”⁶³⁹

⁶³³ U.S. Const. Art. I, § 8, cl. 4.

⁶³⁴ *United States v. Security Industrial Bank*, 459 U.S. 70, 74 (1982), *citing* *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

⁶³⁵ *Id.* at 75, *citing* *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935).

⁶³⁶ *Id.*

⁶³⁷ *Id.* at 81, *citing* *Holt v. Henley*, 232 U.S. 637 (1913) and *Auffm’ordt v. Rasin*, 102 U.S. 620 (1881).

⁶³⁸ *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).

⁶³⁹ *Id.*

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

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. Section 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.⁶⁴⁰ The third change is that § 1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.⁶⁴¹

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.⁶⁴²

⁶⁴⁰ See Section VII(A).

⁶⁴¹ See Section VII(B).

⁶⁴² *In re Moore Properties of Person County, LLC*, 2020 WL 995444, at *4 (Bankr. M.D.N.C. 2020).

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

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

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under §1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.⁶⁴³

Section 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of “fair and equitable” for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.⁶⁴⁴

The court concluded, “The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking.”⁶⁴⁵

The court acknowledged that, if a case were pending for an extended period of time on SBRA’s effective date, the case “could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights.”⁶⁴⁶ In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider “the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make

⁶⁴³ *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.

⁶⁴⁴ *Id.* See Section VIII(B)(3), (4).

⁶⁴⁵ *Id.*

⁶⁴⁶ *Id.*

its application offend ‘[e]lementary considerations of fairness’ such that the parties ‘have an opportunity to know what the law is and to conform their conduct accordingly.’”⁶⁴⁷

Because the application of new subchapter V in the existing case did not violate the Supreme Court’s rulings in *Landgraf* or *Security Industrial Bank*, the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.⁶⁴⁸

The bankruptcy court in *In re Body Transit*⁶⁴⁹ applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA’s effective date to reject the secured creditor’s contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor’s argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor’s assets and business, would also have the right to file a plan.⁶⁵⁰

The *Body Transit* court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.⁶⁵¹ In addition, the court noted that a debtor’s ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would

⁶⁴⁷ *Id.*, quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), and citing *In re Progressive Solutions, Inc.*, 615 B.R. 894 (Bankr. E.D. Cal. 2020).

⁶⁴⁸ *Id.*

⁶⁴⁹ *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020).

⁶⁵⁰ The court had scheduled a hearing on the creditor’s motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.

⁶⁵¹ *Id.* at 408.

unduly prejudice a party.⁶⁵² The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.⁶⁵³

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its burden of showing prejudice in the case before it.⁶⁵⁴ The court summarized, "[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor's right to amend its petition under [Bankruptcy Rule] 1009."⁶⁵⁵

In *In re Ventura*,⁶⁵⁶ an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA's effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a "residence" based on her use of it as a bed and breakfast. After the bankruptcy court had ruled that the exception applied as long as the debtor used any part of the property for her

⁶⁵² *Id.* at 408-09, citing *In re Cudeyo*, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re Brooks*, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re Romano*, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re Bendi, Inc.*, 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).

⁶⁵³ 213 B.R. at 409.

⁶⁵⁴ *Id.* at 409.

⁶⁵⁵ *Id.* at 410.

⁶⁵⁶ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

residence,⁶⁵⁷ it scheduled a hearing on confirmation of the lender’s plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA’s effective date.⁶⁵⁸

The bankruptcy court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had vested rights at the time of the amendment in that its plan was ripe for confirmation.⁶⁵⁹ The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

⁶⁵⁷ Other courts have accepted the debtor’s position. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE, § 5:42 (2d ed. 2019).

⁶⁵⁸ *In re Ventura*, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020), *rev’d sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

⁶⁵⁹ *Id.* at 11. The debtor in the current case and in two previous bankruptcy cases had asserted that her debts were “primarily consumer debts.” *Id.* at 8. The debtor owed \$ 1,678,664.80 on the mortgage, and the property was worth no more than \$ 1,200,000. *Id.* at 9. Although the opinion does not reflect what other debts the debtor has, the context indicates that she had other unsecured debt that were relatively small.

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

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

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

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

The *Ventura* bankruptcy court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit*. In addition, the court concluded that the revision of the definition of “small business debtor” does not appear to affect contractual or vested property rights.⁶⁶⁰

The bankruptcy court then addressed whether the exception in §1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender’s property rights that vested prior to SBRA’s effective date. The court held that, because the debtor had discharged her personal liability in her previous chapter 7 case, application of §1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the bankruptcy court observed, even if the debt had not been discharged, §1190(3) might not “raise significant Constitutional doubts to warrant only prospective application.”⁶⁶¹ Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of § 1190(3) to modify the mortgage would not violate the lender’s Fifth Amendment rights.⁶⁶² The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.⁶⁶³

The *Ventura* bankruptcy court found no prejudice to the lender based on the history of the case, including the fact that the lender’s plan was before the court for confirmation. The court

⁶⁶⁰ *Id.* at 16-17, citing *Moore Properties of Person County, LLC*, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).

⁶⁶¹ *Id.* at 17.

⁶⁶² *Id.* at 17.

⁶⁶³ *Id.* at 24-25. Section VII(B) discusses this aspect of the court’s ruling in connection with consideration of § 1190(3).

saw no Constitutional issues and declined to treat its prior rulings as creating “vested” rights.

The bankruptcy court reasoned, “Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender].”⁶⁶⁴

The district court reversed, concluding that the bankruptcy court had not properly considered the substantial prejudice that the creditor faced due to the belated amendment to elect subchapter V. *Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (E.D. N.Y. 2022).

The district court noted that the amendment did not occur until 16 months after the filing of the chapter 11 case and that allowing it caused “substantial prejudice” to the creditor. The district court observed, *id.* at 505 (emphasis in original; interior punctuation and citation omitted):

By [the time of the amendment], both the parties and the Bankruptcy Court spent considerable time to get to a point in which [the creditor] was posed to confirm its plan. The Bankruptcy Court held numerous hearings and the parties, after significant negotiations, agreed [the creditor] could pursue its unopposed plan of reorganization if the Debtor failed to submit a plan by September 30, 2019. In reliance on this agreement and on the Debtor’s representation that her petition would proceed under Chapter 11, [the creditor] Filed its plan of reorganization, solicited the necessary votes, and was on the cusp of confirming it when the Debtor sought to amend her petition. Moreover, because the SBRA grants the Debtor the sole right to confirm a plan of reorganization, the Debtor’s amendment had the further prejudicial effect of terminating [the creditor’s] right to pass *any* plan, thereby completing changing the rights of [the creditor] as a creditor and resetting the litigation posture of the proceedings.

⁶⁶⁴ *Id.* at 18.

The district court in *Ventura* concluded that the amendment to elect subchapter V “cannot be allowed to cause such prejudice.” 638 B.R. at 505. In addition, the court observed, prejudice to the debtor did not outweigh prejudice to the creditor because “she remains in the Chapter 11 process. While this may prevent her from accessing some of the tools afforded by Subchapter V, the Debtor’s interests are still protected by Chapter 11, which requires [the creditor’s plan] to be ‘fair and equitable,’ 11 U.S.C. § 1191(c), proposed in good faith, deemed to be ‘reasonable,’ and in comportment with existing law. *Id.* § 1129(a).”⁶⁶⁵ 638 B.R. at 505. Accordingly, the court held that the bankruptcy court abused its discretion by overruling the creditor’s objection to the debtor’s amendment of her petition to proceed under subchapter V.

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a subchapter V debtor under SBRA’s revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.⁶⁶⁶ Another court refused to permit a debtor to proceed under subchapter V in a case filed a month before its effective date. The court determined that the debtor had waited too

⁶⁶⁵ *Id.* It is unlikely that the requirements for confirmation the court referenced would provide any material protection for the interests of the debtor as compared to the provisions of her plan.

⁶⁶⁶ *In re Body Transit, Inc.*, 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).

long to make the sub V election and had amended its petition to do so only after two attempts to confirm a traditional chapter 11 plan had failed.⁶⁶⁷

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to \$ 7.5 million.⁶⁶⁸ Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than \$ 7.5 million cannot amend its petition to elect application of subchapter V.⁶⁶⁹ Although the CARES Act provided for the increased debt limit to expire on year after its enactment, the Covid-19 Bankruptcy Relief Extension Act of 2021⁶⁷⁰ amended the CARES Act to extend the increased debt limit for an additional year.

A possible alternative for a debtor in a pre-subchapter V case who wants to be in a subchapter V case is to obtain dismissal of the pending case and then file a new one in which it elects subchapter V. In *In re Slidebelts, Inc.*, 2020 WL 3816290 (Bankr. E.D. Cal. 2020), the court permitted dismissal of a chapter 11 case for this purpose. The court in *In re Twin Pines, LLC*, 2020 WL 5576957 at * 6 (Bankr. D. N.M. 2020), noted that a debtor could, upon dismissal of the pending case, file a new one and elect subchapter V in exercising its discretion to extend the deadlines for the status conference and filing of a plan so that the debtor could proceed under subchapter V.

⁶⁶⁷ *In re Greater Blessed Assurance Apostolic Temple, Inc.*, 624 B.R. 742 (Bankr. M.D. Fla. 2020). Cf. *In re Tibbens*, 2021 WL 1087260 at * 9 (Bankr. M.D.N.C. 2021) (After denial of confirmation of two chapter 13 plans, the debtor sought to convert to chapter 11 and elect subchapter V after the deadline for the filing of a plan had expired; the court converted the case to chapter 11 but declined to extend the deadline because of numerous delays in the chapter 13 case that were within the debtor’s control and for which the debtor should be held accountable.).

⁶⁶⁸ Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). See Section III(B).

⁶⁶⁹ See *In re Peak Serum*, 623 B.R. 609 (Bankr. D. Col. 2020) (Debtors in pending chapter 11 cases may not elect application of subchapter V upon becoming eligible for subchapter V under the increase in the debt limit upon enactment of the CARES Act; increased debt limit applies only in cases filed after enactment.)

⁶⁷⁰ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

In *In re Peak Serum*, 623 B.R. 609 (Bankr. D. Col. 2020), a corporation and its principal, in response to a creditor's motion to appoint a trustee in their jointly administered cases, moved to dismiss them to permit their re-filing as subchapter V cases after the CARES Act increased the debt limit so that they became eligible to proceed under subchapter V. The court found cause to appoint a trustee in the corporate case and concluded that the facts warranted appointment of a trustee. Because the creditor failed to establish cause for appointment of a trustee in the individual case, however, the court dismissed it, observing that subchapter V contained sufficient protections for creditors such that a re-filed case under subchapter V would not unduly prejudice creditors.

The strategy did not work well for the individual debtors in *In re Crilly*, 2020 WL 3549848 (Bankr. W.D. Okla. 2020). A few hours after dismissal of their chapter 11 case filed in 2018 for cause, the individual debtors filed a new case and elected subchapter V. The debtors filed a motion to extend the automatic stay, which under § 362(c)(3) would expire 30 days after filing the second case unless extended based on a showing that the second case was filed in good faith. Under § 362(c)(3)(C)(i)(III), a filing is presumptively not in good faith if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the previous case.

The court concluded that no change of circumstances had occurred between the filing of their two cases that would permit them to avoid the presumption. The availability of subchapter V in the new case, the court explained, could not supply such a change because it was in effect at the time of the dismissal and filing of the cases. The court for a variety of reasons refused to extend the automatic stay beyond 30 days.

In *In re Hunts Point Enterprises, LLC*, 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss it. The court ruled that the debtor's debts did not exceed the eligibility limit but concluded that allowing the case to proceed under subchapter V would be an abuse of its provisions because only the debtor could file a plan, and its request for dismissal demonstrated that it no longer wanted to do so. The court concluded that cause existed for its dismissal and prohibited the debtor from filing another bankruptcy petition for a year unless the debtor sought and obtained relief from that prohibition based on changed circumstances or good cause shown.

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

Enacted August 23, 2019, Effective February 19, 2020

(As Amended By The CARES Act, Enacted and Effective March 27, 2020; The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act for an additional year.)

May 2020

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

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

11 U.S.C.	Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases	New Subchapter V Section
§ 105(d)	§ 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it.	New § 1181(a)
§ 327(a)	New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than \$ 10,000.	New § 1195(a)
§ 365(d)(3)	The Consolidated Appropriations Act, 2021, temporarily added provisions to extend time for debtor as lessee under a nonresidential lease of real property to comply with its obligations under the lease based on financial hardship arising from COVID-19.	
§ 1101(1)	§ 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2).	New § 1181(a)
§ 1102(a) § 1102(b) § 1103	Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees. These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise.	New § 1181(b)
§ 1104 § 1105	Provisions for appointment of trustee (§ 1104) and termination of trustee’s appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession)	New § 1181(a)
§ 1106	§ 1106 specification of duties of trustee and examiner is inapplicable. New § 1183(b) states the trustee’s duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new	New § 1181(a)

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	§ 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).	
§ 1107	§ 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties. § 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional's representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than \$ 10,000 impliedly has the same effect.	New § 1181(a)
§ 1108	§ 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business)	New § 1181(a)
§ 1115	§ 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor.	New § 1181(a)
§ 1116	§ 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties.	New § 1181(a)
§ 1121	Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1123(a)(8)	Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1123(c)	Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1125	Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c).	New § 1181(b)

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§ 1127	Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193.	New § 1181(a)
§ 1129(a)(9)(A)	Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b).	New § 1191(e)
§ 1129(a)(15)	Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1129(b)	“Cramdown” provisions are not applicable. New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met. New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is “fair and equitable with respect to” each impaired, nonaccepting class. The “fair and equitable” requirement in subchapter V does not include the absolute priority rule. For a secured creditor, the “fair and equitable” requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1). To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3).	New § 1181(a)
§ 1129(c)	Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1129(e)	Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time) but does not contain a deadline for confirmation.	New § 1181(a)

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§ 1141(d)	Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs. In the cramdown context, discharge does not occur under new § 1192 until the debtor has completed payments under the plan for three years, or such longer period not to exceed five years as the court determines. The new § 1192 discharge applies to (1) debts listed in § 1141(d)(1)(A) and (2) all other debts allowed under § 503 and provided for in the plan, except for debts (x) on which the last payment is due after the applicable three to five year period and (y) of the kind specified in § 523(a).	New § 1181(c)
	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V	
11 U.S.C.		SBRA
§ 322(a)	Amended to make its provisions for qualification of trustee in a case applicable to a subchapter V trustee appointed under new § 1183.	§ 4(a)(3)
§ 326(a)	Excepts subchapter V trustee appointed under new § 1183 from percentage limitations on compensation applicable to trustees in chapter 11 (and chapter 7) cases.	§ 4(a)(4)(A)
§ 326(b)	Provides that standing subchapter V trustee (like standing chapter 12 and 13 trustees) cannot receive compensation under § 330. (Standing trustees receive compensation under 28 U.S.C. § 586(e), as amended to include standing subchapter V trustees.)	§ 4(a)(4)(B)
§ 347	Current § 347(a) provides for a chapter 7, 12, or 13 trustee to pay into the court, for disposition under chapter 129 of title 28, funds that remain unclaimed 90 days after final distribution under § 726, § 1226, or § 1326. It thus does not apply in chapter 11 cases. SBRA § 4(a)(5)(a) adds subchapter V to the list of trustees and adds new § 1194 to the list of sections providing for distributions. New § 1194 provides for the subchapter V trustee to make distributions under a plan confirmed under the cramdown provisions of new § 1191(b). Current § 347(b) provides that unclaimed property in a case under chapter 9, 11, or 12 at the expiration of the time for presentation of a security or performance of any other act as a condition to participate under any plan confirmed under § 1129, § 1173, or § 1225 becomes property of the debtor or any entity acquiring the debtor's assets under the plan. SBRA § 4(a)(5)(B) added new § 1194 to the list of plans confirmed, but the CARES Act made a technical correction to change this to § 1191. Accordingly, § 347(b) as amended and corrected provides for property that is distributed	§ 4(a)(5); CARES Act § 1113(a)(4)(B)

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	under a confirmed plan and that is unclaimed to become property of the debtor. It is unclear under these amendments what happens to funds that a trustee disburses under a confirmed plan that a creditor does not claim. Amended § 347(a) directs the trustee to pay them into court, but amended § 347(b) makes them property of the debtor. Perhaps the intended result is that unclaimed disbursements that a trustee makes become unclaimed funds subject to § 347(a) whereas unclaimed disbursements that a debtor makes become the debtor's property under § 347(b).	
§ 363(c)(1)	Extends provisions authorizing trustee who is authorized to conduct business to enter into transactions in the ordinary course of business without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 363 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(6)
§ 364(a)	Extends provisions authorizing trustee who is authorized to conduct business to obtain unsecured credit and incur unsecured debt without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 364 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(7)
§ 523(a)	Applies exceptions to discharge to discharge of individual subchapter V debtor under new § 1192 (which is the discharge that a debtor receives when a plan is confirmed under the cramdown provisions of new § 1191(b)). It is unclear whether under new § 1192 the exceptions apply to the discharge of a debtor that is not an individual. If the court confirms a consensual plan under new § 1191(a), the debtor receives a discharge under § 1141(d)(1)-(4), under which the § 523(a) discharge exceptions apply only in cases of individuals.	§ 4(a)(8)
§ 524(a)(1)	Makes discharge injunction applicable to discharge granted under new § 1192.	§ 4(a)(9)(A)(i)
§ 524(a)(3)	Makes discharge provisions relating to community claims applicable to discharge under new § 1192.	§ 4(a)(9)(A)(ii)
§ 524(c)(1) § 524(d)	Extends provisions governing reaffirmation of debt and for hearing on proposed reaffirmation (which apply to a discharge under § 1141(d)) to discharge granted under new § 1192.	§ 4(a)(9)
§ 557(d)(3)	Makes provisions for expedited consideration of appointment of trustee and for retention and compensation of professionals subject to § 1183 in cases of debtors that own or operate grain storage facilities	§ 4(a)(10)
§ 1146(a)	Prohibition on taxation of issuance, transfer, or exchange, or of the making or delivery of an instrument of transfer, under a plan confirmed under § 1129 is extended to a plan confirmed under § 1191.	§ 4(a)(12)

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	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter	SBRA
28 U.S.C. § 586(a)(3), (b), (d)(1), (e)	Provisions applicable to U.S. Trustees duties to supervise the administration of cases and trustees, (a)(3), appoint standing trustees (b), prescribe qualifications of trustees, (d)(1), and fix compensation of standing trustees, (e), extended to include cases and trustees under subchapter V. Adds new 28 U.S.C. § 586(e)(5), which provides for compensation of standing trustee in subchapter V case when trustee's services are terminated due to dismissal or conversion of the case or substantial consummation of a plan under new § 1183(c)(1). In these circumstances, the standing trustee does not make disbursements on which a percentage fee would be due. The court is to award compensation "consistent with services performed by the trustee and the limits on compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."	§ 4(b)(1)
28 U.S.C. § 589b	Provisions relating to reports of trustees and debtors in possession made applicable in subchapter V cases.	§ 4(b)(2)
28 U.S.C. § 1930(a)(6)(A)	Subchapter V cases excluded from requirement of payment of quarterly U.S. Trustee fees	§ 4(b)(3)
	Amendments Applicable in All Cases	
11 U.S.C. § 547(b)	As amended, 11 U.S.C. § 547(b) provides that a trustee may avoid a preferential transfer "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c).	SBRA § 3(a)
28 U.S.C. § 1409(b)	As amended, 28 U.S.C. § 1409(b) provides for venue only in the district of the defendant of a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than \$ 25,000.	SBRA § 3(b)

**Summary of SBRA Interim Amendments to
The Federal Rules of Bankruptcy Procedure
To Implement SBRA**

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as Rule 2015(c). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in “small business case” also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a “small business case,” although a subchapter V debtor is a “small business debtor.”)

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

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Note: The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act referenced herein for an additional year.

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13 Prepared by Mary Jo Heston's Chambers (Updated July 6, 2020)

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).¹ No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person whose primary activity is the business of owning single asset real estate or operating real property or	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than \$7,500,000 (will return to \$2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below \$10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below \$2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); §

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

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	conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is “an affiliate of an issuer” under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of \$2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over \$2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a “small business debtor” hinges, at least in part, upon whether a creditor’s committee is appointed, and on how much that creditor’s committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor’s committee thereby extinguishing	§ 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below \$10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B). Family farmer must be engaged in a farming operation, including “farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.” § 101(21).	1113, CARES Act.

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	debtor's small business status. The UST appoints any such committee. <i>Id.</i> Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.			
Filing Fees	\$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	\$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	\$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is \$325 for disbursements up to \$15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first \$450,000 paid under the plan, and 3% of any payments in excess of \$450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

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	final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.			
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. <i>See</i> § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. <i>See In re SFW, Inc.</i> 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11	A disinterested trustee is appointed in every ch. 13 case. § 1302.

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	Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the	A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."

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Trustee Fees	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for “cause.” Plan payments bear a trustee’s fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee’s fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).
Estate Property	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306.	Section 1186 augments § 541 and parallels § 1115 in ch. 11.	Section 1207 augments § 541 and parallels § 1115 in ch. 11.	Section 1306 augments § 541, and parallels § 1115 in ch. 11.
Estate Property Post-confirmation	Post-confirmation, except as provided in the plan or confirmation order, all the estate’s property reverts in the debtor free and clear of all liens. § 1141(b) & (c).	No separate rule.	Post-confirmation, except as provided in the plan or confirmation order, all the estate’s property reverts in the debtor free and clear of all liens. § 1227 (b) & (c).	Post-confirmation, except as provided in the plan or confirmation order, all the estate’s property reverts in the debtor free and clear of all liens. § 1327(b) & (c).

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Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b).	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order.	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.

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	§ 1123(b)(3)(B).			
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.
Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d). Small Business Debtors: Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes.	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.

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Status Conference	Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f).	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).	None required.	None required.
	None required.			
Commencement of Plan Payments				
Plan Content	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.	Plans <i>must</i>: 1) provide a brief history of the business operations of the debtor; 2)	Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019).	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1).
	Plans <i>must</i>: 1) designate classes of		Mirrors those of ch. 13. ch. 12 plans <i>must</i>: 1) provide future earnings or future income to	Plans <i>must</i>: 1) provide future earnings or future income to the trustee; 2) provide all

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	claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123. Plans <i>may</i>: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2). Plans <i>may</i>: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222. Under § 1222(b)(1)-(12), the plan <i>may</i> designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322. Under § 1322(b)(1)-(11), the plan <i>may</i> designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 <i>debtors in possession</i> may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable		Ch. 12 debtors in possession <i>and</i> trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which	Ch. 13 <i>debtors</i> may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of

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	nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; or 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		applies only in ch. 12, allows <i>trustees</i> under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; or 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017.	

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			Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not <i>pro rata</i>) distribution amongst unsecured claimants.	

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Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. <i>In re Rogers</i>, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income.	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).

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	as their larger ch. 11 counterparts.		Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, <i>and</i> finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), <i>and</i> the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has

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				experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. <i>See In re Campbell</i>, 313 B.R. 871 (B.A.P. 10th Cir. 2004), <i>and see In re Ridgely</i>, 93 B.R. 683 (Bankr. E.D. Mo. 1988); <i>but cf. In re Feely</i>, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch.	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the

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	requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).		12 based on the motion date, not the petition date). There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	conversion. § 1307(f).
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523.	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a “hardship discharge” whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor’s failure to complete plan payments must be due to circumstances beyond the debtor’s control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor’s failure to complete plan payments must be due to circumstances beyond the debtor’s control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the “full compliance” discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from

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	Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1). An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.			discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement, or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328.

Key Events in the Timeline of Subchapter V Cases¹

Benjamin A. Kahn²
Samantha M. Ruben³

- Election to Have Subchapter V Apply
 - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).⁴
 - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor or a debtor as defined under § 1182(1), and if so, whether it elects to have subchapter V apply. Interim Rule 1020(a).⁵

¹ A chart containing more detailed subchapter V deadlines follows.

² United States Bankruptcy Judge, Middle District of North Carolina. No copyright is claimed in these materials by the authors, who give permission to reproduce in whole or in part.

³ Law Clerk to Judge Benjamin A. Kahn. B.A., University of Miami, Departmental Honors in International Studies; J.D., Chicago-Kent College of Law, *magna cum laude*, Order of the Coif.

⁴ All references to rules herein are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated. On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference (“Rules Committee”) distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 (“SBRA”). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein.

⁵ There is no deadline in the rules for a debtor to amend its statement or election, and Rule 1009 permits a debtor to amend any statement as a matter of course at any time before the case is closed. Nevertheless, § 1188 of subchapter V requires the court to hold a status conference no later than 60 days after the order for relief, and requires the debtor to serve and file a report detailing efforts to attain a consensual plan no later than 14 days prior to the status conference. The court may extend the period of time for holding the status conference only “if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.” Similarly, § 1189(b) requires a debtor under subchapter V to file a plan no later than 90 days after the order for relief, and permits the court to extend this period only “if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.” If the debtor does not elect subchapter V, but seeks to amend its statement to elect subchapter V more than 30 days after the order for relief, the court and the debtor will not be able to comply with the time requirements under §§ 1188 and 1189, unless the court extends these periods, and the court only may do so if the need to do so is attributable to circumstances for which the debtor should not justly be held accountable.

- Status Conference
 - Not later than 60 days after the order for relief the court shall hold a status conference “to further the expeditious and economical resolution of a case under this subchapter.” 11 U.S.C. § 1188(a).
 - 14 days BEFORE the status conference under 11 U.S.C. § 1188(a), the debtor shall file and serve on all parties in interest “a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.” 11 U.S.C. § 1188(c).
- Filing Plan of Reorganization
 - Not later than 90 days after the order for relief, the debtor shall file a plan. The court may extend this period if the need for an extension “is attributable to circumstances for which the debtor should not justly be held accountable.” 11 U.S.C. § 1189(b).
- Confirmation Hearing⁶
 - 28 days’ notice must be given for the deadline to accept or reject and file objections to a proposed plan, and for the hearing to consider confirmation of the proposed plan.⁷ Rule 2002(b). The court fixes the date for the confirmation hearing. Rule 3017.2(c).
- Appointment and Termination of Service of Trustee
 - The United States Trustee shall appoint a standing trustee for subchapter V cases, appoint one disinterested person to serve as trustee, or may serve as trustee. 11 U.S.C. § 1183(a).
 - If the plan is consensually confirmed under 11 U.S.C. § 1191(a), the service of the trustee is terminated when the plan is substantially consummated. However, the United

⁶ No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

⁷ Section 1129(e), which requires that the court confirm a plan in a small business case within 45 days after the plan is filed, does not apply to cases under subchapter V. See 11 U.S.C. § 1181(a); see also 11 U.S.C. 101(51C) (excluding any case in which a debtor elects to have subchapter V apply from the definition of “small business case”).

States Trustee may reappoint the trustee for modification of the plan or if the debtor is removed from possession. 11 U.S.C. § 1183(c)(1).

- If the plan is non-consensually confirmed, the trustee will make all payments under the plan, unless the plan or the order confirming the plan provides otherwise. 11 U.S.C. § 1194(b).

- Discharge

- Consensually Confirmed Plans Under 11 U.S.C. § 1191(a). If a plan is consensually confirmed under 11 U.S.C. § 1191(a), then the general discharge provisions under 11 U.S.C. § 1141(d)(1)-(4) shall apply. See 11 U.S.C. § 1181(a), (c). Therefore, in a non-liquidating subchapter V case, discharge will occur on confirmation of a consensual plan. See 11 U.S.C. § 1141(d)(1).⁸
- Non-consensually Confirmed Plans Under 11 U.S.C. § 1191(b). If a plan is confirmed under 11 U.S.C. § 1191(b), then the timing provisions for entry of discharge under 11 U.S.C. § 1141(d) shall not apply. See 11 U.S.C. § 1181(c). In such a case, discharge will be entered after completion of all payments due “within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix” 11 U.S.C. § 1192.⁹

- Modification of a Plan

- The debtor may modify a plan at any time prior to confirmation. 11 U.S.C. § 1193(a).
- After confirmation, the debtor may modify a plan consensually confirmed under § 1191(a) prior to substantial consummation of the plan. 11 U.S.C. § 1193(b).¹⁰
- After confirmation, the debtor may modify a plan confirmed under § 1191(b) at any time within 3 years, or such longer period not to exceed 5 years, as fixed by the court. 11 U.S.C. § 1193(c).

- Plan Term

- Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a

⁸ Section 1141(d)(5), which delays discharge until the completion of payments under a plan in an individual case unless otherwise ordered by the court, does not apply in subchapter V cases. 11 U.S.C. 1181(a).

⁹ Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.

¹⁰ A consensually confirmed plan only may be modified by consent. 11 U.S.C. § 1193(b).

non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

- Timing of Payments
 - The court may authorize the trustee to make payments to the holder of a secured claim prior to confirmation for purposes of providing adequate protection. 11 U.S.C. § 1194(c).

Subchapter V Deadlines¹¹

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	Deadline	Act to Be Performed	Code or Rule¹²
Voluntary debtor	Petition Date	State whether the debtor is a small business debtor or a debtor as defined under § 1182(1) and, if so, whether the debtor elects to have subchapter V apply	Interim Federal Rule of Bankruptcy Procedure 1020(a)
Subchapter V DIP, or Trustee if debtor removed from possession	As soon as possible after the commencement of the case	Give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor	Federal Rule of Bankruptcy Procedure (“Rule”) 2015(a)(4)
Subchapter V debtor	Upon electing to proceed under subchapter V	Append to its petition its most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return; or a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no federal tax return has been filed	11 U.S.C.A § 1187(a); 11 U.S.C. § 1116(1)(A), (B) ¹³
Involuntary debtor	14 days after the entry of the order for relief	File a statement indicating whether the debtor is a small business debtor and, if so,	Rule 1020(a)

¹¹ On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference (“Rules Committee”) distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 (“SBRA”). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein. Deadlines and notations set forth herein that existed under the Federal Rules of Bankruptcy Procedure prior to enactment of subchapter V and that have not been modified by the proposed interim rules have been excerpted from COLLIER PAMPHLET EDITION 2018 Supplement, Time Periods Prescribed by the Bankruptcy Rules (Richard Levin & Henry Sommer eds., Matthew Bender) (the “Collier Supplement”).

¹² With respect to deadlines under title 11, only those time periods and deadlines arising under subchapter V of title 11 are included herein. Time periods relating to adversary proceedings, appeals, and claims are not included. For comprehensive deadlines generally applicable to all cases, including subchapter V, see the Collier Supplement.

¹³ Section 1181(a) provides that 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(a).

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		whether the debtor elects to have subchapter V apply	
Chapter 11 parties in interest	30 days after the conclusion of the meeting of creditors or 30 days after any amendment to the debtor's statement under Rule 1020(a), whichever is later	File objection to the chapter 11 debtor's designation as a small business debtor	Rule 1020(b) ¹⁴
Involuntary debtor	7 days after entry of the order for relief	File a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H	Rule 1007(a)(2)
Chapter 11 debtor	14 days after entry of the order for relief	File a list of the debtor's equity security holders, with the number and kind of interests, and the last known address or place of business of each holder	Rule 1007(a)(3)
Voluntary debtor	14 days after filing petition	File the schedules, statements and other documents required by 1007(b)(1)	Rule 1007(c)
Individual chapter 11 debtor	14 days after filing the petition	File a statement of current monthly income	Rule 1007(c)
Voluntary individual debtor	14 days after entry of the order for relief	File a certificate of credit counseling if debtor filed a statement that debtor received counseling but did not have the certificate on the filing date	Rule 1007(c)
Petitioning creditor(s) in an involuntary case	7 days after issuance of the summons	Serve the summons and a copy of the petition on the debtor	Rule 1010(a); Rule 7004(e)
Involuntary debtor	14 days after entry of the order for relief	File the schedules, statements, and other documents required by Rule 1007(b)(1)	1007(c)
Involuntary chapter 11 reorganization on debtor	2 days after entry of the order for relief	File a list of creditors holding the 20 largest unsecured claims	Rule 1007(d)

¹⁴ Any objection is governed by Rule 9014. See F.R.B.P 1020(c).

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Involuntary debtor	21 days after service of the summons, unless made by publication on a party not residing or found within the state in which the court sits	File and serve defenses and objections to an involuntary petition	Rule 1011(b)
U.S. Trustee in a chapter 11 health care business case	21 days after the commencement of the case	File motion to appoint a patient care ombudsman	Rule 2007.2(a)
Debtor's attorney	14 days after the order for relief	File statement whether the attorney has shared or agreed to share the compensation with any other entity	Rule 2016(b)
The court	60 days after entry of the order for relief	Hold a status conference to further the expeditious and economical resolution of a case under subchapter V ¹⁵	11 U.S.C. § 1188(a)
Subchapter V debtor	14 days before the date of the § 1888(a) status conference	Debtor file and serve on the trustee and all parties in interest a report that details the efforts debtor has undertaken and will undertake to attain a consensual plan of reorganization	11 U.S.C. § 1188(c)

TIME PERIODS RELATED TO PLANS

Entity	Deadline	Act to Be Performed	Code or Rule
Subchapter V debtor	90 days after the order for relief	File a chapter 11 plan ¹⁶	11 U.S.C. § 1189
Chapter 11 plan proponent	With the plan or within a time fixed by the court	File a disclosure statement or evidence of prepetition acceptance of a plan <u>if</u> the court has ordered that 11 U.S.C. 1125 will apply ¹⁷	Rule 3016(b)

¹⁵ Under §1188(b), the court may extend the time for holding a status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

¹⁶ The court may extend the 90-day period if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.

¹⁷ No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility

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Class Including Secured Creditor	Date fixed by the court	Make the election under § 1111(b)	Rule 3014
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time fixed for filing objections and the hearing to consider approval of a disclosure statement, if applicable. <u>See note 17, <i>infra</i>.</u>	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of hearing on disclosure statement and objections in a chapter 11 case, if applicable. <u>See note 17, <i>infra</i>.</u>	Rule 3017(a)
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of time for filing objections to an injunction provided in a chapter 11 plan	Rule 3017(f)(1)
The court	No deadline	Fix a date for the hearing on confirmation.	Rule 3017.2(c)
Holders of claims or interests	Time fixed by the court	Accept or reject the plan	Rule 3017.2(a)
Equity security holder	Time fixed by the court	Record date for eligibility to accept or reject the plan	Rule 3017.2(b)

projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

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Subchapter V debtor in possession, trustee, or clerk, as directed by the court	Times fixed by the court	Transmit the plan, provide notice of the time to accept or reject the plan, and provide notice of hearing on confirmation ¹⁸	Rule 3017.2(d)
Chapter 11 parties in interest	14 days after entry of the order	Stay of order confirming a chapter 11 plan	Rule 3020(e)
Subchapter V debtor	Any time prior to confirmation	Modify the plan. After the modification is filed with the court, the plan as modified becomes the plan.	11 U.S.C. § 1193(a)
Subchapter V debtor	Any time after confirmation of the plan and before substantial consummation of the plan	May seek to modify a plan that was consensually confirmed under section 1191(a). The plan, as modified under this subsection, becomes the plan only if the court confirms the plan as modified by consent under section 1191(a) of this title. ¹⁹	11 U.S.C. § 1193(b)
Subchapter V debtor	Any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court	May seek to modify the plan if the plan was confirmed under section 1191(b).	11 U.S.C. § 1193(c)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of time for filing objections to modification of an individual's chapter 11 plan and of hearing on objections	Rule 3019(b), (c)

¹⁸ In traditional chapter 11 cases under chapter 11, Rule 3017(c) requires that, on or before approval of the disclosure statement, the court shall fix a time within which holders of claims and interests may accept or reject a plan and may fix the date for notice of the confirmation hearing. Rule 3017(d) requires transmission of the plan and the notice of the times so fixed in traditional chapter 11 cases “in accordance with Rule 2002(b).” Despite the lack of any similar reference to Rule 2002(b) in Rule 3017.2(d), nothing in the interim rule purports to affect the minimum 28 days’ notice required of the time fixed for acceptance or rejection of the plan and the hearing to consider confirmation under Rule 2002(b).

¹⁹ Subchapter V does not provide for a contested modification of a consensually confirmed plan.

Any holder of a claim or interest that has accepted or rejected the plan	Within a time fixed by the court	Change the previous acceptance or rejection of the plan if the plan is later modified	11 U.S.C. § 1193(d)
The subchapter V trustee	Until confirmation or denial of confirmation of a plan	Retain payments and funds received pending confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deductions under 11 U.S.C. § 1194(a)(1)-(3).	11 U.S.C. § 1194(a)
The court	After notice and a hearing, and prior to confirmation of a plan	May authorize the trustee to make payments to the holder of a secured claim to provide adequate protection of an interest in property	11 U.S.C. § 1194(c)

DEADLINES THROUGHOUT THE CASE

Entity	Deadline	Act to Be Performed	Code or Rule
Subchapter V debtor	Periodically throughout the case	Comply with the requirements of 11 U.S.C. §§ 308 and 1116(2), (3), (4), (5), (6), and (7)	11 U.S.C. § 1187(b) ²⁰

²⁰ Section 1181(a) provides that § 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(b).

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Subchapter V debtor	14 days after the information comes to the debtor's knowledge	File supplemental schedule disclosing acquisition of property by bequest, devise, inheritance, property settlement agreement, or as a beneficiary of a life insurance policy or death benefit plan. ²¹	Rule 1007(h)
Subchapter V debtor	At any time before the case is closed	File an amendment of any voluntary petition, list, schedule, or statement	Rule 1009(a)
Chapter 11 DIP or trustee in case converted from chapter 7	14 days after conversion of the case	File a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim	Rule 1019(5)(A)(i)
Chapter 11 DIP or trustee in case converted to chapter 7	30 days after conversion of the case	File and transmit to the U.S. Trustee a final report and account	Rule 1019(5)(A)(ii)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of meeting of creditors under § 341	Rule 2002(a)(1)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of proposed use, sale, or lease of property of the estate other than in the ordinary course of business	Rule 2002(a)(2)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on approval of a compromise or controversy other than pursuant to Rule 4001(d)	Rule 2002(a)(3)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on any entity's request for compensation or reimbursement of expenses in excess of \$1000	Rule 2002(a)(6)

²¹ The obligation to supplement continues post-confirmation for plans confirmed under 11 U.S.C. § 1191(b).

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U.S. Trustee in a chapter 11 reorganization case	Between 21 and 40 days after the order for relief	Call a meeting of creditors, except where a prepetition plan has been accepted	Rule 2003(a)
U.S. Trustee	2 years after the conclusion of the meeting of creditors	Preserve recording of § 341 meeting for public access	Rule 2003(c)
Subchapter V debtor	14 days after the plan is substantially consummated	File notice of substantial consummation with the court and serve on the trustee, the U.S. Trustee, and all parties in interest	11 U.S.C. § 1183(c)(2)
Subchapter V trustee	Periodically	File reports and summaries of the operation of the debtor's business, including a statement of receipts and disbursements, if the debtor ceases to be a DIP	11 U.S.C. § 1183(b)(5); 11 U.S.C. §§ 1106(a)(1), (2), (6); 11 U.S.C. § 704(a)(8)
The court	On request and after notice and a hearing	Order that the debtor not be a DIP for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter	11 U.S.C. § 1185(a)
The court	On request and after notice and a hearing	Reinstate the DIP.	11 U.S.C. § 1185(b)
Subchapter V debtor	Periodically	File periodic financial and other reports as required by 11 U.S.C. § 308(b)	11 U.S.C. § 1187(b); 11 U.S.C. § 308(b)
Subchapter V debtor	25 days before the date of the hearing on confirmation of the plan	Mail a conditionally approved disclosure statement if the court directs application of 11 U.S.C. § 1125	11 U.S.C. § 1187(c); 11 U.S.C. § 1125(f)
Subchapter V DIP, or trustee if debtor removed from possession	Periodically	Keep records of receipts and dispositions of money, file reports required by 11 U.S.C. § 704(a)(8)	Rule 2015(b)

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Subchapter V DIP, or trustee if debtor removed from possession	Within the time fixed by the court, if so directed	File and transmit to the United States trustee a complete inventory of the property of the debtor	Rule 2015(b)
Subchapter V debtor	No later than 21 days after the last day of each calendar month	File monthly reports as contemplated by 11 U.S.C. § 308	Rule 2015(b) ²²
Chapter 11 trustee or DIP	7 days before the first date set for the § 341 meeting of creditors	File first periodic report of the value, operations, and profitability of each entity that is not a publicly traded corporation or chapter 11 debtor and in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	No less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted	File subsequent periodic reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a chapter 11 debtor in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	14 days before filing the first periodic financial report required by this rule	Send notice to each entity in which the estate has a substantial or controlling interest, and to all holders of an interest in that entity, that it expects to file and serve financial information relating to that entity	Rule 2015.3(e)

²² The proposed interim rule contemplates that the debtor shall be required to file monthly reports under § 308 and Rule 2015(a)(6) even if removed from possession.

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

Entity	Deadline	Act to Be Performed	Rule
Clerk of court, or some other person as the court may direct	21 days	Provide notice by mail of time for hearing on the dismissal or conversion of a chapter 7, 11, or 12 case, unless the hearing is under § 707(a)(3) or (b) or is on dismissal of the case for failure to pay the filing fee	Rule 2002(a)(4)
The court	As soon as practicable after completion by the debtor of all payments due within the first three years of the plan, or such longer period not to exceed five years as the court may fix	Grant the debtor a discharge ²³	11 U.S.C. § 1192
Chapter 11 party in interest	No later than the first date set for the hearing on confirmation	File complaint objecting to discharge ²⁴	Rule 4004(a)
Creditor	Any time	File complaint under § 523(a)(2), (4), or (6)	Rule 4007(b)
Creditor in a chapter 11 case	No later than 60 days after the first date set for the § 341 meeting of creditors, with 30 days' notice	File complaint under § 523(a)(2) or (4)	Rule 4007(c)

²³ Such discharge pertains to debts as provided under the plan except any debt (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or (2) of the kind specified in section 523(a).

²⁴ A complaint seeking revocation of a chapter 11 discharge as procured by fraud may be filed any time before 180 days after the date of the entry of the order of confirmation. 11 U.S.C. § 1144.

APPENDIX E

Comparison of Subchapter V With Chapter 13 and Chapter 11

This paper is based on materials originally prepared for a program titled *Eeny, Meeny, Miny, Moe* presented on March 25, 2022, at the 48th Annual Southeastern Bankruptcy Law Institute in Atlanta, Georgia.

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I. Introduction

A debtor who is eligible to be a debtor under Subchapter V of Chapter 11 has the option of seeking relief under other provisions of the Bankruptcy Code. Subchapter V applies only if the debtor elects it.

All debtors eligible for Subchapter V may be a Chapter 7 debtor, and debtors who qualify as family farmers or fishers may file a Chapter 12 case. These materials consider the Chapter 11 and 13 alternatives.

Which options are available depends on whether the debtor is an individual and the amount of debt.

Chapter 13 is available only for an individual with regular income whose noncontingent, liquidated debts do not exceed specified debt limits. The debt limits under § 109(e) effective as of April 1, 2022, as adjusted under § 104 under § 109(e), were \$ 465,275 for unsecured debts and \$ 1,395,875 for secured debts.

Effective June 21, 2022, the debt limit in a chapter 13 case is temporarily increased to \$ 2,750,000 for both secured and unsecured debts under the Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATCA”).¹ On June 21, 2024, the debt limits return to \$ 465,275 for unsecured debts and \$ 1,395,875 for secured debts.

Individuals and entities may file a Chapter 11 case. Absent a Sub V election, the type of chapter 11 case will depend on the amount of the debtor’s noncontingent, liquidated debts.

If the debt is less than \$ 3,024,725, adjusted as of April 1, 2022 under § 104, the debtor is a “small business debtor” under § 101(51D),² and the debtor is in a “small business case.” § 101(51C).

The Bankruptcy Code has provisions that apply specifically in a small business case. A debtor does not elect to be in a small business case; the provisions for small business cases apply if the debtor is a small business debtor and does not elect Subchapter V. If the debt exceeds the small business limit, the debtor is in a traditional chapter 11 case.

¹ Bankruptcy Threshold Adjustments and Technical Corrections Act § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”). The increased debt limits apply retroactively in any bankruptcy case commenced on or after March 27, 2020 that is pending on the date of BTATCA’s enactment. *Id.* § 2(h)(2(A)).

II. Subchapter V vs. Chapter 13

Chapter 13 is an option only if the debtor is (1) an individual with (2) regular income (3) whose debts are within the debt limits discussed above. § 109(e). Key differences between relief under Chapter 13 as compared to Subchapter V include the following.

Noneligible spouse cannot be a debtor in a joint Sub V case

The spouse of a debtor eligible for Chapter 13 is eligible to be a debtor in a jointly filed Chapter 13 case, even if the spouse does not have regular income.² Subchapter V does not have a provision that permits a noneligible spouse to file jointly with an eligible debtor. Although an affiliate of a Subchapter V debtor is eligible to be a Sub V debtor, a spouse is not an affiliate.³

Attorney's and trustee's fees may be lower in a Chapter 13 case

In general, a Chapter 13 case is likely to be simpler and cheaper than a Sub V case. The debtor files a plan in the form the court requires and creditors do not vote. The case moves promptly to confirmation. The Chapter 13 process may thus require less time for the debtor's attorney, resulting in a lower attorney's fee.

The Chapter 13 trustee receives a commission based on disbursements under the plan. In a Sub V case, the Sub V trustee receives compensation based on services rendered. Depending on how much money will be disbursed to creditors and the percentage commission the Chapter 13 trustee charges, the Chapter 13 trustee's fees may be lower.

This may not make any difference to the debtor unless the debtor is in a position that payment of claims in full is necessary. If not, the amount of the trustee's fee in either case will

² See § 1322(b)(5). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 12:7.

³ *In re Johnson*, 2021 WL 825156 (Bankr. N.D. Tex. 2021).

be paid before claims of creditors from the plan payments the debtor makes. The amount of the fees will reduce what creditors receive but will not affect how much the debtor pays.

Subchapter V provides more flexibility for modification of secured claims

Subchapter V differs from Chapter 13 in its provisions for the treatment of certain secured claims.

Chapter 13 has provisions that prevent the “strip-down” of a residential mortgage⁴ and that require certain secured claims to be paid in full, regardless of the value of the collateral. For example, a Chapter 13 debtor cannot “strip down” a claim secured by a purchase-money security interest in a vehicle purchased within 910 days of the filing of the petition under the so-called “hanging paragraph” to § 1325(a)(5), which prohibits bifurcation under § 506(a) of such claims.⁵

In a Subchapter V case, § 1190(3) permits modification of a residential mortgage if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was “not used primarily to acquire the real property.” Subparagraph (B) requires that the new value have been “used primarily in connection with the small business of the debtor.”

For example, assume that the debtor’s principal residence is worth \$ 300,000 and is encumbered by a first mortgage in the amount of \$ 270,000 and a second mortgage that secures a debt of \$ 100,000 that the debtor incurred for use in the debtor’s business. A debtor cannot

⁴ § 1322(b)(5). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:26.

⁵ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:20.

reduce the secured portion of the business debt to \$ 30,000 in a chapter 13 case but can do so in a Subchapter V case.

Subchapter V does not contain a special provision like the “hanging paragraph” that prohibits bifurcation of certain secured claims. Thus, for example, if the debtor owns a motor vehicle subject to the “hanging paragraph” worth \$ 15,000 encumbered by a \$ 25,000 debt, the Subchapter V debtor may pay the value of the vehicle, with interest, and treat the \$ 10,000 deficiency as an unsecured claim. In a Chapter 13 case, the debtor must treat the entire claim as secured.

On the other hand, the § 1111(b)(2) election is applicable in a Subchapter V case. It permits an undersecured creditor to elect to treat its claim as fully secured, unless the collateral is of “inconsequential value.”⁶ In this circumstance, if the debtor is retaining the property, cramdown requires that the creditor retain its lien⁷ and receive payments over time that (1) have a value that equals the value of the collateral and (2) total the amount of the entire claim.⁸

⁶ SBRA Guide § VIII(E)(1).

⁷ § 1129(b)(2)(A)(i)(I), applicable under § 1191(b)(1).

⁸ § 1129(b)(2)(A)(i)(II), applicable under § 1191(b)(1).

In the mortgage example, assuming an interest rate of six percent, a monthly payment of \$ 1,667 for five years,⁹ or \$ 883 for ten years,¹⁰ meets the payment requirement. Monthly payments are \$ 555 over 15 years and \$ 417 over 20.¹¹

In a Chapter 13 case, the plan generally must provide for a secured claim either by (1) curing prepetition arrearages during the term of the plan and providing for the continuation of regular postpetition payments, which may extend beyond the term of the plan under § 1322(b)(5) or (2) paying the amount of the allowed secured claim, with interest, over the term of the plan, which may not exceed five years,¹² under § 1325(a)(5)(B).¹³ The second alternative requires that the monthly payments be in equal amounts.

Subchapter V, however, does not have a restriction on the term of the plan or a requirement for equal monthly payments.

⁹ The value of the collateral is \$ 30,000. The monthly payment to amortize that amount over five years with six percent interest is \$ 580, a total of \$ 34,800. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another \$ 65,200, which can be paid in monthly payments over five years of \$ 1,067. The total monthly payment is \$ 1,667 (\$ 580 + \$1,067).

¹⁰ The value of the collateral is \$ 30,000. The monthly payment to amortize that amount over ten years with six percent interest is \$ 333, a total of \$ 39,968. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another \$ 60,032, which can be paid in monthly payments over ten years of \$ 500. The total monthly payment is \$ 833 (\$ 333 + \$ 500).

¹¹ SBRA Guide VIII(E)(1) contains a table that shows calculations for monthly payments for the terms stated in the text and for terms of 25 years (\$ 333), and 30 years (\$ 278). Amortization of \$ 30,000 with interest at six percent over 53 years requires monthly payments of \$ 156.43, which results in payments that total \$ 100,113.

¹² § 1322(d). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:9

¹³ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman CHAPTER 13 PRACTICE AND PROCEDURE § 5:10, 5:13.

The Subchapter V PDI test is more favorable to debtors

Both Chapter 13 and Subchapter V have “projected disposable income” (“PDI”) tests, but they differ.

In a Chapter 13 case, if a plan provides for less than full payment of unsecured claims, a debtor must pay “projected disposable income” to unsecured creditors if the trustee or a creditor objects to confirmation. § 1325(b). (The Chapter 13 trustee always objects.)

The PDI requirement in a Sub V case applies only in the cramdown situation. If all classes of impaired creditors accept the plan, the PDI requirement is not applicable.¹⁴ In a cramdown case, the requirement is applicable regardless of whether an objection is filed.

Subchapter V has a different method for the calculation of disposable income. In a Chapter 13 case, the calculation of disposable income is based on the debtor’s “current monthly income,”¹⁵ and an “above-median” debtor¹⁶ must use the so-called “means test” standards in calculating permissible deductions.¹⁷

In a Subchapter V case, § 1191(d) defines disposable income as “income that is received by the debtor and that is not reasonably necessary to be expended” for support, payment of

¹⁴ See *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8). In *Walker*, the debtor’s plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan, but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate. The creditor urged the court to extend the time for payment of PDI to five years. The court on the facts held that the creditor had not shown a lack of good faith.

¹⁵ Section 101(10A) defines “current monthly income.” It is the average of the debtor’s income (as the statute defines it) in the full six months preceding the filing of the petition. See generally W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:8, 8:9, 8:10.

¹⁶ W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12.

¹⁷ W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:30.

domestic support obligations, and business expenditures. The PDI definition in subchapter V does not use “current monthly income,” and it does not require the “means test” standards.¹⁸

The “applicable commitment period” for the payment of projected disposable income in a Chapter 13 case under § 1325(b)(4) is three years for a “below-median” debtor and five years for an “above-median” debtor. The required time for payment of PDI in a Sub V case is a minimum of three years and a maximum of five years. § 1191(c)(2). The court determines the length of the period, but the statute provides no standards for making the decision.¹⁹ For an above-median debtor, therefore, the *maximum* period for payment of PDI in a Sub V case is five years, the *minimum* (and only) period in a Chapter 13 case.

Finally, a debtor cannot “prepay” PDI in a Chapter 13 case and end the case; the case must remain open for the entire applicable commitment period.²⁰ The Sub V PDI test permits the debtor to pay the value of projected disposable income, thus permitting payment in a lump sum or over a shorter period. § 1191(c)(2)(B).

Times for filing of plan and commencement of payments

In a Chapter 13 case, the debtor must file the plan within 14 days of the filing of the petition (or the date of conversion to Chapter 13, if originally filed under another chapter), Bankruptcy Rule 3015(b), and must commence payments under the plan within 30 days, § 1326(a), unless the court orders otherwise.

¹⁸ SBRA Guide VIII(B)(4)(i).

¹⁹ SBRA Guide VIII(B)(4)(ii).

²⁰ *E.g.*, Whaley v. Tennyson (*In re Tennyson*), 611 F.3d 873 (11th Cir. 2010) (Above-median debtor with no disposable income must remain in Chapter 13 case for five years.). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:66.

The time for the filing of a Sub V plan is 90 days, unless the court extends it. § 1189(b).

Subchapter V does not require payments before confirmation.

Payment of administrative and priority claims under the plan; interest on priority tax debts.

Chapter 13 permits payment of administrative and priority claims in deferred payments over the term of the plan. § 1322(b)(2). The debtor does not have to pay postpetition interest on unsecured priority tax claims.²¹

In a Chapter 11 case, a plan must pay administrative and priority claims, other than priority tax claims, in full on the effective date, unless the creditor agrees to different treatment, § 1129(a)(9)(A), (B), except that, in the case of cramdown confirmation of a plan in a subchapter V case, the plan may provide for payment of administrative expenses under the plan. § 1191(e). For example, although a Chapter 13 plan may provide for payment of a prepetition domestic support obligation over the term of the plan, a Sub V debtor must pay it in cash on the effective date.

Section 1129(a)(9)(C) permits payment of a priority tax claim in installments but requires payment of interest at the applicable governmental rate.

Only the debtor may propose a postconfirmation modification of the plan in a Sub V case

The Chapter 13 trustee or a creditor, as well as the debtor, may propose a postconfirmation modification of a plan. § 1329(a). The trustee or a creditor may do so, for example, to require the debtor to increase payments based on higher earnings or reduced

²¹ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 6:16.

expenses or the debtor's receipt of proceeds from the postpetition sale of an asset.²² Only the debtor may propose a postconfirmation modification in a Sub V case. § 1193(b), (c).²³

Postpetition assets and earnings as property of the estate

In a Chapter 13 case, postpetition assets and earnings are property of the estate under § 1306(a). Depending on the terms of the plan and the confirmation order and the court's interpretation of the vesting provisions of § 1327(b), postpetition assets and earnings may continue to be property of the estate after confirmation.²⁴

Postpetition assets and earnings are not property of the estate in a Sub V case when it is filed.²⁵ If the court confirms a plan under the “cramdown” provisions of § 1191(b), however, postpetition assets and earnings are included in property of the estate. § 1186(a).

An important consequence of these rules is what happens in the event of conversion of the case to Chapter 7.

In a Chapter 13 case converted to Chapter 7, postpetition assets and earnings are not property of the Chapter 7 estate, § 348(f)(1)(A), unless the case is converted in bad faith. § 348(f)(2).²⁶ Absent bad faith, therefore, a Chapter 13 debtor retains all postpetition earnings and assets upon conversion to Chapter 7, regardless of whether conversion occurs before or after confirmation.

²² See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 11:12, 11:13.

²³ SBRA Guide VIII(C).

²⁴ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:19, 10:11, 10:12.

²⁵ SBRA Guide XI.

²⁶ W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 20:11.

Preconfirmation conversion of a Sub V case has the same consequence, except that the debtor's bad faith is not a consideration. Conversion to Chapter 7 after confirmation of a *consensual* plan has the same result, because confirmation of a consensual plan does not put postpetition assets and earnings into the estate.

When conversion of a Sub V case occurs after cramdown confirmation under § 1191(b), the issue is more complicated. Section 1186(a) states that, if a plan is confirmed under § 1191(b), property of the estate includes postpetition assets and earnings. Accordingly, the Chapter 7 estate at the time of conversion would include the debtor's postpetition assets and earnings.

Section 1141(b), however, provides that confirmation of a Chapter 11 plan vests property of the estate in the debtor, unless the plan or confirmation order provides otherwise. If property of the estate vested in the debtor at confirmation, that property would remain property of the debtor upon postconfirmation conversion to Chapter 7. SBRA did not change the applicability of § 1141(b) in Sub V cases.

Section § 1141(b) conflicts with § 1186(a). Presumably, the later and more specific provisions of § 1186(a) prevail over § 1141(b) in a Sub V case.²⁷ Under this view, the debtor's postpetition assets and earnings are property of the Chapter 7 estate upon conversion.

Timing and scope of discharge

Discharge in a Chapter 13 case occurs under § 1328(a) after the debtor completes payments or under § 1328(b) if the court at the end of the case permits a hardship discharge based on the debtor's justified inability to complete plan payments.

In a Subchapter V case, discharge occurs upon confirmation of a consensual plan.²⁸

²⁷ SBRA Guide XI(B)(1).

²⁸ SBRA Guide X(A).

In the cramdown situation, discharge does not occur until the debtor completes payments due within the first three to five years of the plan, as the court determines. § 1192.²⁹ A chapter 13 discharge after completion of plan payments under § 1328(a) applies to more debts than a discharge in a Chapter 7 case,³⁰ and a Sub V discharge is subject to the same exceptions as a Chapter 7 discharge.³¹ The § 1328(a) discharge, therefore, discharges some debts that are excepted in a Sub V case.

Under § 1328(c), the exceptions to a “hardship discharge” under § 1328(b) are the same as in a Chapter 7 or Subchapter V case.

III. Subchapter V vs. Chapter 11 Small Business Case

If a debtor eligible for Subchapter V has debts less than \$ 3,024,725, the Chapter 11 case of a debtor who does not elect Subchapter V will be a “small business case.”

A. Advantages of Small Business Case

A small business case offers some advantages for the debtor.

There is no trustee. The debtor has a longer time to file a plan, 300 days instead of 90.

“Cramdown” confirmation in a small business case does not require satisfaction of the projected disposable income test for an entity. (A creditor’s objection in the case of an individual will trigger a PDI requirement. § 1129(a)(15)).

A small business debtor that is an entity receives its discharge upon confirmation of the plan, regardless of whether it is consensual or cramdown. § 1141(d)(1). The same rule applies in a subchapter V case when the court confirms a consensual plan under § 1191(a).³² Upon

²⁹ SBRA Guide X(B).

³⁰ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 21:16, 21:18.

³¹ SBRA Guide X.

³² SBRA Guide X(A).

cramdown confirmation of a plan, however, the Sub V debtor does not get a discharge until completion of payments for three to five years, as the court determines. § 1192.³³ In addition, it is clear that the exceptions to discharge in § 523(a) do not apply to an entity in a small business case or in a Sub V case when consensual confirmation occurs.³⁴, whereas courts disagree as to whether the exceptions apply in the case of an entity.³⁵

B. Disadvantages of Small Business Case

A small business case has significant disadvantages for a debtor, especially an individual.

Requirement of § 1125 disclosure statement

Section 1125 requires the proponent of a Chapter 11 plan to provide a disclosure statement to creditors prior to the solicitation of votes on the plan containing “adequate information” to enable creditors to make an informed judgment about the plan. The court must approve the disclosure statement after notice and a hearing.

In a small business case, § 1125(f) permits the court to determine that the plan itself provides “adequate information” and allows the court to conditionally approve the disclosure statement, with a hearing on final approval occurring at the confirmation hearing.

Section 1125 does not apply in a Sub V case unless the court orders otherwise. Instead, Subchapter V requires only that the plan contain a brief history of the business operations of the debtor, a liquidation analysis, and projections regarding the ability of the debtor to make payments under the proposed plan. § 1190(1). The Sub V plan does not have to include “adequate information,” and the court’s approval of the information is not required.

³³ SBRA Guide X(B).

³⁴ SBRA Guide X(A).

³⁵ SBRA Guide X(B).

Presumably, materially inaccurate or misleading information could result in a court finding that the plan is not proposed in good faith.

Deadline for confirmation

In a small business case, the court must confirm the plan within 45 days of its filing under § 1129(f), unless the court extends the time under § 1121(e)(3). The order extending time must be signed before the deadline expires. § 1121(e)(3)(C). Subchapter V contains no deadline for confirmation.

Cramdown confirmation is more difficult for a debtor in a small business case

Confirmation in a Chapter 11 case requires that at least one impaired class of creditors, determined without regard to the votes of insiders, accept the plan. § 1129(a)(10).

If this requirement is met but one or more classes do not accept the plan, § 1129(b) permits cramdown if the plan is “fair and equitable.” With regard to a class of unsecured creditors, § 1129(b)(2)(B) contains the “absolute priority rule.” The absolute priority rule provides that, unless the claims are paid in full, holders of equity interests may not receive or retain anything under the plan.

Neither obstacle exists in a Sub V case. The court may confirm a plan even if no impaired class of creditors accepts, and the absolute priority rule is eliminated. § 1191(b), (c).³⁶

Instead, cramdown requires satisfaction of a projected disposable income test,³⁷ a heightened feasibility finding,³⁸ and the inclusion in the plan of “appropriate remedies” for creditors in the event of default.³⁹ The projected disposable income rules apply to cramdown confirmation in the case of an entity as well as in the case of an individual.

³⁶ SBRA Guide VIII(B).

³⁷ § 1191(c)(2). SBRA Guide VIII(B)(4)

³⁸ § 1191(c)(3)(A). SBRA Guide VIII(B)(5).

³⁹ § 1191(c)(3)(B). SBRA Guide VIII(B)(5).

Provisions with regard to the cramdown of secured claims are the same. § 1191(c)(1).

Subchapter V permits modification of a residential mortgage in some circumstances

In a traditional Chapter 11 case, as in a Chapter 13 case, a plan cannot modify a claim secured only by real estate that is the debtor’s principal residence. § 1123(b)(5). Accordingly, a plan may not “strip down” a residential mortgage claim to the value of the collateral and treat the deficiency claim as unsecured.

In a Sub V case, § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was “not used primarily to acquire the real property.” Subparagraph (B) requires that the new value have been “used primarily in connection with the small business of the debtor.”⁴⁰

Only the debtor may file a plan in a Sub V case

In a small business case, a party other than the debtor may file a plan after the expiration of the debtor’s exclusivity period of 180 days. § 1121(e). The court may extend the period or order otherwise for cause. Only the debtor may file a plan in a Sub V case. § 1189(a).

⁴⁰ Query whether an individual whose debts exceed the limits for qualification as a “small business debtor” under § 101(51D)(A) but who qualifies for subchapter V under the temporary \$ 7.5 million debt limit under the CARES Act and BTATCA meets the requirement in (B) for use of loan proceeds for the debtor’s “small business” because such a debtor is not a “small business debtor.”

In an individual small business case, property of the estate includes postpetition assets and earnings

In a traditional Chapter 11 case, § 1115(a) includes postpetition assets and earnings in the estate of an individual.⁴¹ An important consequence for the debtor is that, if the case converts to Chapter 7, the Chapter 7 estate includes postpetition assets and earnings.⁴²

Section 1115(a) is not applicable in a Sub V case. § 1181(a). Section 1186(a) provides, however, that if the court confirms a plan under the cramdown provisions of § 1191(b), property of the estate includes postpetition assets and earnings.

If a Sub V case of an individual is converted to Chapter 7 prior to confirmation, it is clear that the Chapter 7 estate does not include postpetition earnings and assets. As the earlier discussion of the issue in connection with Chapter 13 cases indicates, however, it is likely that postpetition assets and earnings will be property of the Chapter 7 estate if conversion occurs after cramdown confirmation.

A single unsecured creditor may invoke the PDI requirement in an individual's small business case

Section 1129(a)(15) provides that confirmation of a plan in an individual case requires the debtor to commit projected disposable income to the plan if a creditor objects, unless the plan provides for payment in full. The requirement is applicable if a single creditor objects, even if the class of unsecured creditors has accepted the plan. If the PDI requirement is applicable, the debtor must use PDI to make plan payments for the longer of five years or the term of the plan.

Section 1129(a)(15) is inapplicable in Subchapter V cases. §§ 1181(a), 1191(a), 1191(b). Thus, the PDI requirement is not applicable at all if all impaired classes accept the

⁴¹ SBRA Guide XI(A).

⁴² *Id.*

plan.⁴³ Moreover, when the PDI requirement applies in the cramdown situation, the *maximum* period for the payment of PDI is five years, even if the plan extends for a longer period.

Discharge of an individual in a Subchapter V case occurs at confirmation of a consensual plan

In a Chapter 11 case, discharge of an individual does not occur until completion of payments under the plan under § 1141(d)(5)(A), or the court grants a “hardship” discharge at the end of the case under § 1141(d)(5)(B).

Section 1141(d)(5) does not apply in a Sub V case. § 1181(a). Accordingly, if the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation. As a result, an individual gets a discharge upon confirmation of a consensual plan.

If cramdown confirmation occurs, the debtor’s discharge does not occur until completion of payments for three to five years, as the court determines, under § 1192.

Sub V does not contain a provision for a hardship discharge. It is not necessary in the case of consensual confirmation because discharge occurs at confirmation. In the case of cramdown confirmation, the debtor may seek postconfirmation modification of the plan under § 1193(b) to deal with postconfirmation inability to make payments.

Automatic stay is effective in later case filed by Subchapter V debtor, but not by debtor in a small business case

Section 362(n) generally provides that the automatic stay of § 362(a) does not apply in a case in which the debtor was the debtor in a small business case that was dismissed in the two years preceding the filing of the current case or in which a plan was confirmed during that

⁴³ See *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8) and *supra* note 14.

period. Because it applies to a debtor in a “small business case,” it does not apply to a debtor in a Sub V case.

V. Subchapter V vs. Traditional Chapter 11

If a debtor eligible for Subchapter V is not a small business debtor, it will be in a traditional chapter 11 case if it does not elect application of Subchapter V.

A traditional Chapter 11 case generally has the same advantages and disadvantages for a debtor as a small business case, with these differences.

1. No deadline for confirmation exists in a traditional Chapter 11 case.
2. The modifications to the disclosure statement rules applicable in a small business case under § 1125(f) do not apply.
3. The exclusivity period for the debtor to file a plan is 120 days, rather than 180.
§ 1121(b).
4. The rules in § 1116 for the filing and reporting of financial and other information that govern a small business case, which apply in a Sub V case, § 1187(a), do not apply in a traditional Chapter 11 case.
5. The provision for elimination of creditors’ committees unless the court orders otherwise apply only in Subchapter V and small business cases.

SUBCHAPTER V UPDATE

March 2024

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

References in these materials to the “SBRA Guide” are to Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (June 2022 rev. ed.), available at:

https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

This Update is a revision of an earlier Update

*** indicates the beginning of new material

indicates the end of the new material

SUBCHAPTER V UPDATE

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I. How Is Subchapter V Working?

Available data indicates that subchapter V is working as intended to permit smaller businesses to reorganize successfully.

Based on an empirical study, Bankruptcy Judge (and former bankruptcy professor) Michelle Harner and her staff concluded:¹

Overall, subchapter V appears to be working as intended. Small businesses are using the subchapter with some regularity. The businesses also are, for the most part, confirming reorganization plans at a relatively high rate in a relatively short period of time. Although more data is needed to fully understand the impact of invoking the subchapter on both the short- and longer-term prospects of financially distressed small businesses, the initial results are promising. Small businesses appear now to have a restructuring tool that is both affordable and effective for addressing their financial needs.

The survey shows that confirmation occurred in more than half of all the cases and in over 62 percent of those that were not dismissed.²

The results are consistent with data compiled by the United States Trustee Program with regard to subchapter V cases, which shows confirmation in approximately 55 percent of the cases.³ The report notes that, compared to non-subchapter V cases historically, subchapter V

¹ Hon. Michelle Harner, Emily Lamasa, and Kimberly Goodwin, *Subchapter V Cases By The Numbers*, 40-Oct Am. Bankr. Inst. J. 12, 59 (October 2021). Emily Lamasa is a career law clerk, and Kimberly Goodwin is Judge Harner's paralegal.

² The dataset included 438 randomly selected cases filed between February 19, 2020, and December 31, 2020, with data collection ending on December 31, 2021. The cases were randomly selected based on a list of 1,278 cases (excluding duplicate cases) filed during the period, representing approximately 36 percent of the cases filed. The data set included at least one case in each Circuit. Hon. Michelle Harner, Emily Lamasa, and Kimberly Goodwin, *Subchapter V Cases By The Numbers*, 40-Oct Am. Bankr. Inst. J. 12 & nn. 6-8 (October 2021).

As of December 21, 2020, the court had confirmed a plan in 221 cases, the debtor had filed a plan that had not yet been confirmed in 105 cases, the debtor had not filed a plan in 30 cases, and the court had dismissed 82 cases. The debtor had not filed a plan at the time of dismissal in 55 of them. *Id.* at 12 n. 10. In the 30 cases with no plan, the court had converted 25 cases (24 to chapter 7, one to chapter 13) and extended the deadline for the filing of a plan in five. *Id.* at 12.

Consensual confirmation occurred in 130 cases, approximately 59 percent. When nonconsensual confirmation occurred in the other 91 cases, 40 had at least one class of impaired creditors voting against the plan and 51 had impaired classes that did not vote. *Id.* at 59. The average time from filing of the case to confirmation was 184 days, and the median time was 168 days. *Id.* at 59.

³ United States Trustee Program, *Chapter 11 Subchapter V Statistical Summary Through September 30, 2023*, available at <https://www.justice.gov/ust/page/file/1499276/download> (last visited Jan. 29, 2024). The data includes only cases filed in United States Trustee Program districts, which thus excludes Alabama and North Carolina.

For subchapter V cases through September 30, 2023, the report shows that confirmation occurred in 55 percent of them and that confirmation was consensual in nearly 70 percent of them. Conversion occurred in 11 percent of the cases, and 30 percent were dismissed. The remaining four percent were pending without a confirmed plan. It reports the median months to confirmation as 6.6 and the median months to dismissal as 4.7.

cases “have had approximately double the percentage of confirmed plans and half the percentage of dismissals, as well as a shorter time to confirmation or dismissal.”⁴

Anecdotal evidence indicates that most lawyers and judges agree that subchapter V is working well.⁵ As the court noted in *In re Corinthian Communications, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022), subchapter V has been “a remarkably successful addition to Chapter 11 of the Bankruptcy Code.”

II. Amendments to the Bankruptcy Rules With Regard to Subchapter V Cases

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) promulgated Interim Rules pending amendments to the Bankruptcy Rules, which take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require. See SBRA Guide at 5-6.

Effective December 1, 2022, the provisions of the Interim Rules were incorporated as amendments to the Federal Rules of Bankruptcy Procedure.

The following summarizes the changes:

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) but does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor’s classification as a small business (or not) or election of subchapter

⁴ *Id.*

⁵ The author has presented more than 30 continuing legal education programs on subchapter V since its enactment. Although some have expressed reservations or problems with subchapter V, most conclude that it is working as intended to expedite reorganization of smaller businesses that should be reorganized and to expedite dismissal or conversion of cases where reorganization is not feasible.

V (unless committee has been appointed) and instead requires service on 20 largest creditors.

Rule 2009 – Permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under subchapter V.

Rule 2012 – Makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) – (e) renumbered as Rule 2015(c)—(f). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rules 3010(b) and 3011 – Rules relating to trustee’s payments of small dividends and unclaimed funds extended to subchapter V cases.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in “small business case” also applicable to a case under subchapter V case. (Note that, under SBRA, a subchapter V case is not a “small business case.”)

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for

transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – Rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

III. Application of § 523(a) Exceptions to Discharge of Corporation After Cramdown Discharge

In a subchapter V case, consensual confirmation under § 1191(a) results in a discharge under § 1141(d)(1). A corporation’s discharge under § 1141(d)(1) after consensual confirmation is not subject to the § 523(a) exceptions.⁶ When confirmation occurs under the cramdown provisions of § 1191(b), however, § 1141(d) does not apply. § 1181(c). Instead, § 1192 governs the discharge.

Section 1192(2) provides that the discharge does not discharge any debt “of the kind” specified in § 523(a). Section 523(a) provides that a discharge under § 1192 does not discharge an *individual* debtor from the 21 categories of debt § 523(a) lists.

SBRA Guide § X(D)(2) discusses whether the § 523(a) exceptions apply to the discharge under § 1192 of an entity after cramdown confirmation under § 1191(b). It explains the decisions of bankruptcy courts that had concluded that the exceptions do not apply⁷ and the

⁶ Autotech Technologies, LP v. Palmer Drives Controls and Systems, Inc. (*In re Palmer Drives Controls and Systems, Inc.*), 2024 WL 413446 (Bankr. D. Col. 2024).

⁷ Jennings v. Lapeer Aviation, Inc. (*In re LaPeer Aviation, Inc.*), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re Rtech Fabrications LLC*), 635 B.R. 559 (Bankr. D. Idaho 2021); Cantwell-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 Restaurants, Inc., Crabcake Factory USA (*In re Satellite Restaurants, Inc., Crabcake Factory USA*), 626 B.R. 871, 876 (Bankr. D. Md. 2021). Two bankruptcy courts have reached the opposite conclusion. *In re Duntov Motor Co., LLC*. Docket No. 21-40348-MXM-11, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021); Sun City Truck Sales v. Tonka Int’l. Corp. (*In re Tonka Int’l. Corp.*), 2020 WL 13881422 (Bankr. E.D. Tex. 2020) (denying motion to dismiss complaint to except debt from discharge). The court in *Duntov Motor Co.* later concluded that the creditor had not meet its burden of establishing nondischargeability. *In re Duntov Motor Company, LLC*, 2023 WL 8252914 at *29-31, n. 265 (Bankr. N.D. Tex. 2023). *** The court in *Tonka* later dismissed the complaint after confirmation of a consensual plan. *Sun City Truck Sales v. Tonka Int’l. Corp.* (*In re Tonka Int’l. Corp.*), 2020 WL 13881425 (Bankr. E.D. Tex. 2020). ### Another bankruptcy court ruled that a judgment for patent infringement against a corporation in a subchapter V case was excepted from discharge under § 523(a)(6) as a willful and malicious injury without addressing whether § 523(a) exceptions apply to the discharge of a corporation or citing the applicable subchapter V discharge provision, 11 U.S.C. § 1192(2). *Concrete Log Systems, Inc. v. Better Than Logs, Inc.* (*In re Better Than Logs, Inc.*), 631 B.R. 670, 688–89 (Bankr. D. Mont. 2021).

Fourth Circuit’s opinion in *Cantwell-Cleary Co. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509 (4th Cir. 2022), that the exceptions are applicable.

Five more bankruptcy courts⁸ and the Bankruptcy Appellate Panel for the Ninth Circuit⁹ have ruled that the § 523(a) exceptions do not apply to the discharge of an entity, rejecting the Fourth Circuit’s interpretation. The Fifth Circuit¹⁰ and the Eleventh Circuit¹¹ have accepted direct appeals. The Ninth Circuit BAP’s decision was appealed to the Ninth Circuit but dismissed at the request of the parties.¹²

In addition to the text of the two statutes, the debate involves analysis of the context of the statutes, chapter 11 policy, and legislative history. For a detailed discussion of the reasons that support each of the competing interpretations and why the interpretation of the bankruptcy courts is the better one, see Paul W. Bonapfel and Robert Schaaf, *Do § 523(a) Exceptions to Discharge Apply to The Discharge of a Corporation in a Subchapter V Case After “Cramdown” Confirmation Under § 1191(b)?* 32 NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE (No. 4 Dec. 2023). See also SBRA Guide § X(D)(2).

*** In *Synergetic Oil Tools, Inc. v. Relevant Holdings LLC* (*In re Relevant Holdings, LLC*), 2023 U.S. DistLEXIS 53042 (D. Colo. 2023), the bankruptcy court had denied the creditor’s motion to extend the time to object to the dischargeability of its debt on the ground that no exceptions to discharge existed. The District Court reversed and remanded for further consideration in light of the Fourth Circuit’s decision in *Cleary Packaging*. ###

⁸ Primary Investments Group, Inc., v. RA Custom Design, Inc. (*In re RA Custom Design, Inc.*), 2024 WL 607716 (Bankr. N.D. Ga. 2024); Chicago & Vicinity Laborers’ District Pension Plan v. R & W Clark Construction, Inc. (*In re R & W Clark Construction, Inc.*), 2024 WL 495722 (Bankr. N.D. Ill. 2024); BenShot, LLC v. 2 Monkey Trading, LLC (*In re 2 Monkey Trading, LLC*), 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, Eleventh Circuit Case No. 23-90009 (July 19, 2023), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023); Nutrien Ag Solutions v. Hall (*In re Hall*), 651 B.R. 62 (Bankr. M.D. Fla. 2023); Avion Funding LLC v. GFS Industries, LLC (*In re GFS Industries, LLC*), 647 B.R. 337 (Bankr. W.D. Tex. 2022), certified for direct appeal to Fifth Circuit, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023), leave for direct appeal granted, Fifth Circuit Case No. 23-50237 (Apr. 7, 2023).

⁹ Lafferty v. Off-Spec Solutions, LLC (*In re Off-Spec Solutions, LLC*), 2023 WL 4360311 (B.A.P. 9th Cir. 2023), notice of appeal filed, Ninth Circuit Case No. 23-60034 (July 20, 2023), appeal dismissed on stipulation of the parties, 2023 WL 9291577 (Nov. 2, 2023).

¹⁰ Avion Funding LLC v. GFS Industries, LLC (*In re GFS Industries, LLC*), 647 B.R. 337 (Bankr. W.D. Tex. 2022), certified for direct appeal to Fifth Circuit, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023), leave for direct appeal granted, Fifth Circuit Case No. 23-50237 (Apr. 7, 2023), notice of appeal filed, No. 23-50237 (5th Cir., Apr. 7, 2023).

¹¹ BenShot, LLC v. 2 Monkey Trading, LLC (*In re 2 Monkey Trading, LLC*), 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, No. 23-90009 (11th Cir., July 19, 2023), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023).

¹² Lafferty v. Off-Spec Solutions, LLC (*In re Off-Spec Solutions, LLC*), 2023 WL 4360311 (B.A.P. 9th Cir. July 6, 2023), notice of appeal filed, Ninth Circuit Case No. 23-60034 (July 20, 2023), appeal dismissed on stipulation of the parties, 2023 WL 9291577 (Nov. 2, 2023).

After the Fourth Circuit’s ruling in *Cleary Packaging* that the discharge exceptions apply to the discharge of an entity after confirmation of a cramdown plan, the debtor amended its subchapter V election to remove it and to proceed in a traditional chapter 11 case. The withdrawal of the election effectively mooted the dischargeability action because exceptions to the discharge of an entity do not exist in a traditional chapter 11 case. The court considered confirmation of plans filed by the debtor and by the creditor in *In re Cleary Packaging, LLC*, 2023 WL 8703920 (Bankr. D. Md. 2023).

The debtor’s plan provided for payment of its projected disposable income to creditors for five years, which would have resulted in an estimated 27 percent dividend to unsecured creditors, including the judgment creditor. The plan proposed for the owner to retain the ownership interest and for the principal to contribute \$ 25,000 in cash, to waive prepetition claims of \$ 49,000 (some of which were entitled to priority), and to waive an administrative claim for a postpetition loan of \$ 35,000.

The creditor also filed a plan. The creditor proposed to purchase the equity in the debtor for \$ 250,000, to operate the business, and to fund additional payments to unsecured creditors (including its claim) for nine years. It also proposed to preserve and pursue avoidance actions that would not be pursued under the debtor’s plan. The plan subordinated payment on the creditor’s claim to the claims of other unsecured creditors. Unsecured creditors would receive a greater percentage of their claims under the creditor’s plan.

The judgment creditor and three general unsecured creditors voted on each plan. The judgment creditor, whose claim was separately classified in the debtor’s plan, rejected the debtor’s plan. The other creditors accepted it. The judgment creditor accepted its plan, but the other three creditors rejected it.

The court denied confirmation of both plans. The court concluded that the contribution of the principal did not satisfy the “new value” exception to the absolute priority rule, which applied in view of the judgment creditor’s rejection of the plan.

The court concluded that the creditor’s plan did not meet the requirements of paragraphs (a)(5) (dealing with postconfirmation management of the debtor) and (a)(11) (feasibility) of § 1129(a). The court noted the testimony of three key employees of the debtor that they would not continue to work for the debtor under the creditor’s management.

With regard to postconfirmation management, the court concluded that the plan contained “no definite structure proposed or any plausible strategy to address potential employee and customer retention issues and other operational challenges that a reorganized Debtor under the Creditor’s Plan might encounter.” *Id.* at *22. The court noted that the creditor’s principal had testified about his hopes of what would happen to allow the debtor’s business to continue under the creditor’s plan, but the court found “no evidence of the details of that strategy or the likelihood of its success.” *Id.* The court ruled, therefore, that the creditor had failed to meet its burden to establish feasibility under § 1129(a)(11).

In *In re Model Management Inc.*, 2023 WL 5338580 at *7 (Bankr. S.D.N.Y. 2023), the court ruled that it need not consider the creditor’s request for determination that its debt was excepted from discharge after confirmation of a cramdown plan because the creditor had not filed a timely proof of claim. Because the creditor had not filed a timely proof of claim, the court reasoned, it was barred from asserting any prepetition claim against the debtor and thus had no debt to be discharged. The ruling seems inconsistent with the principle that disallowance of a claim is a separate matter from dischargeability.¹³

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IV. Postconfirmation Modification

Subsections (b) and (c) of § 1193 govern postconfirmation modifications to subchapter V plans. Section 1193(b) addresses postconfirmation modification after consensual confirmation, and § 1193(c) deals with modification after cramdown confirmation.

Under both subsections, only the debtor can modify the confirmed plan, and the debtor must demonstrate that the “circumstances warrant such modification.” Both subsections also require that the plan as modified meet confirmation requirements of § 1191(a) or § 1191(b), as applicable.

The key difference between the subsections is one of timing. A consensual plan may only be modified before the plan is “substantially consummated,”¹⁴ whereas a nonconsensual plan may be modified at any time during the three to five year period for the payment of projected disposable income.

In *In re Samurai Martial Sports*, 644 B.R. 667 (Bankr. S.D. Tex. 2022), the debtor sought to modify its plan after cramdown confirmation when its business suffered due to air conditioning problems—a significant problem for an athletic facility operating in the Texas summer—and after defaulting on a few payments. The modification proposed to pause payments for three months and cure the arrearage near the end of the plan. The primary creditor and the subchapter V trustee objected.

At the hearing on modification, it became apparent that the debtor’s principal had intentionally withheld plan payments on the advice of a group of potential investors, who had urged debtor’s principal not to make payments in order to trigger foreclosure and permit the investors to acquire the assets at a lower price.

¹³ See, e.g., *State of Florida Dept. of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073, 1090 (11th Cir. 2011); *United States v. Swanson (In re Swanson)*, 986 F.2d 367, 370-71 (10th Cir. 1993).

¹⁴ See 11 U.S.C. § 1101(2); SBRA Guide at 161-64.

The court denied the modification. The court focused on two aspects of the requirements for postconfirmation modification: (1) whether the circumstances warranted modification, as § 1193(c) requires; and (2) whether the plan as modified satisfied § 1191(b).

In the absence of case law addressing when circumstances would warrant modification under § 1193, the court looked to cases analyzing similar language in § 1127.

The court rejected the proposition, advanced by other courts, that a debtor's inability to pay, without more, was insufficient to warrant modification. Instead, it adopted a test that examined the *circumstances* surrounding that inability to pay.

Thus, the court concluded that modification is warranted when the debtor shows that the circumstances that gave rise to modification were unforeseen and rendered the confirmed plan unworkable. *Id.* at 681. The court noted that the inquiries regarding both foreseeability and workability are factual ones where, particularly for the foreseeability inquiry, the "debtor's good faith and business judgment are relevant." *Id.* at 681.

The court concluded that the failure of the air conditioning equipment was a circumstance that could warrant modification, rejecting the argument that the debtor knew or should have known that it would fail in the near future. *Id.* at 681-82.

But the court concluded that the debtor's intentional failure to make plan payments, rather than the air conditioning problems, was the cause of the need for modification. The derailing of the confirmed plan "could only be attributed to Debtor's deliberate and conscious decision to disregard this Court's order directing Debtor to make all payments under the Plan, and not [to] any unforeseen circumstance rendering the Plan unworkable." *Id.* at 683.

The court reached a similar conclusion regarding the debtor's failure to maintain an escrow fund for emergencies as the plan required. The failure to fund the reserve, the court said, was also the result of the debtor's "bad faith or poor business judgment," because its accounting records indicated that the debtor had been capable of making the requisite payments. *Id.* at 683.

Although the court ruled that the debtor's failure to demonstrate that circumstances warranted modification was sufficient to deny modification, the court also considered whether the debtor's proposed modification complied with the requirements of § 1191(b).

After examining the provisions of that section and the sections it incorporates by cross-reference, the court concluded that the plan as modified (1) would not have been feasible, as required by § 1129(a)(11), in view of the debtor's deficient performance; (2) had not been proposed in good faith, as required by § 1129(a)(3), for the reasons discussed above; and (3) did not satisfy § 1129(a)(1) because it did not include an updated liquidation analysis or adequate projections.

V. Revocation of Subchapter V Election Without Debtor's Amendment of Election

When debtor misbehavior in a subchapter V case results in removal of the debtor from possession, the subchapter V trustee takes over the assets and management of the business, but only the debtor can file a plan in a subchapter V case.

Does the court have authority to address this issue through revocation of the debtor's subchapter V election so that the case proceeds as a traditional or small business case, in which the trustee has authority to file a plan and the debtor has no exclusive period within which to file a plan? § 1121(c)(1).

In *In re National Small Business Alliance*, 642 B.R. 345 (Bankr. D.D.C. 2022), the court revoked the debtor's subchapter V designation, "converting" the case to a standard chapter 11. The debtor operated a 700-strong membership network for small businesses, providing its dues-paying members with referrals and marketing support. It filed under subchapter V in early 2021.

Two very active creditors—one secured and one unsecured—had used the case as a battleground to litigate claims among themselves and the debtor, to the detriment of other stakeholders in the debtor, *id.* at 349-50, and the case had accordingly sprawled. In the course of the lengthy proceedings, the debtor had been removed from possession for cause under § 1185, the docket had ballooned to over 300 entries, and the debtor had proposed five plans, none of which had been timely filed or were confirmable. *Id.* at 347.

After considering conversion to chapter 7 and dismissal under § 1112, the court concluded that the interests of creditors and of the estate would best be served by permitting the debtor to remain in chapter 11 but revoking the debtor's subchapter V designation so that the trustee or other parties could file a plan.¹⁵

Although nothing in the Code specifically permits the revocation of a subchapter V election, the court noted, courts permitted pre-SBRA chapter 11 debtors to amend their petitions pursuant to Bankruptcy Rule 1009 to take advantage of the newly effective subchapter V provisions. "[I]f a petition may be amended to elect to proceed under Subchapter V post-petition, logically it follows that the opposite must also be an option for debtors and courts." *Id.* at 348.

The court also reasoned that the Code permitted an eligible debtor to convert its case from one chapter to another, and that—although moving into or out of subchapter V is not properly a *conversion* between chapters—"chapter 11 and Subchapter V are materially different, much like the differences in chapters under the Bankruptcy Code[, and] the ability to revoke a Subchapter V election is consistent with the Bankruptcy Code." *Id.* at 348.

¹⁵ "If a debtor discovers post-petition that it is unable to meet the deadlines of Subchapter V, the option to revoke such designation provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter 11." *In re National Small Business Alliance*, 642 B.R. 345, 349 (Bankr. D.D.C. 2022)

The court accordingly revoked the subchapter V designation and directed that the U.S. Trustee immediately appoint a chapter 11 trustee to manage the estate.

In *In re ComedyMX, LLC*, 2022 WL 17742295 (Bankr. D. Del. 2022), the court addressed whether revocation of the debtor’s subchapter V designation was permissible but did not decide the issue, deciding that the proper remedy was removal of the debtor from possession.

Alleging that current management was unfit to manage the debtors, a rival company and the U.S. Trustee filed motions to minimize the principal’s impact on the debtor’s business. They requested, alternatively, (1) the conversion of the case to a traditional chapter 11 case to permit the appointment of a chapter 11 trustee, as had occurred in *National Small Business Alliance*; (2) the § 1185 removal of the debtor as debtor-in-possession, which would permit the already-appointed subchapter V trustee to run the debtor’s business under § 1183(b)(5); or (3) the dismissal of the case for cause under § 1112(b).

In considering the “close” question of whether a court could permissibly revoke the subchapter V designation over a debtor’s objection, the court noted that the *National Small Business Alliance* result was the right one on policy grounds, *id.* at *4, and that the cases permitting debtors in pending cases to elect subchapter V after its enactment support that result.¹⁶

The court was concerned, however, that § 103(i) reserves the decision to proceed under subchapter V to the *debtor*. In the post-SBRA cases in which the courts permitted a debtor to amend its petition to proceed under subchapter V, the debtor had requested the amendment.

Because non-debtor parties in interest may not force a debtor into subchapter V over the debtor’s objection, the *ComedyMX* court reasoned, “it cannot be argued that parties in interest have *carte blanche* to . . . move debtors in or out subchapter V as they see fit.” *Id.* at *5. Further, the court noted, Rule 1020¹⁷ implies that the debtor’s subchapter V designation controls unless the court finds the debtor statutorily ineligible to proceed. *Id.* at *5.

The court did not decide the issue because it concluded that revocation of the election would be permissible only as a measure of last resort and that removal of the debtors from possession was the appropriate remedy. Because the case was in an early stage and the debtors

¹⁶ The court elaborated on the argument: “Indeed, the argument can be taken a step further. Because Rule 1009(a) states that a petition may be amended ‘on a motion of a party in interest,’ while Rule 1009(b) permits the statement of intention to be amended only by ‘the debtor,’ one might draw an inference that the Advisory Committee, at least, made an express determination to permit parties in interest other than just the debtor move the Court to amend a bankruptcy petition.” *In re ComedyMX, LLC*, 2022 WL 17742295, at *4.

¹⁷ “The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor’s statement under this subdivision, unless and until the court enters an order finding that the debtor’s statement is incorrect.” Bankruptcy Rule 1020(a).

had not yet proposed a plan, the court reasoned that they should have the chance to proceed under subchapter V, although under the control of the subchapter V trustee. *Id.* at *5.

VI. Projected Disposable Income Issues

A. Can court require debtor to pay PDI based on actual results?

An issue with regard to the projected disposable income requirement of § 1191(c)(2) is whether a debtor can be required to pay PDI based on actual, as opposed to projected results.

Section 1191(c)(2) states two alternative ways to satisfy the PDI test.

The first alternative, subparagraph (A), is familiar from chapter 13. It states that the PDI requirement is met if:

The plan provides that all of the projected disposable income of the debtor to be received [during the three to five year period] will be applied to make payments under the plan.

The second alternative, subparagraph (B), provides for satisfaction of the PDI requirement by payment of the *value* of the PDI. It thus permits a “cash-out” of PDI in a lump sum, something that chapter 13 does not permit. But it has other implications, which later text discusses.

The language in subparagraph (A) says: calculate PDI and pay it for the applicable period. In chapter 13 cases, under this same language, the plan proposes fixed payments (that sometimes “step up” over time), usually payable monthly, for the required time.

In chapter 13 cases, courts have ruled that the payments must be based on *projected* disposable income and that payments to creditors cannot be based on the debtor’s actual income and expenditures. *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355 (9th Cir.1994). We come up with a fixed amount, monthly in chapter 13 cases, and pay it for the required time.

When chapter 12 was enacted as a temporary measure in 1986, it used the same language as the chapter 13 PDI test (and subparagraph (A) in subchapter V cases), which had come into the Bankruptcy Code in 1984. But in chapter 12 cases, courts began requiring that the debtor show, at the end of the case and in connection with an application for a discharge, that the debtor had paid all disposable income during the plan period to creditors. The court would then determine whether the debtor had paid all disposable income retroactively, and a debtor would have to either pay that amount or the case would be dismissed. *E.g., Rowley v. Yarnall (In re Rowley)*, 22 F.3d 190 (8th Cir. 1994).

The chapter 12 case law would support the proposition that PDI in a subchapter V case under paragraph (A) should be determined on an actual basis, not a projected one, and would pose the interesting issue of whether subchapter V PDI should be based on a chapter 13 approach – determination of PDI at confirmation on the basis of projected income and expenses – or a

chapter 12 approach – determination of PDI at the end of the case as a discharge matter on the basis of actual disposable income.

This analysis, however, does not take paragraph (B) of § 1191(c)(2) into account.

Paragraph (B) has its origins in amendments to Chapter 12 in 2005 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. We mostly know about BAPCPA because of the changes it made in consumer bankruptcy, but it did at least two things for farmers.

First, it made chapter 12 permanent.

Second, it added an additional alternative for satisfaction of the chapter 12 PDI test. The language of the alternative is the same language that is in subparagraph (B) of the subchapter V test. At least one contemporary commentator stated that the purpose of the amendment was to eliminate the retroactive determination of PDI, which was a hardship for farmers. Susan A. Schneider, *Bankruptcy Reform and Family Farmers: Correcting the Disposable Income Problem*, 38 Tex. Tech. L. Rev. 309, 342-43 (2006).

If the language in the second chapter 12 alternative has the same meaning in subchapter V, then a subchapter V debtor can insist that PDI be determined at confirmation on a projected basis and that the statute does not permit a “true-up” during or at the end of the case.

Without consideration of any of the foregoing, two cases have ruled on the issue.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (B.A.P. 9th Cir. 2022), the debtor’s plan proposed to pay creditors from two sources. One was \$433,000 the debtor had realized from the liquidation of an estate asset. The other was its actual disposable income over five years. The debtor’s projections were that it would have disposable income of \$287,000 over three years and \$493,000 over five, but the plan provided that creditors might receive less, based on actual earnings.¹⁸

The Ninth Circuit Bankruptcy Appellate Panel concluded that the plan’s provision for payment of projected disposable income based on actual results did not meet the requirement of § 1191(c)(2)(A) that the plan provide for payment of *projected* disposable income because it did not commit the debtor to pay what it projected. *Orange County Bail Bonds* thus holds that a provision for payment of disposable income based on actual results is impermissible, even if the debtor proposes it.

The court concluded, however, that the plan’s provision for the payment of the liquidation proceeds of \$433,000 met the requirement of § 1191(c)(2)(B) that the debtor pay the

¹⁸ The facts are simplified. For a more detailed statement of the facts, amplified by reference to documents in the bankruptcy court’s record, see SBRA Guide at 154-55 & n. 406.

value of its projected disposable income for the commitment period. The \$433,000 payment exceeded the projected disposable income of \$287,000 for three years, which the court held was the proper period in the absence of the bankruptcy court’s fixing of a longer time.

In *In re Staples*, 2023 WL 119431 (M.D. Fla. 2023), the *pro se* debtor proposed to pay projected disposable income of \$150 per quarter for five years. The bankruptcy court confirmed the plan but changed the payment provision to require the debtor to pay actual disposable income as reflected on quarterly reports, with a minimum quarterly payment of \$150.00. *Id.* at *2.

On appeal, the district court stated that paragraph 2(A) of § 1191(c)(2) “simply requires that a plan provide that all projected disposable income be applied to make the distribution payments” and that paragraph 2(B) requires that “the value of property to be distributed is not less than the projected disposable income. *Id.* at *3.

The court then concluded that “requiring all the disposable income to be reported and distributed does not violate” these rules. *Id.* at *3. The court added that the bankruptcy court’s requirements were within its authority under the All Writs Act¹⁹ and § 105(a) because they “were clearly necessary and appropriate under the facts of this case.” *Id.* at *4.

B. PDI in individual cases

SBRA Guide § VIII(B)(1) discusses determination of disposable income under § 1191(d) for purposes of the projected disposable income requirement in § 1191(c)(2) for cramdown confirmation under § 1191(b). In *re Cesaretti*, 2023 WL 3676888 (Bankr. D. Nev. 2023), concludes that appropriate guidance for determining an individual’s reasonable expenditures in a subchapter V case is in chapter 13 case law in cases prior to enactment of the “means test” by the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005 and in cases of below-median debtors after its enactment (in which the means test standards do not apply). The opinion reviews the case law.

To establish compliance with the PDI requirement for cramdown confirmation, an individual debtor must produce projections of all personal income and expenses, not just net income from the operation of the debtor’s business. In *In re McBride*, 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), the court required the debtor to amend schedules I and J to separately show gross receipts, necessary business expenses and total monthly net income for the debtor’s business, as Line 8a of Schedule I requires; to show the debtor’s personal expenses; and to show the nonfiling spouse’s income if schedule J showed all of their household expenses. The court stated, “The decision to include or omit the non-filing spouse’s income and any corresponding

¹⁹ 28 U.S.C. § 1651(a) provides, “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

allocation of household expenses should reflect the economic realities of the household.” *Id.* at 3.²⁰

The debtor in *McBride* had personally guaranteed a debt secured by real estate owned by a limited liability company in which the debtor had a 90 percent interest and owned a camp jointly with the nonfiling spouse that was subject to a mortgage. The plan provided for payment of both debts in accordance with the applicable loan documents.

The court stated that, if the guaranty claim was secured only by property of the LLC, the claim was a general unsecured one that should not be classified separately from the claims of other unsecured creditors.

The court also questioned whether the debtor’s proposal to pay the mortgage on the camp was “fair and equitable when general unsecured creditors are receiving so little on their claims.” *Id.* at *7. The court continued, *id.*:

The Court views a camp as a luxury rather than a necessary expenditure. If the Debtor must resort to the provision of § 1191(b) for confirmation of an amended plan, she should be prepared to explain why continued ownership of the camp does not weigh against a finding of fairness and equity.

The *McBride* court stated that failure to address issues regarding payments on a mortgage secured by property the debtor did not own and payments on the camp might result in a finding of bad faith under § 1129(a)(3). *Id.*

C. Projected Disposable Income and Payments on Secured Claims

In *In re McBride*, 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), a partially secured creditor held a secured claim for \$ 214,000 (the value of its collateral) and an unsecured deficiency claim for approximately \$ 261,300. The debtor proposed to satisfy the secured claim with a promissory note in the principal amount of the value of the collateral, payable with interest at 8.5 percent over eight years in quarterly installments. Like other general unsecured creditors, the creditor would receive a pro rata share of \$ 105,000 on its unsecured deficiency claim. The plan also provided for issuance of a note payable over eight years to satisfy the fully secured claim of approximately \$ 200,300 held by another creditor.

The creditor voted its secured and unsecured deficiency claims to reject the plan and objected to confirmation. No other creditors voted. The court concluded that the plan was not confirmable because the debtor’s calculation of projected disposable income was faulty, as the previous section discusses.

²⁰ For a discussion of inclusion of a nonfiling spouse’s income and expenditures in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:70.

The court also addressed two issues regarding the operation of the alternative method in subparagraph (B) of § 1191(c)(2) for satisfying the projected disposable income test for cramdown confirmation.

Subparagraph (A) of § 1191(c)(2) requires that the debtor commit projected disposable income for a period of three to five years, as the court determines, “to make payments under the plan.” § 1191(c)(2)(A). In *McBride*, however, the debtor contended that the plan satisfied the alternative in paragraph (B), which provides that the value of property to be distributed in the applicable period is not less than the debtor’s PDI. *See McBride*, 2023 WL 8446205 at *3.

The first issue was the debtor’s deduction of plan payments from the business’s profits before determining projected disposable income. The court concluded that the deduction was improper. *Id.* at *5. (Note that the issue does not matter when confirmation involves payment of PDI under subparagraph (A) because PDI may be applied to make payments on the secured claim.)

The court stated, *id.*:

In comparing the value of property to be distributed under the Amended Plan to the Debtor’s projected disposable income during the commitment period for the purposes of § 1191(c)(2)(B), it makes no sense to deduct from disposable income the payments made for the benefit of creditors under the terms of the Amended Plan.

In a plan confirmed under § 1191(c)(2)(A), the Debtor would pay all of her disposable income for the benefit of all classes, including [the two secured creditors]. In a plan confirmed under § 1191(c)(2)(B), the Debtor distributes property, not her disposable income.

Before confirming under this section, then, the Court must ensure that creditors are no worse off than they would be under a plan confirmed pursuant to § 1191(c)(2)(A). Therefore, in calculating the Debtor’s disposable income for the purpose of comparing that value to the value of the property to be distributed, no payments paid for the benefit of creditors under the terms of the Amended Plan should be first deducted from projected disposable income. This approach is consistent with the wording of § 1191(d) which makes no mention of plan payments in listing the types of expenses to be deducted from a debtor’s net income when determining disposable income. Since [the Debtor’s PDI calculation] first deducts the plan payments before determining the Debtor’s projected disposable income, the projections are inaccurate.

Second, the court addressed the competing interpretations of subparagraph (B) of § 1191(c)(2) that the debtor and the creditor advanced. The debtor contended that the distribution of the notes to the two secured creditors met the requirement because their present value exceeded its projected disposable income. The creditor argued that subparagraph (B) requires that each impaired class receive property with a value equal to or greater than the debtor’s PDI. *Id.* at *7. (As noted earlier, the *McBride* court, as stated in the preceding excerpt

from its opinion, had concluded that the subparagraph (A) alternative provides for application of PDI for payment of claims in all classes.)

The court reasoned that a debtor could not commit all of its disposable income to more than one class and that “to require a debtor to distribute property equal to or greater in value than his or her disposable [income] to more than one class would be overly burdensome.” *Id.* at *7. The only way the creditor’s interpretation avoids an absurd result, the court continued, “is if a debtor only needs to satisfy the requirements of § 1191(c)(2) with respect to just one class of claims.” *Id.*

The court posited an interpretation of § 1191(c)(1) as containing all the requirements for classes of secured claims such that § 1191(c)(2) applies to all other classes of claims or interests. In the case before it, therefore, the debtor would have to satisfy subparagraph (B) only with respect to the class of unsecured claims. *Id.* at 7.

The court identified two problems with this approach.

The first problem is that § 1191(c)(2) is not expressly limited to a specific class of claims. The court noted that, although the cramdown provision applicable in a traditional case, § 1129(b)(2), explicitly states different requirements for classes of secured claims, unsecured claims, and interests, the subchapter V requirements in paragraphs (2) (PDI) and (3) (feasibility) of § 1191(c) are not similarly limited. The feasibility test in paragraph (3), the court observed, “does not address the treatment of claims at all and is obviously generally applied to a plan, as a whole.” *Id.* at *7. In the absence of limiting language in § 1191(c), the court reasoned, “the more reasonable interpretation is that § 1191(c)(2), like § 1191(c)(3), is more globally applicable to the entire structure of the plan.” *Id.*

Second, the court pointed out that, because § 1191(c) does not specifically address classes of interests, an interpretation applying § 1191(c)(2) to all other classes except classes of secured claims would require it to include classes of interests. In the unlikely event that both a class of unsecured claims and a class of interests rejected a plan, the court reasoned, the posited interpretation would require the commitment of all disposable income, or the distribution of property of equivalent value, to more than one class. *Id.* at *8.

The *McBride* court adopted, therefore, a “more reasoned approach,” *id.* at *8:

For a plan to be fair and equitable under § 1191(c), classes of secured claims that are impaired and do not accept the plan must be treated in accordance with § 1129(b)(2)(A) [pursuant to § 1191(c)(1)] and, in addition, a debtor must either pay all of [the debtor’s] disposable income into the plan, or distribute property equal in value to that disposable income. Finally, the plan must also provide adequate remedies unless the debtor can meet the more stringent feasibility analysis [in § 1191(c)(3)(A)].

The court acknowledged the possibility that, under its interpretation, a debtor by giving promissory notes with a present value equal to or greater than its projected disposable income

could pay little to unsecured creditors while accruing disposable income. *Id.* at 8. The court noted its “explicit and implicit authority to implement further measures to ensure fairness and equity,” *id.*, such as increasing the applicable commitment period to five years. In addition, the court continued, because § 1191(c) states that the fair and equitable requirement *includes* the specific requirements in paragraphs (1) through (3), “a court might require something more to satisfy that condition.” *Id.*

The combined effect of the two rulings is that, although PDI does not include payments on a secured claim satisfied by the distribution of a note, payments on the secured claim are accounted for because the notes are taken into account in determining whether the property distributed under the plan (including the notes) has a value equal to or greater than PDI.

D. Salary or other compensation of owners

In *In re J & J Pizza*, 2022 WL 4082059 (D.N.J. 2022), the bankruptcy court confirmed a plan over the objection of a creditor that the principal’s salary should be reduced from \$100,000 to \$50,000. The district court affirmed, noting the subchapter V trustee had testified that the salary was reasonable. *Id.* at *4.

In *In re Twisted Oak Winery, LLC*, 2022 WL 5264708, at * 3 (Bankr. E.D. Cal. 2022), the debtor avoided an objection to the debtor’s payment of rent to an insider, which appeared to be compensation to the owners of the business for operating it, by terminating the payments during the plan period.

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VII. Injunction To Prevent Collection from Principal on Guaranty Pending Payments Under the Plan

In *In re Global Travel, Inc.*, 2022 WL 4690426 (Bankr. M.D. Fla. 2022), the debtor filed a subchapter V case to deal with financial distress arising from embezzlement of about \$1.2 million by an internal accountant and from the coronavirus pandemic that adversely affected the travel company’s business.

At the time of filing, Qualpay, Inc., had filed an arbitration proceeding against the principal of the debtor on his alleged guaranty of the company’s debt to Qualpay. The debtor sought and obtained a preliminary injunction against the pursuit of litigation against the principal pending development of a reorganization plan.

The debtor proposed a plan that, among other things, provided for payment of unsecured claims, including Qualpay, from quarterly payments of projected disposable income over three years and from proceeds from certain causes of action after payment or priority claims. The only two classes were equity interests and unsecured claims.

Other unsecured creditors holding allowed claims of \$732,745.95 voted to accept the plan; Qualpay, with a disputed claim of \$288,596.70 allowed for voting purposes only, was the

only creditor to reject it. Because a majority of the creditors in the class holding 71.72 percent of the value of the voting claims accepted the plan, the class accepted the plan. § 1126(c).

The plan contained a “conditional temporal injunction” that protected the principal and a key employee from litigation by the debtor’s creditors against them during the three-year payment period, provided that the debtor was performing under the plan. It tolled and abated statutes of limitation so that enjoined parties could pursue their claims if the plan did not result in full payment. The plan provided for the two beneficiaries of the injunction to contribute \$25,000 to the plan, to limit their compensation to 10% of the excess of actual income over projected income, and to continue to provide their time, resources, and industry knowledge towards the successful completion of the plan for the benefit of creditors.

The debtor asserted that the proposed injunction was fair in view of the contributions of the individuals and limitations on their compensation and that, absent the injunction, protracted litigation would jeopardize the debtor’s restructuring by depleting its assets, primarily the principal.

Qualpay objected to confirmation on the ground that the injunction was an impermissible third-party release of claims against a non-debtor in violation of § 524(e).

The court concluded that the plan did not contain a third-party release or permanent bar to the assertion of claims on the guaranty. Although the injunction was not a permanent bar order, the court evaluated the requested injunction by evaluating the factors identified in *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002), with regard to a plan’s bar order, in accordance with the Eleventh Circuit’s decision in *In re Seaside Eng’s & Surveying, Inc.*, 780 F.3d 1070, 1079 (11th Cir. 2015). *Global Travel*, 2022 WL 17581986 at *3.

Thus, the court listed these factors, *id.*:

1. Whether an identity of interests exists between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
2. Whether the non-debtor has contributed substantial assets to the reorganization;
3. Whether the injunction is essential to the reorganization, namely whether the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
4. Whether the impacted class has overwhelmingly accepted the plan;
5. Whether the plan provides a mechanism to pay for all, or substantially all, of the class members affected by the injunction;

6. Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full.

The *Global Travel* court noted, 2022 WL 17581986 at *3, that the list is nonexclusive and flexibly applied, *Seaside*, 780 F.3d at 1079, that bar orders must be essential to a successful reorganization and that the bankruptcy court must make specific factual findings to support entry of a bar order, with discretion to determine which *Dow Corning* factors are relevant in each case. *Id.* at 1078-79.

Addressing the factors, the court concluded that the facts merited the injunction.

First, with regard to identity of interests, the court noted that, although no indemnity obligation existed, the principal was the debtor's primary asset and that without him the business would suffer. The court credited his testimony that the arbitration was "massively consuming" and that he would have to be replaced at an annual cost of \$100,000 to \$150,000 while he defended the arbitration. The court concluded that "the proposed injunction is essential to the reorganization due to the identity of interests" between the debtor and the principal. 2022 WL 17581986 at *4.

Second, the court concluded that the cash contribution and the limitation on compensation was "substantial and sufficient consideration" for the temporary injunction. *Id.* at *4.

Third, the court concluded that the temporary injunction was essential to the reorganization. *Id.* at *4.

Fourth, the court concluded that the impacted class had overwhelmingly accepted the plan. The court rejected Qualpay's contention that it was receiving worse treatment than other creditors in the class because the plan forced it to give up rights to pursue the principal on a guaranty that other members of the class did not have. The court concluded that Qualpay was an unsecured creditor like all other members of the class based on its rights against the debtor. *Id.* at *5.

Fifth, the court concluded that the plan had a mechanism to pay Qualpay, which would receive payments in the same manner as other members of the class, and expressly preserved Qualpay's rights on the guaranty if it did not receive payment in full. *Id.* at *5.

Finally, the court concluded that the plan provided Qualpay with the opportunity to recover on its claim in full because it left Qualpay's rights intact by tolling and abating all statutes of limitations and deadlines during the three-year term. *Id.* at *5.

The court summarized its ruling, *id.* at *6, "In sum, the Court finds that the Plan does not contain a nonconsensual third-party release. Qualpay's Objection is overruled, and the Plan is confirmed."

See also In re Central Florida Civil, LLC, 649 B.R. 77 (Bankr. M.D. Fla. 2023). (Plan confirmed with injunction preventing pursuit of guaranty claims pending payments under plan).

In *Ferrandino & Son, Inc. v. Sahene Construction, LLC (In re Sahene Constructions, LLC)*, 2023 WL 3010073 (Bankr. M.D. La. 2023), the debtor was a subcontractor on a construction project and indemnified the general contractor for any damages arising from its failure to perform the work properly. The property owner made demand on the general contractor for damages caused by the debtor's abandonment of work on the project and instituted an arbitration proceeding against the general contractor.

The general contractor sought a preliminary injunction to stay the arbitration on the theory that the owner's demand and prosecution of the arbitration were effectively actions against the debtor and property of the estate because the debtor was ultimately responsible for any arbitration award under its indemnity obligations to the general contractor.

The court denied the preliminary injunction, concluding that the general contractor was not likely to prevail on its claim because it had an adequate remedy at law, did not show irreparable injury, and did not establish harm to the estate.

For a discussion of third-party releases in the Subchapter V context, see *infra* Section XXI(12).

VIII. Role and Compensation of the Trustee in Subchapter V Cases

A. Role of subchapter V trustee generally

A principal duty of the subchapter V trustee is to “facilitate the development of a consensual plan of reorganization.” § 1186(b)(7).

In *In re Corinthian Communications, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022), the court observed:

Subchapter V provides for the appointment by the United States Trustee of a non-operating trustee who provides oversight of the debtor in possession and helps facilitate negotiation of what will hopefully be a consensual plan of reorganization plan. *See* 11 U.S.C. § 1183. In this Court's experience, Subchapter V trustees are the “honest brokers,” who through their efforts have provided credibility in evaluating the debtor's business prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor's stakeholders, thereby enabling a small business to reorganize.

The court in *In re New York Hand & Physical Therapy PLLC.*, 2023 WL 2962204, at *1 (Bankr. S.D.N.Y. 2023), summarized the subchapter V trustee's role:

Importantly, Subchapter V provides for the appointment of a trustee to assist the debtor in possession, provide oversight, and to help facilitate negotiation of a consensual plan of reorganization. 11 U.S.C. § 1183. The Subchapter V trustee appears at status conferences and provides the Court with valuable information on the progress of the case. *Id.* § 1183(b)(3). The Subchapter V trustee may be called on to perform the duties of the debtor in possession and operate the business. *Id.* § 1183(b)(5). Bankruptcy courts rely on the Subchapter V trustee to provide candid advice concerning a debtor's efforts to comply with its duties under the Code. *Id.* § 1183(b)(4); *In re Corinthian Commc'n, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022) (“Subchapter V Trustees are the ‘honest brokers,’ who through their efforts have provided credibility in evaluating the debtor's business's prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor's stakeholders, thereby enabling a small business to reorganize.”). The success of an individual Subchapter V case and of the bankruptcy courts in overseeing them depends in part on “the openness and transparency of the debtor with the Subchapter V Trustee, the U.S. Trustee, creditors, and with the Court.” *Id.*

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Several cases illustrate how subchapter V trustees have assisted the confirmation process or the administration of subchapter V cases.

In *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), an objector attacked the projections attached to the debtor's plan. The court noted that the subchapter V trustee “testified convincingly that he not only had a hand in preparing the financial projections but has also reviewed them and concludes they show a viable path forward for Debtor.”

The court continued, *id.* at 6:

As the subchapter V trustee, his primary duty is to facilitate development of a consensual plan of reorganization. 11 U.S.C. § 1183(b)(7). The [subchapter V] Trustee's expertise as a financial advisor is integral to this process of attempting to bridge the gap between debtors in distress and creditors seeking repayment.”

Although the court concluded that other issues required amendment of the plan for it to be confirmable, the court ruled that the debtor had met its burden of establishing that the plan complied with the requirement of § 1190(1)(C) that the plan contain financial projections that demonstrated the debtor's ability to make payments under the plan.

The *Channel Clarity* court also considered and discussed the subchapter V trustee's views and proposals, stated at the hearing, concerning management of the debtor and encouraged the debtor to explore them with the trustee and other parties objecting to confirmation in response to the court's concerns about management. Section XV(B) *infra* discusses this aspect of the case.

In *In re Lapeer Aviation, Inc.*, 2022 WL 7204871 (Bankr. E.D. Mich. 2022), the court denied confirmation because the plan did not meet the “best interests of creditors test” of § 1129(a)(7) and because it unfairly discriminated against the holder of an equity interest. The court overruled objections, however, based on good faith and feasibility.

The good faith objection, in part, was that the debtors had not provided accurate financial disclosures in their monthly operating reports. The court agreed that initial reports were not entirely accurate and were incomplete. The court found no absence of good faith, however, stating, *id.* at *4:

[T]he Debtors readily provided Debtors’ complete financial records to the Subchapter V Trustee, . . . a seasoned financial consultant with decades of experience assisting troubled companies, [who] testified that the Debtors were cooperative and responsive in providing the source documents containing the financial information he needed to prepare his 13 week cash flow and the projections which form the basis of the Plan. The monthly operating reports played no role in [the trustee’s] formulation of the Plan’s financial projections and, in any event, those monthly operating reports have now been amended and corrected.

The court concluded that the debtors had not filed the inaccurate reports to mislead creditors or the court and that, while “certainly imperfect,” they generally complied with the reporting requirements in § 308.

With regard to feasibility, the court found that the plan was feasible based in part on the subchapter V trustee’s testimony that he had reviewed all of the necessary source financial information to “model a 13 week rolling cash flow inclusive of all income and expenses” and that his plan projections based on this cash flow forecast were realistic and achievable. *Id.* at *6.

The “best interests” problem was that the debtors had identified potential claims that the debtors *might* pursue for the benefit of creditors. The court concluded that the best interests test required pursuit of the claims and that the plan must include provisions requiring the debtors to pursue them or granting derivative standing to other interested parties if the debtors chose not to pursue them. *Id.* at 5.

The court did not mention it, but an alternative might be to provide for the subchapter V trustee to pursue the claims.

In re Corinthian Communications, Inc., 642 B.R. 224 (Bankr. S.D.N.Y. 2022), involved an apparently viable business that might reorganize. The debtor’s management, however, had been accused of fraud with several conflicts of interest and had failed to provide information to, and otherwise cooperate with, the subchapter V trustee. The court found that the debtor’s “grudging disclosure of information” was “completely unacceptable.” *Id.* at 232.

Concerned that “the result of removing the debtor as debtor-in-possession could very well lead to the failure or collapse of the business,” the court instead expanded the powers of the subchapter V trustee to include investigation of the debtor under § 1183(b)(2). *Id.* at 234. The court noted that further relief, such as removal of the debtor from possession, dismissal, or conversion might be required, based on the outcome of the investigation. *Id.* at 234.

Corinthian Communications illustrates two points. First, it is an example of how a debtor should *not* deal with the subchapter V trustee. Second, it is an example of how the presence of the subchapter V trustee provides an opportunity to salvage a viable business *if* the debtor follows the approach of the debtors in *Channel Clarity* and *Lapeer Aviation*.

One of the duties of a trustee under § 704(a) is to “examine proofs of claims and object to the allowance of any claim that is improper,” if a purpose would be served. § 704(a)(5). A subchapter V trustee has this duty under § 1183(a). In *In re Mallett, Inc.*, 2024 WL 150628 (Bankr. S.D.N.Y. 2024), the court approved the subchapter V trustee’s settlement of claims of affiliates of the debtor after confirmation of a plan over the objection of the debtor’s largest unsecured creditor other than the affiliates. The trustee’s duties and authority with regard to the review of proofs of claims were not issues in the case, but it illustrates the role that the trustee may play in resolving issues with the debtor’s insiders and confirms that the trustee’s authority to object to proofs of claim necessarily includes the authority to settle objections under Bankruptcy Rule 9019.

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In *In re Major Model Management, Inc.*, 641 B.R. 302 (Bankr. S.D.N.Y. June 21, 2022), the court declined to permit the filing of a proof of claim on behalf of a class under Rule 23 of the Federal Rules of Civil Procedure. Noting that an independent trustee serves in subchapter V cases to provide “oversight and guidance” to the court and the parties, the court agreed with the subchapter V trustee’s views at the hearing that the most efficient way to deal with the claims of the putative class members was through the claims objection process.

In *In re Central Florida Civil, LLC*, 649 B.R. 77 (Bankr. M.D. Fla. 2023), the court confirmed a plan providing for an injunction that prevented pursuit of guaranty claims against the debtor’s managers pending payments under plan. The court observed that the input of trustee in support of confirmation was “especially instructive.” The trustee stated the plan could not go forward without an injunction to protect the debtor’s managers.

The court in *In re Rosa Mosaic & Tile Company*, 643 B.R. 865 (Bankr. W.D. Ky. 2022), permitted the debtor to reject a collective bargaining agreement after an extensive factual analysis of the debtor’s negotiations with the union to determine whether § 1113(c) permitted the rejection. The subchapter V trustee participated in the negotiations and testified at the hearing on the debtor’s application for approval of the rejection.

The subchapter V trustee’s involvement in a subchapter V case provided an “extra safeguard” with regard to patient issues that provided “additional comfort” to the court that the debtor’s dental practice operations were being monitored such that the appointment of a patient care ombudsman under § 333 was not necessary. *In re Sameh H. Anouk Dental Services, P.C.*, 648 B.R. 755, 766 (Bankr. S.D.N.Y. 2023).

A subchapter V trustee and a bankruptcy administrator have standing to appear and be heard in an adversary proceeding brought by a creditor to determine ownership of personal property. *Palmetto State Armory, LLC v. Ikon Weapons, LLC (In re Ikon Weapons)*, 650 B.R. 670, 677 n. 3 (Bankr. M.D. N.C. Nov. 30, 2022). *See also* 7 Collier on Bankruptcy ¶¶ 1109.04, 1112.04[1] n. 5 (16th ed.).

B. Authority of subchapter V trustee to exercise trustee powers

Section 1184 provides that “a debtor in possession shall have all the rights, other than the right to compensation under [§ 330], and powers . . . of a trustee serving in a case under [chapter 11], including operating the business of the debtor.” Section 1186(b) provides that the debtor remains in possession of all property of the estate, unless the debtor is removed from possession or a confirmed plan or confirmation order provides otherwise.

A question is whether the subchapter V trustee has the authority to exercise the rights that a trustee has in a chapter 11 case. A chapter 11 trustee’s rights include the rights to use, sell, or lease property of the estate under § 363(b) other than in the ordinary course of business, to obtain postpetition financing under § 364, and to pursue avoidance actions under §§ 545, 547, 548, 549.

The court in *In re Roe*, 2024 WL 206678 (Bankr. D. Ore. 2024), addressed the issue in the context of a subchapter V trustee’s motion under § 363(b) to require the debtor to post a retainer for the trustee’s fees and expenses. The court observed that § 1184 does not provide for the subchapter V debtor in possession to have the rights and powers of a trustee exclusive of the subchapter V trustee and concluded, *id.* at *2:

[A] subchapter V trustee may use the trustee’s rights and powers under the Bankruptcy Code to the extent it is necessary for a subchapter V trustee to fulfill the statutory duties given to subchapter V trustees in section 1183. Such authority is concurrent with the debtor’s authority to use those same trustee’s rights and powers under the Bankruptcy Code to fulfill the debtor’s duties as a debtor in possession, including those duties under section 1184.

The *Roe* court held that it could not grant the trustee’s motion because the trustee had not served it on all parties in interest, as Bankruptcy Rule 2002(a)(2) requires for a motion to use property outside of the ordinary course of business. The court ruled, however, that it would require the debtor to establish a trust account for the benefit of all administrative claimants if, after service of the motion on all parties in interest, no one objected. *Id.* at *5.

The next section discusses the *Roe* court’s reasoning in support of its decision.

C. Deposit for payment of compensation and payment of the subchapter V trustee

Judges in the Middle District of Florida have included a provision for interim trustee compensation in subchapter V cases in an “Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference.”²¹ The orders require the debtor to pay \$ 1,000 as interim compensation to the subchapter V trustee within 30 days of the petition date and monthly thereafter. The amount is subject to adjustment upon request of any interested party and to the court’s approval of the trustee’s compensation under § 330. The debtor must include the interim compensation in any cash collateral budget.

Other courts are requiring similar deposits.

The court considered a subchapter V trustee’s request for the debtor to post a retainer for the subchapter V trustee in *In re Roe*, 2024 WL 206678 (Bankr. D. Ore. 2024), discussed in the preceding section.

The *Roe* court concluded that the trustee had shown a valid business judgment to require the debtor to set money aside “to establish a viable source of funds to pay an obligation that Debtor has incurred in [the] case” and that a deposit of \$ 7,500 was reasonable given the fees that the trustee had incurred and was likely to incur. *Id.* at *3. The court ruled, however, that the funds should be available for the pro rata benefit of all administrative claimants, not just the trustee, reasoning that claims of equal priority under the Bankruptcy Code must be treated the same. The court stated, *id.* at *3 (footnote omitted):

[The] funds should be placed in a trust account to be used to pay administrative expenses, and not in the form of a retainer in which only the Subchapter V trustee would have a property interest. Section 1194(a) authorizes subchapter V trustees to hold funds before plan confirmation. Funds may not be paid from the trust account unless and until payment to the Subchapter V Trustee and any other administrative expenses is authorized by the Bankruptcy Code and approved by the court.

D. Trustee’s receipt and distribution of preconfirmation payments -- § 1194(a)

SBRA Guide § IV(C)(1) discusses the trustee’s preconfirmation receipt and distribution of payments and funds the trustee receives from the debtor prior to confirmation. It states, *id.* at 61, “Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the debtor to make preconfirmation payments to the trustee.”

²¹ *E.g.*, *In re Nostalgia Family Medicine P.A.*, Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Bankr. M.D. Fla. Mar. 26, 2021).

The court in *In re Roe*, 2024 WL 206678 (Bankr. D. Ore. 2024), discussed in the previous Section, however, found an appropriate situation to require the debtor to make payments to the trustee. As section VIII(C) of this Update discusses, the court concluded that it had authority to require the debtor to make a preconfirmation payment to the trustee to establish a trust account for the benefit of administrative claimants, including the trustee. The court stated, *id.* at *3:

Section 1194(a) authorizes subchapter V trustees to hold funds before plan confirmation. Funds may not be paid from the trust account unless and until payment to the Subchapter V Trustee and any other administrative expenses is authorized by the Bankruptcy Code and approved by the court.

A potential problem with the use of § 1194 in this circumstance is that § 1194(a) requires the trustee to hold prepetition payments and funds until confirmation or denial of confirmation of a plan. A court might avoid this complication (which could prevent, for example, use of the funds for the trustee's interim compensation prior to a hearing on confirmation) by stating the terms for disbursement in the order requiring the trust account. As the *Roe* court held (see *supra* Section VIII(C)), § 363(b) may authorize the trustee to use funds of the debtor outside the ordinary course of business to establish a trust account that the trustee controls, without the necessity of invoking § 1194.

E. Payment of trustee's fees as condition of dismissal

When a court considers dismissal of a subchapter V case, the subchapter V trustee may request that the dismissal be conditioned on payment of the trustee's fees. SBRA Guide § IV(E)(2) discusses the issue.

The court in *In re New York Hand & Physical Therapy PLLC*, 2023 WL 2962204 (Bankr. S.D. N.Y. Apr. 14, 2023), concluded that § 349(b) permits a structured dismissal and that payment of professional fees as a condition to dismissal is appropriate. The court required payment of the trustee's fees within 45 days, in the absence of which the case would be converted to chapter 7.

In *In re East Coast Diesel, LLC*, 2022 WL 19078763 (Bankr. M.D.N.C. 2022), the court declined to condition dismissal on payment of the trustee's fees and postpetition taxes. The court refused to permit a structured dismissal as proposed because the evidence did not establish that all postpetition wages had been paid and because disputes over the amount of the prepetition taxes existed. Because the parties had not demonstrated that payments would occur in accordance with the priority provisions of the Bankruptcy Code, the court dismissed the case without conditions.

The bankruptcy court in *In re Baby Blue of Junction, LLC*, 2024 WL 124190 (E.D.N.Y. 2024), had conditioned dismissal of the debtor's subchapter V case on payment of the trustee's compensation over the objection of the landlord who had received no postpetition rent for 10 months and sought conversion of the case instead. The district court reversed, concluding that

the bankruptcy court had not analyzed whether conversion or dismissal was in the best interests of creditors.

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IX. Debtor Misbehavior in Subchapter V Cases: Conversion or Dismissal; Removal of Debtor From Possession; Expansion of Trustee's Duties

One problem arising in subchapter V cases is not unique to them: debtor misbehavior.

In a traditional chapter 11 case, § 1112(b)(2) permits dismissal or conversion to chapter 7 for “cause,” defined in § 1112(b)(4). Section 1104(a) requires appointment of a trustee for cause or if appointment of a trustee is in the interests of “creditors, any equity security holders, and other interests of the estate.”

Section 1112 applies in a subchapter V case, and § 1185(a) permits removal of the subchapter V debtor in possession for cause.

A common thread in subchapter V cases considering dismissal, conversion, or removal of the debtor from possession is inaccurate or incomplete disclosure of required information, failure to file proper operating reports, or both. Cases may also involve questionable transactions with, or transfers to, insiders and failure to disclose information about them or conflicts of interest arising from them. They often involve a noncooperative relationship with the subchapter V trustee that may border on hostility, failure to timely comply with court orders, and feasibility issues. Gross mismanagement of the estate or continuing losses may also be issues. *E.g.*, *In re Coeptis Equity Fund, LLC*, 2022 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff'd* 2024 WL 1133580 (9th Cir. 2024) (unpublished); *In re Jar 259 Food Corp.*, 2023 WL 6201739 (E.D.N.Y. 2023); *In re United Safety and Alarms, Inc.*, 2024 WL 973674 (Bankr. S.D. Fla. 2024); *In re Exigent Landscaping, LLC*, 656 B.R. 757 (Bankr. E.D. Mich. 2024); *In re California Palms Addiction, Recovery Campus, Inc.*, 2023 WL 2664284 (N.D. Ohio 2023); *In re Duling Sons, Inc.*, 650 B.R. 579 (Bankr. D. S.D. 2023); *In re East Coast Diesel*, 2022 WL 19078763 (Bankr. M.D. N.C. 2022); *In re No Rust Rebar, Inc.*, 641 B.R. 412 (Bankr. S.D. Fla. 2022). *In re Hao*, 644 B.R. 339 (Bankr. E.D. Va. 2022); *In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re KLMKH, Inc.*, 2022 WL 4281478 (Bankr. W.D.N.C. 2022).

A trustee in a traditional chapter 11 case has investigative duties under §§ 1106(a)(3), (4), and (7). Section 1183(b)(2), however, provides for the subchapter V trustee to perform such duties only if the court orders it. The same types of debtor misbehavior may give rise to entry of an order expanding the trustee's duties as an alternative to removal of the debtor from possession when reorganization may require debtor management. *In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022).

Courts have faced the question of whether to convert the case to chapter 7, dismiss it, or remove the debtor from possession when cause for any of them exists. For example, in *In re*

Duling Sons, Inc., 650 B.R. 579 (Bankr. D. S.D. 2023), the court concluded that cause for dismissal, conversion, or removal existed because of incurable conflicts of interest between the debtor and the debtor's principal who held all corporate positions of the debtor and the debtor arising from prepetition conduct of the principal.

Because the debtor intended to market and sell its assets to fund a liquidating plan, the *Duling Sons* court concluded that the best remedy was removal of the debtor in possession. Liquidation by the subchapter V trustee, the court reasoned, would be better than conversion to chapter 7 because trustee fees would be lower, the subchapter V trustee was already familiar with the case, and the "natural learning curve" for a chapter 7 trustee would require duplicative work and delay distributions to creditors.

The *Duling Sons* court addressed the fact that a subchapter V trustee cannot file a plan, regardless of the removal of the debtor in possession, by directing the debtor and the subchapter V trustee to file a joint plan and that, if they did not do so within 90 days, the case would automatically convert to chapter 7.

In *In re M.A.R. Designs & Construction, Inc.*, 653 B.R. 843 (Bankr. S.D. Tex. 2023), however, the court concluded that cause for conversion or dismissal existed and that no unusual circumstances prevented conversion to chapter 7. The court rejected the debtor's arguments that confirmation of a plan providing for liquidation by the subchapter V trustee would be better for creditors than conversion. The subchapter V trustee's familiarity with the case, the court ruled, did not establish unusual circumstances because a trustee's professional familiarity with a case is common to all cases.

The court in *In re Exigent Landscaping, Inc.*, 656 B.R. 757 (Bankr. E.D. Mich. 2024), concluded that conversion to chapter 7 was in the best interests of the estate rather than a proposed plan for liquidation by the debtor in view of the fact that the debtor proposed to sell the business to the spouse of its principal and the existence of postpetition operating losses and substantially inaccurate and incomplete disclosures.

SBRA Guide § V(C) notes that the Supreme Court's ruling in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023 (2004), appears to preclude compensation of the debtor's attorney for services following removal of the subchapter V debtor from possession. The court in *In re NIR West Coast, Inc.*, 638 B.R. 441, 451-52 (Bankr. E.D. Cal. 2022), applied *Lamie* to deny compensation to the debtor's attorney for services following removal.²²

²² When the best interests of the estate require that the debtor be represented after its removal from possession, one potential argument is that the fees of the debtor's counsel (or other professionals) are actual, necessary costs and expenses of preserving the estate under § 503(b)(1)(A).

A second theory could be that fees are appropriate under § 330 because, as prior counsel to the debtor, the professional is a professional person employed under § 327. *Lamie* is potentially distinguishable because the case involved services after conversion to chapter 7. The Court did not address the contention that the attorney was a

In an unreported order entered without objection by the U.S. Trustee or any other party after notice and a hearing, the court in *In re ComedyMX, LLC*, Case No. 22-11181 (CTG), D. Del. (Apr. 25, 2023), permitted attorneys to seek compensation for services rendered after the dispossession of the debtor under § 1185(a). The court stated (footnotes in original):

Such compensation may be appropriate on several potential bases. The fees may be awardable on the ground that they are actual, necessary costs and expenses of preserving the estate under § 503(b)(1)(A). Alternatively, it could be argued that an award is appropriate under § 330 on the ground that, as prior counsel to the debtor, the firm is a professional person employed under § 327.²³ A third potential basis for the relief is that it could be argued that the effect of § 1189 is to leave a debtor that has been dispossessed under § 1185(a) with certain limited obligations of a trustee, such that the dispossessed debtor remains entitled to retain counsel under § 327(a) (who may thus be compensated under § 330) to carry out that role.²⁴ Each of these potential bases is subject to counterarguments that are at least colorable. This Order does not adjudicate or resolve any such issue. Rather, in the circumstances of this case, no party objects to awarding [the debtor’s attorneys] compensation from the estate for actual, necessary work performed for the benefit of the estate after the Dispossession Date. The Court accordingly grants this relief on that basis. *See In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, D.I. 176 (Bankr. D. Del. March 27, 2023) (addressing the circumstances in which it may be appropriate, in an adversary system, for a court to grant relief on the ground that it is unopposed).

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A court may remove a debtor from possession or expand the trustee’s powers *sua sponte*. *In re Coeptis Equity Fund, LLC*, 2002 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff’d*

professional employed under § 327, perhaps in light of the directive in § 348(e) that conversion terminates the service of the trustee (the debtor-in-possession) in the chapter 11 case.

A third approach arises from the fact that dispossession under § 1185(a) does not alter the debtor’s exclusive right under § 1189(a) to file a plan. The argument is that, after dispossession, the debtor retains the limited obligation of a trustee to file a plan so that the dispossessed debtor can retain counsel under § 327(a) (entitled to compensation under § 330(a)) for services necessary to perform that function. The difficulty with this position is that the duty of a trustee to file a plan under § 1106(a)(5) is not applicable in a subchapter V case. *See* § 1181(a). The argument thus depends on the proposition that the duty to file a plan is a trustee duty that § 1189 vests in the debtor and that the debtor retains this trustee duty even after dispossession.

²³ *But see Lamie v. United States Trustee*, 540 U.S. 526 (2004) (holding that counsel for chapter 11 debtor could not be compensated under § 330 following conversion of case to chapter 7, but not considering or addressing the contention that such counsel remained “a professional person employed under section 327,” perhaps in light of the directive of § 348(e), which is inapplicable here).

²⁴ 11 U.S.C. § 1106(a)(5) describes the filing of a plan under § 1121 as a duty of a trustee. While §§ 1106 and 1121 are inapplicable in a subchapter V case, *see* 11 U.S.C. § 1181(a), one might nevertheless contend that these provisions suggest that the filing of a plan – which under § 1189 is a right vested exclusively in the debtor – is a duty of a “trustee.”

2024 WL 1133580 (9th Cir. 2024) (unpublished); *In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re Ozelbi*, 639 B.R. 365, 425 (Bankr. S.D. Tex. 2022).

An order removing the debtor from possession is not a final order for purposes of appeal. *In re Green v. Nosek (In re Green)*, 2022 WL 16857106 (D. Minn. 2022).

X. Deadline for Filing Plan; Extension of Deadline; Modification After Denial of Confirmation

Section 1189(b) requires the debtor to file a plan within 90 days of the order for relief, but subchapter V contains no deadlines for a confirmation hearing or entry of a confirmation order. *See* SBRA Guide § VI(D). Section 1193(a) permits preconfirmation modification of a plan at any time.

Section 1189(b) permits the court to extend the deadline for filing the plan “if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.” SBRA Guide § VI(J) discusses the different approaches courts have taken to the determination of what constitutes “circumstances for which the debtor should not justly be held accountable.”

Courts continue to differ in the proper standard for extending the time for the debtor to file a plan.

In *In re Trinity Consortium, LLC*, 656 B.R. 429 (Bankr. D.N.M. 2023), the debtor sought an extension of the plan deadline, which had previously been extended several times, because it was still engaged in mediation with creditors that showed promise of resulting in settlements that would permit the debtor to file a meaningful and confirmable plan.

The court noted that the disagreement among courts about the standard for granting an extension “centers around whether the court may only consider whether the delay was due to circumstances beyond the debtor’s reasonable control or whether the court can take other things into account that relate to the subchapter V case, such as undue prejudice, lack of good faith, or whether the debtor has made progress in drafting a plan.” 656 B.R. at 434.

The court examined three approaches to the issue in the case law. One view is that the debtor must establish that the circumstances are beyond the debtor’s control.²⁵

²⁵ *Trinity Consortium*, 656 B.R. at 435-36. The court cited *In re Majestic Gardens Condo. C Ass’n, Inc.*, 637 B.R. 755, 756 (Bankr. S.D. Fla. 2022); *In re Keffer*, 628 B.R. 897, 910 (Bankr. S.D.W. Va. 2021); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 (Bankr. S.D. Fla. 2020).

A second approach involves a four-factor test: “(1) whether the circumstances raised by Debtor were within his control, (2) whether Debtor has made progress in drafting a plan, (3) whether the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances, and (4) whether any party-in-interest has moved to dismiss or convert Debtor’s case or otherwise objected to a deadline extension in any way.”²⁶

The court identified a third approach that involves an equitable inquiry into whether the debtor is “fairly responsible for his inability” to file a plan by the deadline.²⁷ The inquiry seeks to “strike the correct balance of [subchapter V’s] goals of speed and access to a realistic reorganization scheme” and takes into account “whether the debtor manipulated the timing of his bankruptcy case, potential prejudice to creditors, and whether the debtor [is complying] with his obligations under the Code.”²⁸

The *Trinity Consortium* court concluded that the determination of whether the need for an extension under § 1189(b) is “attributable to circumstances for which the debtor should not justly be held accountable” allows an equitable inquiry “to take into account all relevant circumstances surrounding the debtor’s need for an extension of time to file a plan and to balance the interests of the affected parties.” 656 B.R. at 437 (footnotes omitted).

The court continued, 656 B.R. at 440.:

In striking that balance under § 1189(b), the Court should be guided by the overarching goals of subchapter V to (i) provide a process by which debtors may reorganize and rehabilitate their financial affairs, (ii) provide a framework for an expeditious and economical resolution of the case under subchapter V, and (iii) facilitate the development of a consensual plan. In striking the proper balance, the Court should give due regard to the particularly important protection § 1189(b) affords creditors because subchapter V eliminates various creditor protections available to creditors in chapter 11 cases not governed by subchapter V.

The court then identified specific factors to consider, *id.* at 440-41:

Circumstances surrounding the debtor’s need for an extension of time to file a plan which should be taken into account include whether the need for the extension is within the debtor’s reasonable control and may include such things as the danger of prejudice by granting or refusing to grant the extension, the length of the extension, the debtor’s good

²⁶ *Trinity Consortium*, 656 B.R. at 436, quoting *In re Baker*, 625 B.R. 27, 35 (Bankr. S.D. Tex. 2020).

²⁷ *Trinity Consortium*, 656 B.R. at 436-37, quoting *In re Trepitin*, 617 B.R. 841, 849 (Bankr. D. Md. 2020). The court also cited: *In re HBL SNF, LLC*, 635 B.R. 725, 730 (Bankr. S.D.N.Y. 2022) (considering prejudice to the parties); *In re Greater Blessed Assurance Apostolic Temple, Inc.*, 624 B.R. 742, 746 (Bankr. M.D. Fla. 2020) (considering prejudice to creditors).

²⁸ *Trinity Consortium*, 656 B.R. at 437, discussing *In re Trepitin*, 617 B.R. 841, 848-49 (Bankr. D. Md. 2020). The *Trinity Consortium* court observed that *Trepitin* stated that it was following the “circumstances beyond the control of the debtor” test but that the test *Trepitin* actually applied was an equitable one. 656 B.R. at 437.

faith, the debtor’s progress in formulating a meaningful plan, and the views of creditors as a whole and the subchapter V trustee.

Applying this standard, the court granted the extension. The court found that the debtor was close to concluding its negotiations with creditors in the mediation and that the extension would not unduly prejudice creditors. *Id.* at 442-43.

In re Mateos, 2023 WL 4842301 (Bankr. M.D. Fl. 2023), involved similar circumstances. The married debtors who had personally guaranteed debts of a company in chapter 11 sought an extension of time based on the need to resolve matters in the company’s chapter 11 case so that their plan could properly take account of that resolution. The court found that the ability to settle matters in the company’s case was important to their cases and granted the extension.

The court in *In re Signia, Ltd.*, 2024 WL 331967 (Bankr. D. Colo. 2024), after a review of the various approaches in the case law and extensive analysis and application of principles of statutory construction, adopted the “beyond-the debtor’s control” approach.

The court began by stating that it had “little doubt” about the plain or ordinary meaning of the operative statutory language, “the debtor should not justly be held accountable.” The court stated, *id.* at *8:

It means simply that the debtor should not be responsible for external events that the debtor did not cause. And, the corollary is that the debtor is responsible for the debtor’s own conduct. This corresponds exactly with the Beyond-the-Debtor’s-Control Standard. Extensions may be warranted for external events beyond a debtor’s control which make it impossible for a debtor to file a timely plan.”

The court checked its interpretation by consulting dictionary definitions of the two key statutory words, “justly” and “accountable.” Definitions of “accountable,” the court noted, included “expected or required to account for one’s actions: answerable” and “liable to be called to account, or to answer for responsibilities and conduct: answerable, responsible.” *Id.* at *9. The best meaning of “justly” in the context of the statute, the court said, is “in conformity with fact or reason: correctly, properly.” *Id.* The court concluded that a reasonable reader would understand the words to have these meanings such that the statutory language “does mean that the debtor should not be responsible for external events that the debtor did not cause but is accountable for the debtor’s own conduct.” *Id.*

The *Signia* court then observed that, “[w]hile considering the constituent parts of the clause at issue – ‘accountable’ and ‘justly’ – might have some relevance, merely stringing the words together is not enough and could lead in the wrong direction.” *Id.* at *9. The court explained that “the entire clause (‘the debtor should not justly be held accountable’) must be considered as a single unit in the special context of the Bankruptcy Code.” *Id.* The court noted that, in the legal field, “terms of art” develop and that ordinary legal meaning may be different

from common meaning. Specifically, the court referred to Justice Frankfurter’s statement on statutory interpretation, *id.* at *9:²⁹

[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

The *Signia* court concluded that, in addition to having plain or ordinary meaning, the clause also has “specialized meaning and ‘old soil,’” the “old soil” being § 1221 in chapter 12, which permits an extension of the debtor’s deadline for filing a plan with the same language as the subchapter V statute.

The court extensively reviewed the legislative history of § 1221 and the case law interpreting that section, concluding that § 1221 permits an extension only if the inability to file a plan is due to circumstances beyond the debtor’s control. *Id.* at *10-11. Accordingly, the court explained, *id.* at *12:

When Congress copied the exact same language used in Section 1221 into Section 1189(b), it must be presumed that Congress meant for the same Beyond-the-Debtor’s-Control Standard to apply given that that had been the law for decades. The Supreme Court has repeatedly invoked this “longstanding interpretive principle”: “[w]hen a statutory term [or phrase] is ‘obviously transplanted from another legal source,’ it brings the old soil with it.”³⁰

The *Signia* court summarized its holding, *id.* at *11:

So, the meaning of Section 1189(b) already has been settled in the context of Section 1221. The Court reaffirms that the Beyond-the-Debtor’s-Control Standard (derived from Section 1221) is the right standard for evaluating requests for extension under Section 1189(b).

The court denied the motion to extend the deadline because the only basis for the extension was an unresolved dispute concerning financing. This circumstance, the court concluded, was not beyond the debtor’s control because it could have filed its financing motion earlier, asked for an expedited hearing, reached some agreement with the objecting party, or drafted around the issue in a plan with differing provisions depending on whether the debtor prevailed. *Id.* at 12.

The *Signia* court observed that in its district debtors and their counsel were manipulating the § 1189(b) deadline by filing “bogus placeholder plans of reorganization on the ninetieth day”

²⁹ The Court quoted Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 73 (Thomson West 2012) and Felix Frankfurter, *Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

³⁰ Quoting *Taggart v. Lorenzen*, ___ U.S. ___, 139 S.Ct. 1795, 1801 (2019) (construing bankruptcy statutes pertaining to injunctions), and citing *Hall v. Hall*, ___ U.S. ___, 139 S.Ct. 1118, 1128 (2018).

that were “obviously deficient (many containing blanks, inadequate information, and missing financials) [with] no chance of confirmation.” *Id.* at 1. The court criticized the practice because the plans “seem to be filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement while obviously skirting the import of the statute.” *Id.*

The court in *In re United Safety and Alarms, Inc.*, 2024 WL 973674 (Bankr. S.D. Fla. 2024), concluded that the filing of a plan that promised the liquidation analysis and financial projections that § 1190(1) requires on or before 21 days before the confirmation hearing did not meet the requirement of § 1189(b) for filing a plan within 90 days. Accordingly, the failure to timely file a plan constituted cause for dismissal or conversion under § 1112(b)(4)(J). The court converted the case to chapter 7, concluding that cause for dismissal also existed under § 1112(b)(4)(F) for failure to file timely reports.

The debtor in *In re S-Tek I, LLC*, 2023 WL 2529729 (Bankr. D. N.M. 2023), timely filed its original plan, followed by second and third plans that the court considered to be preconfirmation modifications of the original plan. After denial of confirmation of the third plan, the debtor filed a fourth plan.

The court ruled that, after denial of confirmation, no plan existed that the debtor could modify and that the fourth plan was not timely. *Id.* at *5. The court noted that chapter 12 cases had permitted modification after denial of confirmation. *Id.* at *5, n. 36 (citing *Novak v. DeRosa*, 934 F.2d 401, 403-04 (2d Cir. 1991) (providing that a chapter 12 plan may still be modified after denial of confirmation); *In re Mortellite*, No. 17-21818-ABA, 2018 WL 388966, at *1 n.3 (Bankr. D.N.J. Jan. 11, 2018) (same)).

The *S-Tek* court declined to give the debtor more time to file a plan based on the circumstances of the case, including the facts that the case had been pending for two years, was essentially a two-party dispute, and had involved contentious and expensive litigation. *Id.* at *8-9.

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XI. What is “Unfair Discrimination” That Precludes Cramdown Confirmation?

One of the requirements for cramdown confirmation in both traditional (§ 1129(b)) and subchapter V (§ 1191(b)) cases is that the plan must not “discriminate unfairly.”

The court in *In re Lapeer Aviation, Inc.*, 2022 WL 7204871, at *8-9 (Bankr. E.D. Mich. 2022), addressed the requirement in connection with the plan’s treatment of equity interests. The plan provided that one holder would retain his equity interest but that the other would be required to accept \$15,000 for his.

The court adopted the so-called “Markell test,” articulated in an article by Hon. Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L. J. 227 (1998), and adopted by the bankruptcy court in *In re Dow Corning Corp.*, 244 B.R. 705, 710

(Bankr. E.D. Mich. 1999), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd*, 280 F.3d 648 (6th Cir. 2002). *See also In re Mallinckrodt, PLC*, 639 B.R. 837, 898-99 (D. Del. 2022) (applying the Markell test).

The court summarized the test as creating a “rebuttable presumption that a plan is unfairly discriminatory” when three conditions exist. *Lapeer Aviation* at *8. The first two are the presence of a dissenting class and of another class with the same priority.

The third condition is that the difference in the plan’s treatment of the two classes result in either “(a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with the proposed distribution.” *Id.* at *8.

The first two requirements were met because the plan put the two equity interests with the same priority in separate classes and one of them rejected the plan.

The third requirement was met because the cash-out provision had the potential to result in a materially lower recovery for the dissenting holder than the other would receive through retention of his interest in the reorganized debtor. *Id.* at *9. The court rejected the proposition that the discrimination was not unfair because of the dissenting holder’s opposition to reorganization efforts, noting that he had no management or control rights. *Id.* at *9.

XII. The “Appropriate Remedies” Requirement for Cramdown Confirmation, § 1191(c)(3)(B)(ii)

The Bankruptcy Threshold Adjustments and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022), amended § 1191(c)(3) to provide that, as a condition for cramdown confirmation, the plan must provide “appropriate remedies” to protect creditors only if the court concludes that there is a reasonable likelihood that the debtor will make plan payments. Prior to the amendment, the remedies requirement arguably also applied if the court found that the debtor would be able to make all payments under the plan. The amendment applies to cases filed before its enactment. *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at *15 n. 12 (Bankr. N.D. Ill. 2022).

The plan in *Channel Clarity Holdings* provided that a creditor could “pursue its remedies as are available to it pursuant to applicable law” if plan payments were not made. *Id.* at 16. The court concluded that it was “clear that the language proposed by Debtor is deficient.” *Id.* at 16. The court explained, *id.* at 16:

[I]t offers no specific protections for unsecured creditors who are forced to forgo some of the standard protections of a typical chapter 11 case when debtors elect to proceed under subchapter V. To assert that creditors can pursue remedies under applicable law if Debtor should default is a toothless remedy.

Noting that the debtor’s limited assets would likely be depleted by the time of a default and that a “race to the courthouse” would be “contrary to the spirit and intent of the bankruptcy policy of orderly distribution of limited assets,” the court suggested, *id.* at 16:

Under these circumstances where the objecting unsecured creditor bears a disproportionate amount of risk, Debtor could offer options such as expedited liquidation of nonexempt assets, or a truncated process for declaring a default and allowing collections to begin, or immediate conversion to allow a chapter 7 trustee to take over business operations and possibly conduct a winddown and liquidation.

In *In re McBride*, 2023 WL 8446205 (D. Maine 2023), the court observed that a provision in a plan for the court to retain jurisdiction to address postconfirmation issues did not provide an adequate remedy. The court noted that a remedy is insufficient “if it is not tailored to the specific circumstances of the plan” and that “providing creditors with the opportunity to pursue their state law rights or to seek enforcement of a plan is insufficient.” 2023 WL 8446205 at * 6.

In contrast, other courts have concluded that the availability of relief in the bankruptcy court to enforce the plan or seek relief available under federal or applicable state law is an adequate remedy. *In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 691 (Bankr. S.D. Tex. 2022) (A provision in a plan permitting a creditor, upon the debtor’s failure to cure a default after 30 days’ notice, to proceed to collect “all amounts owed pursuant to state law without further recourse to the Bankruptcy Court” is a “marginally sufficient” remedy.); *In re Ellingsworth Residential Cmty. Ass’n, Inc.*, 2021 WL 6122645, at *2 (Bankr. M.D. Fla. 2020); *In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985, at * 11 (Bankr. E.D. Wis. 2021).

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Hamilton v. Curiel (In re Curiel), 2023 WL 4146017 (B.A.P. 9th Cir. 2023), did not directly involve the issue of appropriate remedies. Rather, the Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court’s cramdown confirmation of the debtor’s plan over the objection of a secured creditor because the BAP concluded that the evidence did not establish feasibility under § 1129(a)(1). Nevertheless, the court’s remand to the bankruptcy court is relevant to the adequate remedies issue for two reasons.

First, the court in remanding for further proceedings regarding feasibility specifically directed the bankruptcy court to determine whether the objecting secured creditor could invoke the subchapter V feasibility requirement for cramdown confirmation in § 1191(c)(3). *Id.* at *1. The same issue arises with regard to a secured creditor’s objection to cramdown confirmation based on the adequate remedies requirement in § 1191(c)(3).

Second, the court commented on the question of whether the remedies in the plan were adequate, although that issue was not before it. The court stated, *id.* at *10, n. 11:

[The debtor’s] Plan provided that in the event of a default [the creditor] could serve a notice of default and give [the debtor] at least sixty days to cure the default. If the default was material, the creditor “may: (i) take any action permitted under bankruptcy or non-bankruptcy law to enforce the terms of the Plan; (ii) seek liquidation of nonexempt assets pursuant to § 1191(c)(3)(B); (iii) seek to remove the Debtor as a DIP; and/or (iv) move to dismiss this case or to convert this case to Chapter 7 pursuant to § 1112(b).” We note the dearth of cases discussing what are, or are not, appropriate remedies under § 1191(c)(3)(B)(ii). But we agree with the bankruptcy court’s observation in *In re Channel Clarity Holdings LLC*, 2022 WL 3710602 at *16 [(Bankr. N.D. Ill. 2022)], that merely allowing creditors to “pursue remedies under applicable law if Debtor should default is a toothless remedy.” The requirement under § 1191(c)(3)(B)(ii) that the remedies provided be “appropriate” suggests that they should be tailored to the situation. [The debtor] could bolster the default remedies to provide for a prompt auction of the Properties, a stipulated foreclosure, or an automatic deed in lieu of foreclosure. The prospect of an immediate, certain, and inexpensive remedy would increase [the debtor’s] incentive to obtain funding for the balloon payment and decrease the prejudice to [the creditor] if she is not successful.

Does the Bankruptcy Appellate Panel’s discussion of remedies for the secured creditor indicate that the Panel thinks the § 1191(c)(3) requirements should govern cramdown confirmation of a secured claim?

In re McBride, 2023 WL 8446205 (D. Maine 2023), supports the proposition that a secured creditor may invoke § 1191(c)(3) in opposition to cramdown confirmation of a plan that it has rejected. The court noted (in connection with its discussion of the projected disposable income requirement of § 1191(c)(2)(B), discussed in Section VI(C)) that § 1191(c)(3) “does not address the treatment of claims at all and is obviously generally applied to a plan, as a whole” and that § 1191(c)(3) is “globally applicable to the entire structure of the plan.” *Id.* at *7.

The opposite view is that a secured creditor does not have the right to invoke § 1191(c)(3) in opposition to cramdown confirmation of its claim:

Because section 1191(b) states that the plan must be “fair and equitable” with regard to the class that has not accepted the plan, and because section 1191(c)(1) states specifically that the plan must meet the requirements of section 1129(b)(2)(A) “with respect to a class of secured claims, one argument is that a secured creditor may not invoke the other fair and equitable requirements in paragraphs (2) and (3) of section 1191(c).

COLLIER ON BANKRUPTCY ¶ 1191.04[1] at 1191-16.

The issue may be more theoretical than real because the fair and equitable requirement of § 1129(b)(2)(A) applicable to cramdown of secured claims includes consideration of feasibility.

COLLIER ON BANKRUPTCY ¶ 1191.04[1] at 1191-16; *see also id.* ¶¶ 1129.03[4]b][ii]; 1129.04[2][a][v].

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XIII. Plan Provisions Inconsistent With Statutory Provisions

Section 1193(b) does not permit modification of a plan after consensual confirmation under § 1191(a) once “substantial consummation” has occurred. In *In re North Richland Hills Alamo, LLC*, 2022 WL 2975121 (Bankr. N.D. Tex. 2022), all impaired classes accepted the plan, *id.* at *9, and the debtor received a discharge upon the plan’s effective date because the plan was confirmed under § 1191(a), *id.* at 15. Nevertheless, the confirmation order permitted postconfirmation modification at any time within the “Commitment Period,” *id.* at 15.

If cramdown confirmation occurs under § 1191(b): (1) property of the estate includes postpetition assets and earnings, § 1186(a); and (2) the subchapter V trustee remains in place until completion of PDI payments. In *In re ActiTech, L.P.*, 2022 WL 6271936 (Bankr. N.D. Tex. 2022), the court confirmed the plan under § 1191(b) because all impaired classes did not accept it. *Id.* at *3. Nevertheless, the confirmation order provided for (1) the revesting of property in the reorganized debtor, *id.* at *9; and (2) termination of the trustee’s services as of the effective date of the plan, *id.* at *14, which under the plan occurred upon entry of a final confirmation order, certain governmental and material third-party approvals, execution of required documents, and approval of settlements. *Id.* at *22, 42-43.

See also *In re Bronson*, 2022 WL 3637566, at *2 (Bankr. D. Or. 2022) (In resolving postconfirmation issues, the court noted that the plan confirmed under § 1191(b) had revested all property “except property required to perform obligations under the Plan” in the reorganized debtor.).

XIV. Confirmation Requirements of § 1129(a) Applicable for Confirmation in Subchapter V Cases

A. Compliance with provisions of Bankruptcy Code (§ 1129(a)(2))

In *In re Cesaretti*, 2023 WL 3676888 (Bankr. D. Nev. Feb. 24, 2023), the debtor had paid prepetition credit card and tax debts without court approval. The court concluded that the unauthorized postpetition payment of prepetition debt violated § 363 and that the violation of this provision of the Bankruptcy Code precluded confirmation under § 1129(a)(2). The court also concluded that the plan was not confirmable for several other reasons. The court did not address whether the payments, made from postpetition earnings, did not violate § 363 because an individual’s postpetition earnings are not property of the estate. *See* SBRA Guide § XI(B)(2).

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B. Postconfirmation management (§ 1129(a)(5))

The confirmation requirement in § 1129(a)(5) requires the plan to disclose the identities of directors and officers and that their appointment to, or continuance in, office is “consistent with the interests of creditors and equity security holders and with public policy.”

This requirement rarely receives much attention in confirmation disputes, but it was an issue in *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at * 11-12 (Bankr. N.D. Ill. 2022).

The court noted concerns about the lack of a “defined management structure” for the debtor that involved someone other than the principal, who was also the majority shareholder. The debtor’s management structure lacked someone “who can hold him accountable” in view of the principal’s conduct in securing preferred member majority status, his conflicts of interest as the principal of affiliates doing business with the debtor, a number of high-level vacancies, and the fact that the debtor might not have anyone in charge of accounting functions.

The court noted that the subchapter V trustee had made proposals for management that involved appointment of a plan administrator with authority ranging from full control over all debtor bank accounts and sole signing authority to no signing authority but responsibility for making disbursements. *Id.* at *12.

The court concluded that the debtor continuing its operation with only the principal in charge was inconsistent with the interests of creditors and equity security holders and public policy, stating, *id.* at *12:

No evidence was presented at the hearing as to the propriety or legality of one proposal over another. The Court encourages Debtor to explore them all with the Objecting Parties and the SBRA Trustee in hopes of identifying an acceptable solution to allay the Court’s legitimate concerns about Debtor putting all its eggs in [the principal’s] basket at a time when he will be dealing with other pressing obligations. But to be clear, to satisfy section 1129(a)(5), any amended plan will need to specifically address Debtor’s management structure, including but not limited to [the principal’s] potentially conflicting roles and the provision of accounting services and financial controls.

C. Best interest of creditors test (§ 1129(a)(7))

The court in *In re Boteilho Hawaii Enterprises, Inc.*, 2023 WL 7117223 (Bankr. D. Haw. 2023), considered whether the debtor’s subchapter V plan satisfied the “best interest of creditors” test of § 1129(a)(7), which requires that the plan provide for creditors who have not accepted it to receive not less than they would receive if the debtor were liquidated under chapter 7.

The court concluded that the debtor’s plan met the test because a hypothetical liquidation of the debtor’s assets by a trustee in a chapter 7 case would produce less than what the plan provided for creditors. In its analysis, the court took into account the facts and circumstances that exist when a chapter 7 trustee liquidates assets.

In its discussion of the hypothetical chapter 7 liquidation of the debtor, the court noted that a trustee must liquidate assets “as expeditiously as is compatible with the best interests of parties in interest” under § 704(a)(1) and that, therefore, the trustee must “always dispose of the property quickly (although not necessarily at ‘fire sale’ prices.)” *Id.* at * 2. The court rejected the valuations proposed by the objecting creditors based on its assessment of what the trustee’s disposition of the assets would likely realize and concluded that the trustee’s liquidation would not produce any funds for distribution to unsecured creditors after satisfaction of secured, administrative, and priority claims, including a postpetition loan made by the debtor’s principal. Accordingly, the court concluded that the plan that provided for no payments to unsecured creditors complied with § 1129(a)(7). The court in a separate order concluded that the plan met all other requirements for cramdown confirmation under § 1191(b). *In re Boteilho Hawaii Enterprises, Inc.*, 2023 WL 7411176 (Bankr. D. Haw. 2023).

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D. Acceptance by all impaired classes (§ 1129(a)(8))

SBRA Guide § VIII(D)(2) discusses the issue of whether a class is deemed to accept a plan when no members of the class vote or object to confirmation.

Following *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267-68 (10th Cir. 1988), the court in *In re Jaramillo*, 2022 WL 4389292 (Bankr. D.N.M. Sept. 22, 2022), ruled that a class is deemed to accept a plan when no one votes or objects. The court noted, however, that affirmative acceptance is required for compliance with § 1129(a)(10), which requires that at least one impaired class of creditors accept the plan if any class of claims is impaired. Section 1129(a)(10) applies in the case of consensual confirmation in a subchapter V case under § 1191(a), but not to cramdown confirmation under § 1191(b). (Section 1129(a)(10) is somewhat superfluous for consensual confirmation because, by definition, all impaired classes have accepted the plan.)

The court in *In re Creason*, 2023 WL 2190623 (Bankr. W.D. Mich. 2023), concluded that *Ruti-Sweetwater* was wrongly decided and ruled that a class that had not voted had not accepted the plan. The court, therefore, confirmed the plan under the cramdown provision in § 1191(b).

In *In re Vega Cruz*, 2022 WL 2309798 (Bankr. D. P.R. June 27, 2022), the court had confirmed a consensual plan but had deferred entry of a discharge order because the court wanted briefing regarding whether the cancellation of junior liens under the plan would occur upon discharge. The court concluded that the individual was entitled to discharge upon confirmation and to an order discharging and cancelling the junior liens. It appears that the junior lienholders had not objected to confirmation, but it is not clear whether they had

affirmatively accepted the plan. The court did not address the issue of whether their acceptance would be required for consensual confirmation.

Two courts outside the Tenth Circuit have concluded that classes that do not vote are not counted for purposes of determining whether § 1129(a)(8) is satisfied. *In re Hotz Power Wash, Inc.*, 655 B.R. 107 (Bankr. S. D. Tex. 2023); *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023). The courts reasoned that section 1126(c) requires determination of acceptance by dividing the number of acceptances by the total votes in the class. When no creditor in an impaired class has voted, the computation requires division of zero by zero, which produces an indeterminate result that is absurd and could not have been intended by Congress.

Thus, the court in *Hotz Power Wash*, 65 B.R. at 188, concluded:

This Court concludes, similar to the court in *In re Franco's Paving LLC*, that the result of a § 1126(c) computation for a nonvoting class is absurd, unsolvable, and was not contemplated by Congress. Furthermore, as discussed *supra*, treating a nonvoting class as having implicitly accepted or rejected the plan is prohibited by the Code and applicable rules. Thus, since the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied.

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E. Whether balloting is required

SBRA Guide § VIII(A)(4) considers whether balloting on a plan is necessary if the debtor wants to bypass the solicitation of acceptances and seek cramdown confirmation under § 1191(b).

In the course of dealing with the debtor's proposal that creditors who did not "opt out" of the plan's provisions for third-party releases would be bound by them, the court in *In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), addressed the need for balloting in the case, where the debtor intended to pursue cramdown confirmation without soliciting any acceptances. The court stated, *id.* at *2:

The typical practice in this Court has been for creditors' consent (or not) to a third-party release to be determined in connection with the vote on the plan. In subchapter V cases, however, § 1191(b) of the Bankruptcy Code eliminates § 1129(a)(10)'s requirement of an impaired accepting class. As a result, so long as the plan is nondiscriminatory and satisfies absolute priority, there is no requirement that creditor votes be solicited in a case under subchapter V.

Another court took a different approach in *In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 690-91 (Bankr. S.D. Tex. 2002). The court noted that the two subsections of § 1129(a) which impose the balloting duty—§ 1129(a)(8) and (a)(10) — do not apply in a cramdown situation. The court reasoned, however, that a good-faith effort to solicit ballots is still necessary on the debtor’s part because, absent balloting, the court cannot determine whether the plan should be confirmed under § 1191(a) or (b).

F. Feasibility (§ 1129(a)(11))

SBRA Guide § VIII(B)(5) discusses feasibility issues under § 1191(c)(3), applicable in connection with cramdown confirmation under § 1191(b).

In *Hamilton v. Curiel (In re Curiel)*, 2023 WL 4146017 (B.A.P. 9th Cir. 2023), the court considered feasibility in a subchapter V case under § 1129(a)(11). The bankruptcy court had confirmed the debtor’s plan over the objection of a secured creditor that the plan was not feasible. Concluding that the debtor had not established feasibility under the requirement of § 1129(a)(11), the court remanded for further proceedings.

In the course of its opinion, the court summarized the feasibility standard as follows, *id.* at *10:

It is [the debtor’s] burden, as the Plan proponent, to present concrete evidence to establish that she has sufficient cash flow to maintain her ongoing personal expenses while funding all Plan payments. *See In re Pizza of Haw., Inc.*, 761 F.2d [1374,] 1382 [(9th Cir. 1985)]; 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2023). And while feasibility under § 1129(a) presents a relatively low threshold, it still depends on adequate evidence. *Legal Serv. Bureau, Inc. v. Orange Cnty. Bail Bonds, Inc.*, (*In re Orange Cnty. Bail Bonds, Inc.*), 638 B.R. 137, 148 (9th Cir. BAP 2022) (citing *In re Brotby*, 303 B.R. [177,] 191 [B.A.P. 9th Cir. 2003]). To this end, “[f]actual support must be shown for the Debtor’s projections.” *In re Hobble-Diamond Cattle Co.*, 89 B.R. 856, 858 (Bankr. D. Mont. 1988). “The use of the word ‘likely’ in Section 1129(a)(11) requires the Court to assess whether the plan offers a reasonable ‘probability of success, rather than a mere possibility.’ ” *In re Sanam Conyers Lodging, LLC*, 619 B.R. 784, 789 (Bankr. N.D. Ga. 2020) (quoting *In re Aspen Vill. at Lost Mountain Memory Care, LLC*, 609 B.R. 536, 543 (Bankr. N.D. Ga. 2019)). Thus, “[t]he mere fact that the bare numbers in the income and expense projections provided in the plan demonstrate an apparent surplus to adequately fund the plan is not enough to meet the burden on feasibility.” *In re Kowalzyk*, 2006 WL 3032145, at *5 (Bankr. D. Minn. 2006).

The court concluded that the debtor had not met her burden, *id.* at * 12:

We agree with the bankruptcy court that if one were to accept [the debtor’s] projected income and expenses, feasibility would be a very close question. We also understand that we must give due deference to the bankruptcy court’s findings. *See Cardenas v. Shannon (In re Shannon)*, 553 B.R. 380, 387 (9th Cir. BAP 2016). But

“sheer optimism and hopefulness, without more, is not sufficient to support a finding of feasibility.” *In re Om Shivai, Inc.*, 447 B.R. 459, 463 (Bankr. D. S.C. 2011); *see also In re Walker*, 165 B.R. 994, 1004 (E.D. Va. 1994) (“sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are visionary promises” (cleaned up)). [The debtor’s monthly operating reports] undermine her projections. They similarly undermine the bankruptcy court’s inference based on the projections that Curiel’s income was reasonably sufficient to support performance of her Plan. Her calculations suggest that if everything were to go as projected, she initially would have just enough to perform her Plan obligations. However, her monthly reporting cannot be reconciled with the projections or the bankruptcy court’s feasibility findings. More specifically, there is no reliable, concrete evidence to support that [her business venture] will be able to fund the necessary income—that [the debtor] will be able to contribute \$4,500 in gross monthly income from her wages and receive \$3,000 from [a third party]. *See In re Aurora Memory Care, LLC*, 589 B.R. [631,] 642 [(Bankr. N.D. Ill. 2018)] (“Optimistic but hollow declarations from a debtor’s principal about hopes for funding do not do the job.” (cleaned up)).

The debtor in *In re Saturno Design, LLC*, 2023 WL 5962573 (Bankr. D. Or. 2023), sought cramdown confirmation of a plan that provided for interim monthly payments to the objecting secured creditor and a balloon payment in three years to be made through refinancing. Based on the testimony of the principal who had refinanced other businesses and the debtor’s accountant, the court found that the plan was feasible and confirmed it.

The court noted that the feasibility requirement in § 1191(c)(3)(B)(i) (that the court find a “reasonable likelihood” that the debtor will make plan payments) is indistinguishable from the feasibility standard in § 1129(a), which the court defined as a “reasonable probability of success.” The court stated, *id.* at * 2 (footnotes in original renumbered):

The Ninth Circuit Bankruptcy Appellate Panel has held that, when a plan turns on sale or refinancing of collateral, satisfaction of the “reasonable probability” standard requires that the bankruptcy court “determine whether a sufficient refinancing or sale is reasonably likely to occur”³¹ The BAP has also held that a debtor need not “prove that success is inevitable.”³²

See also In re S-Tek 1, LLC, 2023 WL 2529729, at * 3 (Bankr. D.N.M. 2023) (discussing adequacy of financial projections in concluding that the plan was not feasible under § 1129(a)(11) or § 1191(c)(3)).

³¹ *Hamilton v. Curiel (In re Curiel)*, 651 B.R. 548, 567 (9th Cir. B.A.P. 2023).

³² *Comput. Task Grp., Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 191 (9th Cir. B.A.P. 2003).

Based in part on testimony from officers of the objecting creditor and two accountants who testified as experts, the court in *Who Dat?, Inc.*, Case No. 21-10292 (Bankr. E.D. La. Mar. 27, 2024), concluded that the plan was not feasible and converted the case to chapter 7.

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XV. Cramdown Confirmation: “Indubitable Equivalent” Treatment of Secured Claim

Section 1191(c) makes the cramdown requirements in § 1129(b)(2)(A) with regard to a secured claim applicable to cramdown confirmation under § 1191(b) in a subchapter V case. *See* SBRA Guide § VIII(B)(2).

In *In re Creason*, 2023 WL 2190623 (Bankr. W.D. Mich. 2023), a creditor held a security interest in personal property, but it was avoidable under § 544(a) because the financing statement did not have the correct name for the debtor. The debtor’s plan put the creditor in a separate class and treated the creditor as an unsecured creditor.

The creditor did not vote on the plan. The court held that, because the creditor had not voted, the class had rejected the plan so that consensual confirmation under § 1191(a) was not permissible.

The court concluded that the plan was, however, confirmable under the cramdown provisions of § 1191(b) because the plan provided for the creditor to receive the “indubitable equivalent” of the claim under § 1129(b)(2)(A)(iii). The court reasoned, *id.* at 3:

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). *See* 11 U.S.C. § 1191(c)(1) (incorporating § 1129(b)(2)(A)(iii) as rule of construction). On this point, [the creditor’s] failure to participate in the confirmation process certainly backfired. The court finds that the plan is fair and equitable in its treatment of [the creditor], and § 1141(c) permits revesting of [the creditor’s] supposed collateral in [the debtor], free and clear of [the creditor’s] lien.

XVI. Eligibility for Subchapter V

A. Debtor must be “engaged in commercial or business activities”

As SBRA Guide § III(C)(2) discusses, a number of courts have broadly interpreted “commercial or business activities” to include “wind-down” activities for a business that has discontinued active business operations. More courts have taken this approach.

In *In re Hillman*, 2023 WL 3804195 (Bankr. N.D.N.Y. June 2, 2023), the debtor held a 50 percent equity interest in two entities. A creditor had filed a lawsuit against one of them and the debtor for defaults under a commercial lease agreement with the company and the debtor’s personal guaranty of its obligations. The creditor objected to subchapter V eligibility on the

ground that neither of the debtor’s two companies was engaged in commercial or business activities at the time of the filing of the petition.

The court agreed that eligibility must be determined based on the existence of activities on the petition date but held that the debtor met the requirement under the “totality of circumstances” approach because both companies were currently engaged in commercial or business activities.

Although the defendant company had closed, the court ruled that the defense of the claim on the guaranty constituted sufficient winding down activity for the debtor to satisfy the “engaged in commercial or business activities” requirement. *Id.* at *4. The court found no “reason to distinguish between pursuing versus defending commercial litigation when determining subchapter V eligibility.” *Id.* at * 4 n. 8 (citing *In re Port Arthur Steam Energy*, 629 B.R. 233, 237 (Bankr. S.D. Tex. 2021)).

The creditor alleged that the operations of the other entity were not enough to constitute being presently involved in business or commercial activity, characterizing it as a “hobby.” The court rejected the contention that “little or scarce business activity is insufficient for subchapter V eligibility,” noting that the company had completed a sale of goods for profit within 60 days of the bankruptcy filing. *Id.* at *4 n. 7.

In *In re Robinson*, 2023 WL 2975630 (Bankr. S.D. Miss. Apr. 17, 2023), the debtor filed the subchapter V case over a year after the closing of a poultry farming operation when its contract for chicken processing terminated. At the time of the filing, the debtor had a job as a loader operator at a lumberyard. The debtor filed the case to liquidate the farm’s assets after efforts to find another grower contract were unsuccessful.

The U.S. Trustee objected to the debtor’s eligibility, contending that the cessation of farming operations more than a year before the filing was so distant that his current activities could not be characterized as winding down.

The court concluded that, under the “totality of circumstances” approach, the debtor’s continued management of farm assets, his efforts to sell the farm or parts of it, and his maintenance and inspection of improvements on the farm were sufficient wind-down activities to satisfy the “engaged in” commercial or business activities requirement. The court reasoned, “[T]he totality of the circumstances standard does not dictate a quantum of activities or time engaged in them.” *Id.* at *4.

In *In re Free Speech Systems, LLC*, 649 B.R. 729, 733 n.14 (Bankr. S.D. Tex. 2023), the court noted that the requirement that the debtor be engaged in commercial or business activities is not a continuing one, such that the termination of business operations after filing does not render the debtor ineligible.

In two related cases, the bankruptcy court held that the individual debtors, siblings who each owned 25 percent of a construction and contracting company but had not had any involvement with the company for about seven years, were “engaged in commercial or business activities” because they were appealing a judgment against them on a guaranty of a debt of the business and were pursuing an action against former business associates for taking excessive distributions from the company. *In re Fama-Chiarizia*, 655 B.R. 48 (Bankr. E.D.N.Y. 2023); *In re Fama*, 2023 WL 6131466 (Bankr. E.D.N.Y. 2023). (In *Fama-Chiarizia*, the court also found that the debtor’s rental of an apartment in her residence satisfied the requirement.)

After an extensive review of the case law, the court agreed “with the substantial majority of courts that have found that a debtor may be eligible to reorganize under Subchapter V when it seeks to address residual business debt, and to marshal residual business assets. And here, the facts and circumstances show that [the debtors seek] to do exactly that with respect to the business debt and assets of [the company].” 655 B.R. at 69 and 2023 WL 6131466 at * 18.

The court further observed, 655 B.R. at 70 and 2023 WL 6131466 at * 18:

And, for better or worse, courts agree that where – as here – the “business and commercial activities” are, in large part, in the nature of evaluating, asserting, pursuing, and defending litigation claims, this can still amount to addressing the business’ debts and marshaling its assets, and can satisfy Section 1182(1)(A)’s requirement of “commercial or business activities.”

###

B. Debt limit: debts of affiliates

As amended by the Bankruptcy Threshold Adjustments and Technical Corrections Act (“BTATCA”), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022), debts for purposes of the debt limit for subchapter V eligibility include debts of affiliates of the debtor if the affiliate is a debtor in a bankruptcy case. § 1182(a).

When an affiliate of an eligible subchapter V debtor later files its own bankruptcy case, and the combined debts of all affiliates exceed the debt limit, the second debtor is clearly not eligible for subchapter V. The question is whether the second filing affects the eligibility of the debtor in the first case.

Two courts have ruled that, because eligibility is determined as of the filing date, the second filing does not render the first debtor ineligible, even when the total of the debt of the affiliates exceeds the debt limit.

In *In re Free Speech Systems, LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023), the debtor filed a subchapter V petition. It was eligible despite the existence of substantial defamation claims against it because the damages had not yet been determined and, therefore, were unliquidated debts excluded from the calculation of debts for purposes of eligibility. After the court lifted the stay to permit the defamation litigation to proceed and a jury awarded substantial

damages against the debtor and its jointly liable principal, the principal filed his own chapter 11 case.

Plaintiffs in the defamation action sought revocation of the subchapter V election in the first case based on the fact that the total debt of the affiliates exceeded the debt limit. The court rejected the argument, ruling that determination of eligibility on the effective date was not affected by the affiliate's later filing. The court observed, "If postpetition affiliate filings lead to ineligibility and revocation, it means that debtors could float in and out of Subchapter V at any time." *Id.* at 734.

In *In re Dobson*, 2023 WL 3520546 (Bankr. W.D. Va. 2023), the sole shareholder of a construction company and his spouse filed a joint subchapter V petition. The next day, the corporation filed a chapter 7 case. The U.S. Trustee contested the eligibility of the individuals for subchapter V because the total of their debts and the corporation's debts exceeded the debt limit. The court agreed with *Free Speech* and ruled that the debtors' correct statement of eligibility on the petition date did not become incorrect based on a later event.

The court also rejected the U.S. Trustee's argument that the timing of the filing demonstrated an abuse. The court stated, *id.* at *6:

The U.S. Trustee asks this Court to consider the strategic decision by [the corporation] to not file a bankruptcy petition until after its sole shareholder filed his petition as if the professional planning is by itself an abuse or an indication of harm. Yet, the U.S. Trustee has failed to show how professional advice and deliberate planning of the timing of a bankruptcy petition is unlawful or abusive.

A debtor desiring to proceed in subchapter V must pay careful attention to the debts of any affiliate in a pending bankruptcy case, even if the debtor has no realizable interest in the affiliated entities in bankruptcy. In *In re Carter*, 2023 WL 9103614 (Bankr. N.D. Ga. 2023), the individual debtor owned 65 percent of one company that had been in bankruptcy for seven years and 99 percent of another that had been in bankruptcy for five years. Both had been pending under chapter 7 for five years, and their cases remained open.

Although the individual's debts were less than the debt limit, inclusion of the debts of the chapter 7 debtors put the debtor over the limit. The court rejected the debtor's contention that the two companies were not his affiliates because they were controlled by the chapter 7 trustees.

A debtor in such a situation might seek to avoid this result through divestment of the worthless ownership interests prior to the filing of a subchapter V case.

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C: Debt limit: whether debt is contingent or unliquidated

Debts for purposes of determining the debt limit for subchapter V eligibility do not include contingent or unliquidated debts. § 1182(1)(A).

In *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), the court concluded that claims for damages arising from the rejection of unexpired leases were contingent and that the debtor’s obligations under a note pursuant to the Paycheck Protection Funding Program of the CARES Act were both contingent and unliquidated. Excluding those debts from the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In *In re Macedon Consulting, Inc.*, 2023 WL 400484 (Bankr. E.D. Va. 2023), the court ruled that the entire, uncapped liability of the debtor for rent for the remainder of the lease term was noncontingent and liquidated.

The next subsection further discusses a debtor’s liability for future rent under a real estate lease for purposes of the debt cap.

In *In re Hall*, 650 B.R. 595 (Bankr. M.D. Fla. 2023), a creditor objected to the eligibility of the debtor and an affiliated corporation on the ground that their debts exceeded the debt limit. The debtors contended that the creditor’s debt should be excluded because it was disputed, and therefore unliquidated.

The court concluded that, under *United States v. Verdunn*, 89 F.3d 799 (11th Cir. 1996) (“vigorously disputed” tax penalties are liquidated), the existence of the dispute did not render the creditor’s claim unliquidated. The debtors’ pending adversary proceeding contesting the claim based on fraud in the inducement, intentional misrepresentation, negligent misrepresentation, and equitable subordination did not make the claim unliquidated.

The court summarized principles relating to determination of whether a debt is liquidated as follows, *id.* at 599:

“[C]ourts have generally held that a debt is liquidated if its amount is readily and precisely determinable, where the claim is determinable by reference to an agreement.” *United States v. May*, 211 B.R. 991, 996 [Bankr. M.D. Fla. 1997] (citing Collier on Bankruptcy, 15th Ed. At 1109.06[2][c] (March 1997)). Ordinarily, debts of a contractual nature are “subject to ready determination and precision in computation of the amount due” and, therefore, are considered liquidated, even if subject to a substantial dispute. *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008, 1014 (B.A.P. 8th Cir. 1997). By contrast, tort claims are generally unliquidated if not reduced to judgment. *Id.* The nature of “the process for determining the claim” dictates whether the claim is liquidated or unliquidated, not the magnitude of the dispute or the length of the trial required to resolve the dispute. *See id.*; *Nicholes v. Johnny Appleseed (In re Nicholes)*, 184 B.R. 82, 91 (B.A.P. 9th Cir. 1995) (“So long as a debt is subject to ready determination and precision in computation of the amount due, then it is considered liquidated and included for

eligibility purposes under § 109(e), regardless of any dispute.”); *see also In re Robinson*, 535 B.R. 437, 448 (Bankr. N.D. Ga. 2015) (“Generally, when a debt is owed pursuant to a contractual obligation it is liquidated.”).

D. Debt limit: debtor’s liability for future rent under a real estate lease

A debtor often has an unexpired lease for its business premises under which substantial future rent is due. For purposes of determining whether the debtor’s debts exceed the debt cap, two questions arise with regard to the obligation for future rent. The first is whether the obligation is contingent or unliquidated. The second is whether the amount for eligibility purposes is the total future rent that is due (*i.e.*, the entire rent reserved under the lease for its remaining term) or the amount that is allowable under § 501(b)(6) (*i.e.*, the greater of future rent for one year or 15 percent of future rent, not to exceed three years).

In *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), the court concluded that claims for damages arising from the rejection of unexpired leases were contingent because they did not arise unless the debtor rejected the leases. Excluding those debts from the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In *In re Macedon Consulting, Inc.*, 2023 WL 400484 (Bankr. E.D. Va. 2023), the court ruled that the entire, uncapped liability of the debtor for rent for the remainder of the lease term was noncontingent and liquidated. The court reasoned, *id.* at *4:

In this case, the debt at issue is liability under the Leases, and that liability arose pre-petition, on the dates the Leases were fully executed. For example, it could not be said that if the Debtor vacated the premises on the 31st of one month during the lease term, that it would not still owe the landlord for the next month and the remainder of the lease term. While it may be argued that the timing of payments is the future extrinsic event that may never occur, the Court disagrees. The timing of lease payments is simply that – timing. Absent the end of the world, we know the future date will occur. As a result, liability under the Leases must be considered noncontingent and liquidated, and the Debtor in this case is therefore above the debt limits for subchapter V, which are capped at \$7.5 million of aggregate noncontingent liquidated debts.

The court in *In re Zhang Medical P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y. 2023), declined to follow *Macedon Consulting* and concluded that claims for future rent were contingent and unliquidated. The court observed that an executory contract “‘represents both an asset (the debtor’s right to performance) and a liability (the debtor’s own obligation to perform).’”³³ Accordingly, the court continued, § 365(a) gives the debtor the option to assume or reject the executory contract or unexpired lease. *Id.* at *6.

³³ *Zhang Medical*, 655 B.R. 403, 411 (Bankr. S.D.N.Y. 2023), quoting *Mission Product Holdings, Inc. v. Tempnology, LLC*, ___ U.S. ___, 139 S.Ct. 1652, 1658 (2019).

If the debtor assumes the executory contract or unexpired lease, the court reasoned, the debtor's future obligations should not be considered "debts" for purposes of subchapter V eligibility because assumption means that the contract or lease is a net asset, *i.e.*, its benefit to the estate outweighs the debtor's future liability. *Id.* at *6. The court then explained that, until the debtor elects to assume or to reject, the amount and nature of the debtor's obligations are contingent and unliquidated. The court stated, *id.*:

Because the amount and nature of the debtor's obligations, as well as whether these are even "debts," depend on an uncertain event – the debtor's election to either assume or reject – any eventual debt is both contingent and unliquidated prior to that election.

Although the court thus determined that the debtor's obligations for future rent were not included in determining the amount of the debtor's debts, the court held that the existence of other debts made the debtor ineligible for subchapter V.

E. Debt limit: determination of amount of debt

In *In re Zhang Medical P.C.*, 655 B.R. 403, 409 (Bankr. S.D.N.Y. 2023) (citations omitted), the court stated:

The court may look both to the debtor's schedules and to creditors' proofs of claim. Proofs of claim are *prima facie valid*. Because the debtor bears the ultimate burden of proving its eligibility for subchapter V, proofs of claim that the debtor does not challenge may be deemed to be valid for subchapter V eligibility purposes.

See also In re Heart Heating and Cooling, LLC, 2024 WL 1228370 at *10-11 (Bankr. D. Col. 2024); *In re Hall*, 650 B.R. 595, 600 (Bankr. M.D. Fla. 2023); *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021).

The debtor has the burden of explaining discrepancies between the amounts of debts shown on its schedules when those amounts are less than those stated in proofs of claim, as well as the reasons for the reduction of debts in amended schedules. The failure to do so may cause a court to conclude that the debtor is manipulating the amounts of debts in its schedules in an effort to skirt the debt limitation for eligibility. *See In re Heart Heating and Cooling, LLC*, 2024 WL 1228370 (Bankr. D. Col. 2024).

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F. What debts "arise from" commercial or business activities

One of the requirements for subchapter V eligibility is that not less than 50 percent of the debtor's debts arise from the debtor's commercial or business activities.

In *In re Bennion*, 2022 WL 3021675 (Bankr. D. Idaho 2022), the court ruled that medical debts arising from injuries sustained by a debtor engaged in a “tree-felling” business while doing such work for his mother without charge did not arise out of commercial or business activities. The debtor, therefore, was not eligible for subchapter V because those debts exceeded his business debts.

In *In re Reis*, 2023 WL 3215833 (Bankr. D. Idaho 2023), the U.S. Trustee challenged debtor’s eligibility because almost all of her debt was for student loans incurred to enable her to go to medical school.

The debtor had graduated from medical school in 2009, completed her residency in 2012, and worked as an employee before creating a limited liability company in 2020 and opening her practice in 2021.

The court agreed with the courts that reject the proposition that working as an employee constitutes “commercial or business activities.”³⁴ The court reasoned, *id.* at * 6:

Here, the gap between incurring the debt and actually engaging in any sort of commercial or business activity as an owner is simply too great to find that the student loans at issue arose from Debtor’s commercial or business activities. While it is clear that Debtor hoped to earn income from the use of her medical degree, it was entirely unclear for a decade whether she had borrowed to follow a career path as an employee working for a hospital, as a business owner, or even in public service.

Accordingly, the court concluded that the student loans did not qualify as business debts and that she was ineligible for subchapter V.

The court observed that its holding did “not foreclose all debt which arises prior to a business opening, as supplies, product, and a space for the business often must be acquired prior to the actual opening, and there is the possibility that a debtor may open more than one business during his or her lifetime and incur debt in doing so.” *Id.* at *7.

The court also noted that it was not establishing a *per se* rule that student debt can never qualify as a debt arising from commercial or business activities. Rather, the court stated, “[T]he student loan debt at issue here, incurred over ten years prior to opening the medical practice, is simply too far removed for Debtor to qualify for Sub V relief.” *Id.* at *7.

³⁴ *E.g.*, *In re Rickerson*, 639 B.R. 416, 426 (Bankr. W.D. Pa. 2021); *In re Johnson*, 2021 WL 825156, at *7-8 (Bankr. N.D. Tex. 2021). *But see In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021). SBRA Guide § III(C)(2) discusses the cases.

G. “Nexus” between current commercial or business activities and debts arising from previous activities

SBRA Guide § III(E) discusses the debate over whether a nexus must exist between the debtor’s current commercial or business activities and debts arising from previous activities.

Other courts addressing the issue have reached opposite conclusions. The court in *In re Reis*, 2023 WL 3215833, at *4-5 (Bankr. D. Idaho 2023), concluded that no nexus is required but found the debtor was ineligible because the debt in question was not a business or commercial debt. The court in *In re Fama-Chiarizia*, 655 B.R. 48 (Bankr. E.D.N.Y. 2023) and *In re Fama*, 2023 WL 6131466 (Bankr. E.D.N.Y. 2023) (discussed *supra* § XVII(A)), held that a nexus is not required and that the debtor was eligible.

In re Hillman, 2023 WL 3804195, at *4-5 (Bankr. N.D.N.Y. 2023), concluded that a nexus is required and that it existed in the case.

H. Single asset real estate debtor

A debtor is not eligible for subchapter V if its primary activity is the business of owning “single asset real estate.” § 1182(1)(A). Section 101(51B) defines “single asset real estate” as “real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.”

The court in *In re Evergreen Site Holdings*, 625 B.R. 307 (Bankr. S.D. Ohio 2023), found from the evidence that a debtor who owned two adjacent properties was not using the properties together in a common scheme and that the debtor would likely conduct substantial business on the properties other than leasing them and collecting rent. Accordingly, the court concluded that the debtor had established its eligibility for subchapter V.

In *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023), a single-asset real estate debtor filed a subchapter case shortly after an affiliate filed its own subchapter V case. The debtor argued that, although it was an excluded single asset real estate debtor, it was nevertheless eligible for subchapter V as an affiliate of an eligible subchapter V debtor. The court concluded that the plain language of the statute “expressly excludes SARE debtors, regardless of whether they are affiliates of Subchapter V debtors.” *Id.* at *6.

In contrast, the court in *In re Bridle Path Partners, LLC*, 2024 WL 86601 (Bankr. D. Utah 2024), ruled that a debtor was a single asset real estate debtor when its business was the development in four phases of an equestrian community to include residential lots, open space, riding trails, and riding facilities on seven parcels of land acquired at various times with different financing. The court rejected the debtor’s contention that the development involved several economic enterprises, concluding that the debtor’s “clear intent [was] to create a master-planned

recreational development for a mountain-based community” that was a “cohesive, unified project.” *Id.* at *4.

I. Time for objecting to eligibility; authority of court to raise eligibility issue *sua sponte*

In *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023), discussed in the preceding subsection, the court concluded that it had the authority to raise the question of the eligibility of a debtor *sua sponte* even after expiration of the deadline for objections to eligibility under Bankruptcy Rule 1020(a).

The court in *In re 2202 East Anderson St., LLC*, 2024 WL 1340655 at * 5 (Bankr. C.D. Cal. 2024), noted that an objecting party may waive an objection to subchapter V eligibility and that the court has the authority to approve a stipulation permitting a case to proceed under subchapter V even when the debtor does not satisfy the requirements for subchapter V eligibility.

J. A determination of ineligibility does not “revoke” the election

In ruling that a debtor is not eligible for subchapter V, some courts have stated that the election is “revoked.” *E.g.*, *In re Carter*, 2023 WL 9103614 (Bankr. N.D. 2023); *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023). The terminology is inaccurate.

Interim Bankruptcy Rule 1020(a) provides that the debtor must state on the petition whether it is a debtor as defined in § 1182(1) and whether it elects to proceed under subchapter V. The rule further provides that the case proceeds in accordance with the debtor’s statement “unless and until the court enters an order finding that the debtor’s statement is incorrect.”

Section 103(i) provides that subchapter V applies “only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of chapter 11 shall apply.” Official Forms 101 and 201 each require a debtor to state (by checking the appropriate box) that the debtor is a debtor “according to the definition in § 1182(1) of the Bankruptcy Code.”

If a court determines that the debtor is incorrect in its statement that the debtor is a debtor as defined in § 1182, therefore, the provisions of subchapter V are inapplicable under § 103(i). As a result, the proper remedy for the debtor’s incorrect statement is for the court to determine that the provisions of subchapter V do not apply and that the case will proceed as a non-subchapter V case.

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XVII. Conversion of Chapter 12 Case to Subchapter V; Creditor Request for Conversion of Chapter 7 Case

In chapter 12 cases, § 1208 governs conversion or dismissal to another chapter. Section 1208(a) permits the debtor to convert the case to chapter 7, and § 1208(b) provides for dismissal

of the case at the request of the debtor, if the case has not previously been converted from chapter 7 or chapter 11. Section 1208(c) permits dismissal for cause, and section 1208(d) provides for dismissal or conversion to chapter 7 for cause. Section 1208(e) prohibits conversion to another chapter if the debtor may not be a debtor under such chapter.

Section 1208 does not have any provision that permits conversion to chapter 11. Some courts have held that a debtor may not convert from chapter 12 to chapter 11, while others have permitted it. *See, e.g., In re Cardwell*, 2018 WL 4846520 (Bankr. N.D. Tex. 2018) (permitting conversion and collecting cases); *In re Colon*, 2016 WL 35498821 (Bankr. D. P.R. 2016) (not permitting conversion and collecting cases); W. Homer Drake, Jr., and Karen D. Visser, *BANKRUPTCY PRACTICE FOR THE GENERAL PRACTITIONER* § 14:8 & nn. 9 & 10.

The court in *In re Leonaggeo* 2023 WL 3638053 (Bankr. S.D.N.Y. 2023), denied the chapter 12 debtor's request to convert to subchapter V, which she sought as an alternative to dismissal based on ineligibility for chapter 12. The court reasoned, *id.* at *4:

In the Second Circuit, when the plain meaning of the statute fails to clarify ambiguity, Courts look to legislative history. *United States v. Jones*, 965 F.3d 190, 195 (2d Cir. 2020). While some Courts read the statute to be permissive, there is nothing in the legislative history suggesting that Congress intended for a chapter 12 debtor to convert to chapter 11. *See In re Orr*, 71 B.R. 639 (Bankr. E.D. N.C. 1987); *Matter of Bird*, 80 B.R. 861 (Bankr. W.D. Mich. 1987); *In re Johnson* 73 B.R. 107 (Bankr. S.D. Ohio 1987). This Court declines to accept the permissive reading and finds that conversion from chapter 12 to chapter 11 subchapter V is not possible under section 1208 of the Bankruptcy Code.

The *Leonaggeo* court noted that the debtor might choose to file a new case under subchapter V and cautioned that the automatic stay would not go into effect under § 362(c)(4) because it would be the debtor's third case within a year.

The court in *In re Powell*, 2022 WL 10189109 (Bankr. M.D. Pa. 2022), noted that it had denied the chapter 12 debtor's motion to convert to subchapter V in connection with its dismissal of the case.

A creditor sought conversion of a corporate debtor's chapter 7 case to subchapter V in *In re Roberson Cartridge Co., LLC*, 2023 WL 2393809 (Bankr. N.D. Tex. 2023). Acknowledging that § 706(b) permits conversion of a chapter 7 case to a chapter 11 case on request of a creditor or other party in interest, the court concluded that it could not order conversion to a case under subchapter V because only the debtor may elect its application.

XVIII. Property of the estate and automatic stay after cramdown confirmation

Section 1186(a) provides that, after cramdown confirmation under § 1191(b), property of the estate includes, in addition to property specified in § 541, postpetition earnings and property that the debtor acquires postpetition. See SBRA Guide Part XI.

In *In re Chesney*, 2023 WL 8855242 (Bankr. W.D.N.C. 2023), the court considered the request of a creditor with a nondischargeable debt for relief from the automatic stay after confirmation of a cramdown plan to collect its judgment from a substantial commission that the debtor could become entitled to as the personal representative of the estate of a friend who had died about four months after the filing of the subchapter V case. (The court rejected the creditor's contention that the commission was a bequest or devise within six months after the filing of the case that was property of the estate under § 541(a)(1) that the debtor failed to disclose.)

The court noted that the debtor's receipt of a commission during the plan term would be property of the estate under § 1186(a) that she would have to disclose on an amendment to her schedules³⁵ but that only the debtor may seek postconfirmation modification of a plan and that it was "doubtful" that she would have an obligation to modify her plan to increase plan payments. *Id.* at *4. (The court observed that § 363(b) continued to apply so that "any out of the ordinary uses of estate property" would require notice to creditors and court approval. *Id.* at *6 n. 3.)

Because the commission would be property of the estate and the debtor would not receive her discharge until completion of payments under the plan under § 1192, the court explained, the automatic stay continued to apply to protect the commission. *Id.* at *6. The court declined to lift the stay to permit the creditor to enforce its claim against the commission, concluding that it would be inequitable to do so because it would give the creditor "an unfair advantage over other creditors."

The court reasoned, *id.* at *6:

One might reasonably ask why, if the plan cannot be modified to claim the newly received asset, what is the harm in permitting a creditor with a nondischargeable debt to seek it outside of bankruptcy? Certainly, it is not to permit the Debtor a windfall. Rather, it has to do with the success of the Confirmed Plan. For creditors with dischargeable debts, payment is dependent on the success of [the Debtor's] plan. And while these

³⁵ Courts consistently state that a debtor must file an amendment to disclose postpetition assets or income despite the fact that no such requirement exists in the Bankruptcy Code or Bankruptcy Rules. Bankruptcy Rule 1007(h), which requires a debtor to disclose the postpetition acquisition of an interest in property, applies only to interests in property under § 541(a)(6). See generally W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 16:7 at 362-63.

prospective monies were not in prospect at the time of confirmation, before that three-year plan is completed, these monies may be necessary to fund plan payments.

[The Debtor] is currently 71 years old. At her age, one cannot gainsay that she will be able to continue to work for the entire plan term, nor that her employer . . . will continue to be able to pay her. If not, [the Debtor] may need the decedent's estate commission to pay living expenses and to fund plan payments. Many individual debtors fund plan payments out of monies which are exempt and otherwise unreachable by creditors. Given this possibility, it would be improvident at this point in time to afford one unsecured creditor exclusive rights to these potential funds.

The court stated that its order was without prejudice to renewal of the request for stay relief if and when the Debtor received the commission.

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XIX. Modification of Residential Mortgage in Subchapter V Cases

SBRA Guide § VII(B) discusses the provisions of § 1190(3), which provides an exception to the rule of § 1123(b)(5) that a plan in a chapter 11 case may not modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence. Section 1190(3) permits modification if the debtor received new value in connection with the granting of the security interest that was not used primarily to purchase or acquire the real property and the new value was used primarily in connection with the small business of the debtor.

Chapter 13 also contains a prohibition on modification of a residential mortgage in § 1322(b)(2). Section 1322(b)(5), however, permits a chapter 13 plan to provide for the cure of arrearages, maintenance of installment payments during the case, and reinstatement of the maturity of the mortgage.

If § 1190(c)(3) is inapplicable, then the usual rule of § 1123(b)(5) governs. In a non-subchapter V case, the court in *In re Jacobs*, 644 B.R. 883 (Bankr. D. N.M. 2022), considered whether a chapter 11 plan, like a chapter 13 plan, can provide for the postconfirmation cure of arrearages and reinstatement of maturity. Noting that courts have disagreed on this issue, the court concluded that the only way for a chapter 11 plan to deal with defaults under a residential mortgage subject to § 1123(b)(5) is for the claim to be unimpaired under § 1124, which requires the cure of all arrearages prior to the effective date of the plan. The court discussed and rejected the view of some courts that permit the postconfirmation cure of arrearages under a residential mortgage in a chapter 11 case.

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XX. Technical Amendments to Eligibility Requirements (CARES Act and BTATCA)

As originally enacted by SBRA, paragraph (B)(iii) of the eligibility requirement for subchapter V (then § 101(51D), now § 1182(1) until June 20, 2024) excluded any corporation that was subject to the reporting requirements of the Securities and Exchange Act and was an affiliate of the debtor. SBRA § 4(a)(1)(B). Paragraph (B)(ii), however, already excluded a corporation subject to the reporting requirement. For a discussion of the issues relating to this provision, see Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankr. Law Letter, no. 10, Oct. 2019, at 7.

It appears the intent of the provision was to exclude from eligibility a public company and any of its affiliates. The CARES Act made a technical correction to (B)(iii) in an effort to accomplish this. The revised (B)(iii) excluded “any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c)).”

The Cares Act amendment created problems. Section 3(8) of the Securities Exchange Act defines an “issuer” as “any person who issues or proposes to issue any security.” 15 U.S.C. § 78c(a)(8). Section 3(10) broadly defines “security” as including, among other things, any “stock,” “certificate of interest or participation in any profit-sharing agreement,” or “investment contract.” 15 U.S.C. § 78c(a)(10).

Read broadly, the exclusion for the affiliate of an issuer under the CARES Act version of (B)(iii) would render ineligible any debtor that is an affiliate of any corporation or other limited liability entity. By definition, stock in a corporation or an interest in a limited liability entity is a “security.” Thus, for example, if an individual has a sufficient equity interest in two or more such entities to qualify as an “affiliate” under § 101(2), all of the affiliates would be disqualified. Similarly, if one entity is an affiliate of another, neither could be a small business or subchapter V debtor.

The court in *In re Phenomenon Marketing & Entertainment, LLC*, 2022 WL 1262001 (Bankr. C.D. Cal. 2022), applied this reading of the statute to conclude that a limited liability company was not eligible to be a subchapter V debtor because affiliates of the debtor were “issuers.” One of the affiliates was the sole member of the debtor, and another affiliate was the sole member of the debtor’s member.

The court ruled that the affiliates were “issuers” under the Securities Exchange Act even though the securities were not publicly traded. *Id.* at *3-4. The court ruled that the plain meaning of the statute required the result and that it was not absurd. *Id.* at *5.

Congress could not have intended this result. The appropriate interpretation of the CARES Act version of (B)(iii) would limit its application to an affiliate of an issuer that is subject to the reporting requirements specified in (B)(ii). See Mark T Power, Joseph Orbach, and Christine Joh, et al., *Not so Technical: A Flaw in the CARES Act’s Correction to “Small Business Debtor”*, 41-Feb. Amer. Bankr. Inst. J. 32, 33 (2022) (“It is evident that Congress intended to exclude from subchapter V eligibility public companies, including affiliates.”).

The Bankruptcy Threshold Adjustments and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) made a further technical amendment to subparagraph (B)(iii). As amended, the statute excludes an affiliate of a public company rather than an affiliate of an issuer. Because the amendment applies retroactively, the *Phenomenon Marketing* court later entered an order, *In re Phenomenon Marketing & Entertainment, LLC*, 2022 WL 3042141 (Bankr. C.D. Cal. 2022), permitting the debtor to proceed under subchapter V, thus replacing its earlier ruling.

BTATCA also amended subparagraph (B)(1) to make it clear that application of the debt limit to the aggregate debts of affiliates applies only to affiliates that are debtors in a bankruptcy case.

XXI. Miscellaneous Matters of Interest

1. Good faith; minimal distributions. A subchapter V plan providing for minimal distributions to unsecured creditors may establish lack of good faith that § 1129(a)(3) requires for confirmation. *In re Hao*, 644 B.R. 339, 348. (Bankr. E.D. Va. 2022).

2. Death of debtor. Death of debtor prior to confirmation may result in conversion to chapter 7. *In re Landau*, 2022 WL 4647473 (Bankr. D. Kan. 2022). The court discusses standards for determining whether a subchapter V case might continue upon the death of the debtor.

3. Plan must provide for prosecution of potentially valuable claims. If potentially valuable avoidance or other claims exist that could be prosecuted for the benefit of the estate, the “best interests of creditors” test of § 1129(a)(7) requires that a plan provide for their prosecution or grant derivative standing to other interested parties to pursue them if the debtor does not. *In re Lapeer Aviation, Inc.*, 2022 WL 7204871 (Bankr. E.D. Mich. 2022).

4. Payment of debtor’s counsel upon dismissal. In *In re Bartley*, 2023 WL 1768415 (Bankr. W.D. Okla. 2023), the court allowed attorney’s fees to debtor’s counsel and “authorized and directed” the debtor to pay them in connection with the dismissal of the debtor’s case. When the debtor did not pay the fees, the lawyer sought to collect the fees by filing a motion for the court to hold the debtor in contempt for failure to pay the fees. The court abstained from considering the motion, concluding that the order was essentially a monetary judgment for which contempt is not an appropriate remedy and that enforcement was more appropriately a matter for the state courts.

5. Bad faith bankruptcy filing. The filing of a subchapter V case on the eve of a hearing on damages in state court litigation to stay the litigation and to obtain release of the debtor from jail without complying with the state court’s civil contempt orders in a two-party case is a “textbook example” of a bad faith bankruptcy filing, resulting in its conversion to chapter 7. *In re Roberts*, 644 B.R. 220, 229 (Bankr. D. Col. 2022).

6. Adequacy of debtor’s financial projections. “Nothing in the Code requires an audit or independent verification of a debtor’s financial projections. ‘The creation of a liquidation analysis and financial projections is not an exact science, so the Courts typically defer to the debtors’ projections, subject to cross-examination and/or a competing set of projections.’” *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), quoting *In re Lost Cajun Enters., LLC*, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

7. Plan must deal with nondischargeable claims. In *In re Jaramillo*, 2022 WL 4389292, at * 3 (Bankr. D. N.M. 2022), the debtor converted his case from chapter 13 to subchapter V in order to deal with nondischargeable debts, including student loans. In identifying numerous classification problems in the plan, the court noted that a plan cannot lump student loan debt with general unsecured claims and discharge it. If that were not the intent, the court indicated, the failure to separately classify and treat the student loan prevented confirmation. *Id.* at *3.

8. Reported confirmation orders entered after resolution of objections. A number of confirmation orders have been reported that do not resolve objections but address confirmation requirements. Some include other provisions (such as releases and exculpations). *** *In re Gilbert*, 2023 WL 5123245 (Bankr. D. Utah 2023) (consensual confirmation; all impaired classes have accepted or did not vote or object to confirmation); *In re Raspberry Creek Fabrics, LLC*, 2023 WL 8606662 (Bankr. D. Utah. 2023) (same); *In re Little Road Co., LLC*, 2023 WL 7008981 (D. Utah 2023) (same); *In re KW Excavation, Inc.*, 2023 WL 7381529 (Bankr. D. Utah (same) *In re Gage’s Granite LLC*, 2023 WL 5422253 (Bankr. N.D. Tex. 2023) (consensual confirmation); *In re Mulvadi Corp.*, 2023 WL 2023 WL 6798625 (Bankr. D. Hawaii 2023) (cramdown confirmation); *In re Matthews*, 2023 WL 6280219 (Bankr. E.D. Wash. 2023); *In re ATH Sports Nutrition, LLC*, 2023 WL 6284544 (Bankr. D. Haw. 2023). ### *In re Bitter Creek Water Supply Corp.*, 2023 WL 2962206 (Bankr. N.D. Tex. Apr. 14, 2023) (consensual plan confirmation; order provides that, if case is converted, all property will automatically vest in chapter 7 estate); *In re Jess Hall’s Serendipity, LLC*, 2023 WL 3635068 (Bankr. N.D. Tex. 2023) (consensual plan confirmation order including provisions for third party releases and approval of insider settlement); *In re SRAK Corp.*, 2023 WL 2589252 (Bankr. N.D. Tex. 2023) (consensual confirmation); *In re Associated Fixture Manufacturing, Inc.*, 2023 WL 1931301 (Bankr. D. Utah 2023) (consensual confirmation); *In re Higgins AG, LLC*, 2023 WL 3745100 (Bankr. N.D. Tex. 2023) (consensual plan confirmation; includes provisions for third party releases); *In re iVidex*, 2022 WL 5264710 (Bankr. W.D.N.Y. 2022) (cramdown confirmation; trustee to make payments); *In re ActiTech*, 2022 WL 6271936 (Bankr. N.D. Tex. 2022) (plan attached to order; order provides for approval of settlement, releases, and exculpation); *In re North Richland Hills Alamo, LLC*, 2022 WL 2975121 (Bankr. N.D. Tex. 2022); *In re Logistics Giving Resources, LLC*, 2022 WL 2760126 (Bankr. D. Utah 2022).

9. Subchapter V’s purposes and procedures may be a factor in resolving non-subchapter V issues.

In *Hawkes v. Automated Recovery Systems of New Mexico, Inc. (In re Automated Recovery Systems of New Mexico, Inc.)*, 2022 WL 17184548 (Bankr. D. N. Mex. Nov. 2022), the subchapter V debtor removed from the state court a class action that alleged that its filing of collection actions in its own name, even though it did not own the claims, was the unauthorized practice of law. The plaintiffs requested that the bankruptcy court abstain. The court determined that the lawsuit was a core proceeding so that mandatory abstention was not required. The court decided that permissive abstention was not appropriate, in part because of the need for a prompt resolution of the dispute. The court noted that subchapter V cases are intended to proceed expeditiously.

In *In re Major Model Management, Inc.*, 641 B.R. 302 (Bankr. S.D.N.Y. June 21, 2022), the court declined to permit the filing of a proof of claim on behalf of a class under Rule 23 of the Federal Rules of Civil Procedure. The court noted that an independent trustee serves in subchapter V cases to provide “oversight and guidance” to the court and the parties and agreed with the subchapter V trustee’s views at the hearing that the most efficient way to deal with the claims of the putative class members was through the claims objection process.

The court in *In re Hal Luftig Company, Inc.*, 2023 WL 8522603 (Bankr. S.D.N.Y. 2023), *recommendation rejected*, 2024 WL 1197702 (S.D.N.Y. 2024), discussed *infra*, relied on subchapter V’s purposes in approving third-party releases.

###

10. Debtor as disbursing agent after cramdown confirmation. SBRA Guide § IX(C) notes that some courts permit the debtor to make plan payments after cramdown confirmation under § 1191(b). Section 1194(b) requires the trustee to make disbursements after cramdown confirmation, unless the plan or confirmation order provides otherwise. In *In re Creason*, 2023 WL 2190623 (Bankr. W.D. Mich. 2023), the court permitted the debtor to serve as the disbursing agent after cramdown confirmation.

11. Third-party releases. For a discussion of third-party releases and procedures in a subchapter V context, see *In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. 2023) (discussing procedures for creditors to “opt in” or “opt out” of provisions for third party releases).

Two courts have approved provisions in a subchapter V plan for the release of claims of creditors against principals of the debtor in exchange for a contribution to the plan.

In *In re Kalos Capital, Inc.*, 2023 WL 7179265 (Bankr. N.D. Ga. 2023), the court confirmed a plan providing for the release of claims of certain creditors against the principals when affected creditors overwhelmingly supported the plan.

In *In re Hal Luftig Company, Inc.*, 655 B.R. 508 (Bankr. S.D.N.Y. 2023), *recommendation rejected*, 2024 WL 1197702 (S.D.N.Y. 2024), the bankruptcy court approved third-party releases over the objection of the only creditor covered by the release. The *Luftig* court concluded that the absence of “overwhelming support” for the release by affected creditors was of “little weight” in applying the factors governing third-party releases because subchapter V “itself contemplates the confirmation of a plan without the consent of any creditor” and because the plan was “the best possible means of enabling [the creditor’s] recovery. Put differently, [the creditor] has not identified – and the Court has not found – a tangible financial harm that would result from the approval of a third-party release.” 655 B.R. at 547.

The bankruptcy court made its ruling as proposed findings of fact and conclusions of law. The district court rejected the bankruptcy court’s recommendation for confirmation of the plan with the releases. *In re Hal Luftig Company, Inc.* 2024 WL 1197702 (S.D.N.Y. 2024). The district court concluded that the creditor’s objection “must be given significant, if not controlling weight.” *Id.* at *3.

12. Objection to chapter 7 discharge of individual based on alleged fraudulent conduct as sole member of subchapter V debtor during the subchapter V case prior to plan confirmation. After the court confirmed a subchapter V plan without objection, the sole member of the subchapter V debtor filed a chapter 7 case. Creditors filed a complaint objecting to his discharge based on his allegedly fraudulent conduct during the subchapter V case. The court denied the member’s motion to dismiss the complaint. The court held that the confirmation order was not res judicata as to these issues because it dealt with different issues and that the court could not determine at this stage of the case whether collateral estoppel applied based on the finding of good faith in the confirmation order. The court also concluded that the exculpation clause in the plan by its terms did not shield the member from claims based on willful misconduct or gross negligence, as the complaint alleged. *Bleznick v. DePaolo (In re DePaolo)*, 2023 WL 2482723 (Bankr. D. N.J. 2023). *See also In re Keevers*, 2023 WL 4921566 (Bankr. D. N. H. 2023) (Objection to discharge in chapter 7 case of couple, converted from subchapter V, based on improper disclosures and reporting regarding real estate commissions received by entity owned by one of the debtors based on his services).

13. Material default under confirmed plan. The provisions of the debtor’s plan, extensively negotiated with the creditor, provided for payments to be made electronically and received by a date certain. The debtor missed the first plan payment, and the creditor declared a default, which the debtor attempted to cure with a check. The subchapter V trustee and the debtor filed a motion for the court to require the creditor to accept the payment. The creditor stated it would agree to accept the payment if it received prompt payment of its attorney’s fees. The debtor contended that attorney’s fees should not be required because the default was not material.

The court determined that the default was material and awarded attorney's fees. *In re Ace Holding, LLC*, 2023 WL 4412184 (Bankr. N.D.N.Y. 2023). The court reasoned:

Based upon the prior defaulted payment agreements, unending state court litigation and multiple bankruptcy filings, the Debtor should have been ready, willing and able to commence both plan payments as well as maintain the ongoing monthly fees to this Creditor. Moreover, as previously noted, Schedule A's terms are the result of extensive negotiations and their attendant costs. Thus, any default based upon a late payment or a payment not made in the proper manner is material.

14. A subchapter V case is a chapter 11 case. Two cases serve as a reminder that a subchapter V case is a chapter 11 case.

In *In re Ruby-Gordon, Inc.*, 2023 WL 8252356 (Bankr. W.D.N.Y. 2023), the court denied an ex parte application by the debtor for authority to use cash collateral filed seven days after the filing of the case because the request failed "in every respect" to comply with the requirements of Bankruptcy Rule 4001(b)(1)-(3). The court noted that the debtor had filed no "first day motions," which it described as a "troubling situation," and that the debtor's unauthorized use of cash collateral was "cause for much concern."

In *In re Golexis*, 2024 WL 134791 (Bankr. D. Utah 2024), the court declined to authorize compensation for debtor's counsel for services rendered prior to the filing of the application for approval of employment, which occurred almost two weeks after the filing of the petition. The court ruled that retroactive approval of employment for services prior to the filing of the application is permissible only in "the most extraordinary circumstances" and found none.

15. An order converting a case to chapter 7 is a final appealable order. *In re California Palms Addiction Recovery Campus, Inc.*, 87 F.4th 734 (6th Cir. 2023).

16. Absolute priority rule in traditional case of individual. The court in *In re Joseffy*, 654 B.R. 747 (S.D. Fla. 2023), ruled that the absolute priority rule applies in a traditional chapter 11 case of an individual and explains why the absolute priority rule does not prohibit the individual from retaining exempt property under the plan. "Because a debtor does not retain exempt property under a plan on account of his or her junior claim or interest, an individual chapter 11 debtor does not violate the absolute priority rule by receiving or retaining exempt property." *Id.* at 760-61.

17. Objection to discharge of debtor not engaged in business. In *In re Lucido*, 2023 WL 5962839 (Bankr. N.D. Cal. 2023), a creditor objected to the subchapter V discharge of an individual who had proposed a liquidating plan. In a traditional chapter 11 case, § 1141(d)(3) provides for denial of discharge upon confirmation of a plan providing for the liquidation of all or substantially all of the debtor's assets if the debtor does not engage in business after confirmation.

The court stated that § 1141(d)(3) could deprive the debtor of a discharge regardless of whether consensual or cramdown confirmation occurred. The court concluded, however, that the provision was not applicable because the evidence showed that the debtor would have income from employment, consulting, and social security after confirmation. The court ruled that the debtor's business after confirmation did not have to be the same as the debtor's prepetition business and that income from engaging in business did not have to be sole source of funds for a debtor to be engaged in business in order to be engaged in business for purposes of § 1141(d)(3).

It is uncertain whether § 1141(d)(3) applies after cramdown confirmation. See COLLIER ON BANKRUPTCY ¶ 1192.03[3].

18. Subchapter V cases involving cannabis. In *In re Arts District Patients Collective, Inc.*, 2023 WL 5546920 (Bankr. C.D. Cal. 20223), the U.S. Trustee sought dismissal of the subchapter V case because the debtor's business was the sale of cannabis. The debtor did not oppose dismissal of the case because reorganization was not possible. Without addressing whether ownership of cannabis-related assets required dismissal, the court dismissed it.

In *In re Hacienda Company, LLC*, 654 B.R. 155 (Bankr. C.D. Cal. 2023), the debtor had discontinued its own cannabis operations prior to the filing of the petition but retained a 9.4 interest in a Canadian company engaged in the cannabis business, including operations in the United States. The debtor proposed a plan for the liquidation of its interest.

The U.S. Trustee sought dismissal of the case on the ground that the debtor's ownership of an interest in the Canadian company involved the debtor in a conspiracy to violate federal law. The court denied the motion.

The court reasoned, *id.* at 166:

[T]his Bankruptcy Court does not interpret Congress' mandate that this Bankruptcy Court "shall" dismiss or convert a bankruptcy case for "cause" under § 1112(b) to mean that any violation of criminal law requires dismissal. Rather, this Court interprets the statute as giving discretion to determine whether dismissal is warranted based on all the facts and circumstances.

The court reasoned that it must "exercise its discretion to determine whether, given all of the facts and circumstances, a debtor's connection to cannabis profits and any past or future investment in cannabis enterprises warrants dismissal of this bankruptcy case." *Id.* at 166. The court ruled that the U.S. Trustee had not established sufficient cause for dismissal in view of the facts that (1) the debtor's connection with any violation of the Controlled Substances Act or any other law was indirect; (2) the debtor intended to liquidate its assets and pay creditors; and (3) the bankruptcy case benefitted all parties in interest, including creditors. *Id.*

19. Appointment and compensation of subchapter V trustee. Confirming what appears to be universal practice, the court in *In re Robert J. Armbruster, Inc.*, 653 B.R. 461 (Bankr. E.D. Mo. 2023), in an opinion denying a motion to reconsider various rulings, noted that

it had awarded compensation to the subchapter V trustee based on 330(a)(1) and had overruled objections that U.S. Trustee should have appointed a standing trustee under 28 U.S.C. § 586(b) and that § 586(b) limits compensation to five percent of payments under confirmed plan.

20. Obligations under merchant credit agreement are noncontingent and liquidated, even when debtor disputes the obligations. *In re Heart Heating and Cooling, LLC*, 2024 WL 1228370 at *10-11 (Bankr. D. Col. 2024), the court concluded that the obligations of the debtor arising from a number of “merchant credit agreements” were neither contingent nor unliquidated.

21. Confirmation of plan providing for releases of claims against insiders for fraudulent transfer and claims of debtor against directors for breaches of fiduciary duties is appropriate over objection of creditor in exchange for \$25,000 is appropriate when under § 1123(b) (permitting plan to provide for “settlement or adjustment of a claim or interest belonging to the debtor or to the estate”) when the release is “a valid exercise of the debtor’s business judgment, is fair, reasonable, and in the best interests of the estate.” *In re Alecto Healthcare Services, LLC*, 2024 WL 1208355 at * 6 (Bankr. D. Del. 2024) (interior quote and citation omitted).

22. Automatic stay issues in case filed after dismissal of earlier subchapter V case. Section 362(n) provides that the automatic stay does not apply in the case of a debtor who is in a small business case pending at the time of the filing of the petition or who was a debtor in a small business case that was dismissed, or in which a plan was confirmed, within the previous two years. A subchapter V case, however, is not a small business case. Accordingly, section 362(n) does not apply in the case of a debtor filed after dismissal of a subchapter V case or confirmation of a plan in a subchapter V case.

In *In re Pacific Panorama, LLC*, 2024 WL 696226 (Bankr. D. Nev. 2024), the court granted the creditor’s motion in a subchapter V case for so-called *in rem* relief under § 362(c)(4), which provides that the automatic stay does not apply with regard to real property in any case filed within two years after entry of an order finding that the case was filed as part of a scheme to delay, hinder, or defraud a creditor.

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FINAL REPORT OF THE AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE

THE AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE

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AMERICAN BANKRUPTCY INSTITUTE

2023 – 2024

FINAL REPORT AND RECOMMENDATIONS

AMERICAN BANKRUPTCY INSTITUTE

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FINAL REPORT OF THE AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE

The ABI Task Force undertook a year-long, in-depth study of Subchapter V of Chapter 11 of the Bankruptcy Code. The Task Force studied the statute and related case law, analyzed empirical data, and heard directly from the major constituents affected by Subchapter V. This Report details the Task Force's key findings and recommendations. Overall, the information reviewed by the Task Force overwhelmingly shows that Subchapter V is working as Congress intended, allowing smaller companies to reorganize their businesses and to make payments to their creditors. The Task Force's study also revealed, however, certain practices and procedures that may benefit from further refinement or statutory amendment. Accordingly, this Report not only highlights key takeaways from the Task Force's study but also offers best practices and potential statutory amendments for policymakers, judges, and practitioners to consider.

I. Introduction

Smaller businesses are the core of the U.S. economy. In 2023, the United States was home to approximately 33.2 million small businesses, which employed over 61 million people representing 46% of private sector employees.¹ Approximately 50 percent of those businesses fail within the first five years of operation, and approximately 70 percent fail before their tenth anniversary.² Common reasons cited for such failures include insufficient capital, a faulty business model or infrastructure, and inadequate or inexperienced management. These challenges are not unique to smaller businesses, and larger companies frequently use Chapter 11 of the U.S. Bankruptcy Code to address them.

Many in the bankruptcy field, however, found standard Chapter 11 ineffective for smaller businesses. The research documenting the reorganization challenges for smaller businesses began around thirty years ago. Reorganization through Chapter 11 proved costly and time-consuming, and many smaller businesses were unable to use it successfully or did not try, choosing to liquidate in state

1 Small Business Administration, *Frequently Asked Questions About Small Businesses* (March 2023), <https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf>.

2 See Bureau of Labor Statistics, *Business Development Dynamics, Entrepreneurship and the U.S. Economy*, http://www.bls.gov/bdm/entrepreneurship/bdm_chart3.htm (documenting, by percentage, the survival rates of establishments by year started and number of years since starting from 1994 through 2015); Chamber of Commerce, *Small Business Statistics*, <https://www.chamberofcommerce.org/small-business-statistics/> (last accessed March 22, 2024) (50% of small business fail every year).

court proceedings and close the business.³ Recognizing these challenges early, U.S. Bankruptcy Judge Thomas Small deployed an innovative “fast-track” Chapter 11 process for smaller businesses in North Carolina in the 1980s.⁴

With increasing study and research,⁵ proposals for change gained momentum. The National Bankruptcy Review Commission (NBRC), established pursuant to the Bankruptcy Reform Act of 1994,⁶ evaluated proposals concerning smaller business bankruptcy and recommended reforms specifically tailored to the concerns of small business cases.⁷ In 2014, the American Bankruptcy Institute’s Commission to Study the Reform of Chapter 11 (the Chapter 11 Commission) built on this earlier work. Like the earlier NBRC, the Chapter 11 Commission obtained the input of bankruptcy judges and bankruptcy professionals knowledgeable about the small- and middle-market cases, examined the issues identified as barriers to effective reorganizations for these entities, and recommended the creation of an alternative restructuring scheme which would eliminate or minimize these barriers.⁸ The work of these commissions, along with the efforts of many others, led to necessary legislative reform in 2019.

Congress enacted the Small Business Reorganization Act of 2019 (SBRA) on August 23, 2019, to facilitate the reorganization of smaller business debtors in the United States.⁹ The SBRA, codified as Subchapter V of Chapter 11 of the Bankruptcy Code, became effective on February 19, 2020.¹⁰ Subchapter V’s goal is to provide eligible business debtors with a quicker, less costly, and more feasible path to reorganization than a standard Chapter 11 case.¹¹

Many debtors have availed themselves of Subchapter V. As of February 29, 2024, almost 7,500 Subchapter V cases have been filed,¹² representing more than a quarter of all Chapter 11 cases filed

3 See, e.g., Am. Bankr. Inst. Comm’n to Study the Reform of Chapter 11, 2012-2014, Final Rep. & Recommendations (2014) 282–283, <http://commission.abi.org/full-report>, [hereinafter “Chapter 11 Commission Report”] (reporting anecdotal evidence that distressed companies were increasingly turning to state law remedies (e.g., receiverships and assignments for the benefit of creditors) and equity receivership law with greater frequency); Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. Legal Stud. 255, 256, 300 (2009) (finding that around 80 percent of small businesses used state law procedures to liquidate or reorganize during the period of study).

4 Hon. A. Thomas Small, U.S. Bankruptcy Judge for the Eastern District of North Carolina (retired), *Small Business Bankruptcy Cases*, 1 Am. Bankr. Inst. L. Rev. 305 (1993) (describing the fast-track procedure); see also Hon. A. Thomas Small, *Small Business Reorganization Chapter*, 4 Am. Bankr. Inst. L. Rev. 550 (1996) (recommending a small business reorganization chapter modeled after Chapter 12).

5 See, e.g., Anne Lawton, *Chapter 11 Triage: Diagnosing a Debtor’s Prospects for Success*, 54 Ariz. L. Rev. 985, 995–1001 (2012); Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, *supra* note 3, at 256; Ford Elsaesser, *The Small Business Blues-Making Bankruptcy Work in Mid-size Cases*, Am. Bankr. Inst., WL 091803 ABI-CLE 547 (2003); Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy*, 4 J. Small & Emerging Bus. L. 181 (2000); Robert M. Lawless, et al., *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. Ill. L. Rev. 847 (1994).

6 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994).

7 See Nat’l Bankr. Review Comm’n Final Report: Bankruptcy: The Next Twenty Years (Oct. 20, 1997) 609–660, [hereinafter NBRC Report], <http://govinfo.library.unt.edu/nbrc/reporttitlepg.html>.

8 See Chapter 11 Commission Report, *supra* note 3, at 275–283.

9 Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (Aug. 23, 2019) (effective Feb. 19, 2020).

10 See *id.*

11 H.R. Rep. No. 116-171, at 4 (2019), as reprinted in 2019 U.S.C.C.A.N. 366, 369.

12 See U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, <https://www.justice.gov/ust/page/file/1499276/dl?inline>.

since February 2020.¹³ Subchapter V filings reached record levels in 2023 and constituted 44% of all Chapter 11 filings for that year.¹⁴ Meanwhile, courts have generated four years of case law addressing various statutory and procedural issues arising in Subchapter V cases. Enough time has passed to merit evaluating the collective Subchapter V experience thus far and to consider the overall effectiveness of the subchapter.

To that end, the American Bankruptcy Institute (ABI) created the Subchapter V Task Force (Task Force) in April 2023. The Task Force was charged with reviewing the implementation and administration of Subchapter V. The Task Force continued the ABI's tradition of bringing together experienced professionals to study and report on matters affecting the bankruptcy system.¹⁵ Indeed, the SBRA is informed by the final report of the Chapter 11 Commission, and some of its proposals have been incorporated into the SBRA.¹⁶

The Task Force is co-chaired by Bankruptcy Judge Michelle Harner (District of Maryland) and Megan Murray (Underwood Murray) and includes Bankruptcy Judge Paul Bonapfel (Northern District of Georgia), former ABI President Robert Keach (Bernstein Shur), Elizabeth Lally (Spencer Fane), Jolene Wee (JW Infinity Consulting, LLC), and Donald Swanson (Koley Jessen, P.C.).¹⁷ In addition, Lisa Tracy, Deputy General Counsel, Executive Office for U.S. Trustees, also participates as an *ex officio* member representing the U.S. Trustee Program.¹⁸

The Task Force spent the past twelve months holistically evaluating the subchapter, guided by its mission statement, which reads:

The ABI Subchapter V Task Force is committed to reviewing the implementation and administration of Subchapter V of Chapter 11 of the Bankruptcy Code. The Task Force will study and evaluate case law and statistical data under Subchapter V from February 19, 2020, through and including the present. This study will consider, among other things, how the subchapter is working in practice and whether it is achieving certain underlying objectives, such as assisting debtors and creditors in resolving the reorganization cases of small- and medium-sized businesses more effectively and efficiently, and what may

13 See Appendix B (ABI Statistical Summary of Subchapter V Cases), at 1. Subchapter V cases likely represent a higher percentage of all Chapter 11 filings than the ABI data indicate. The U.S. Trustee Program's data report a higher number of Subchapter V cases overall than the ABI's data. There is a variance in the two datasets because the U.S. Trustee Program's statistical summary includes cases that are pending while the ABI's data, which combine data from PACER and the Federal Judicial Center's Integrated DataBase (IDB), only become available after a case has been statistically closed.

14 Professor Robert M. Lawless, *About 44% of Chapter 11s are Subchapter V Cases*, Credit Slips: A Discussion on Credit, Finance, and Bankruptcy, (Mar. 26, 2024), <https://www.creditslips.org/creditslips/2024/03/about-44-of-chapter-11s-are-subchapter-v-cases.html> (reporting that Subchapter V cases constituted 44% of all Chapter 11 case filings in 2023).

15 The ABI previously has installed two commissions—the Commission to Study the Reform of Chapter 11 (the Chapter 11 Commission) and the Consumer Bankruptcy Commission—charged with studying and reporting on Chapter 11 and consumer bankruptcy reforms. For more about the Chapter 11 Commission, see <https://commission.abi.org/purpose-commission>.

16 See generally Chapter 11 Commission Report, *supra* note 3, at 275–283 (describing the Commission's recommendations and proposals for legislative reform for small and middle market businesses).

17 Appendix A (Biographies of Members of the American Bankruptcy Institute Subchapter V Task Force).

18 *Id.* As a nonvoting member, Deputy General Counsel Lisa Tracy took no position on legislative proposals or recommendations. Ms. Tracy provided institutional perspectives and technical assistance on issues considered by the Task Force.

be needed to improve its effectiveness. The Task Force intends to memorialize the results of its study in a written report.¹⁹

To carry out its mission, the Task Force sought input from a range of interested bankruptcy judges, academics, insolvency professionals, and other interested groups. The Task Force convened seven public hearings, held roundtable discussions with trade groups, and deployed surveys inviting comment on Subchapter V. The Task Force also consulted the case law and commentary relevant to Subchapter V.

The Task Force's evaluation of the implementation of Subchapter V was guided by the following core principles.

- First, Subchapter V, just over four years old, is still in its infancy. Because the subchapter remains relatively new, many issues are not sufficiently developed, or have yet to reveal themselves, so the Task Force's study was necessarily limited in scope. Thus, the Task Force was careful not to recommend statutory reform, in some instances, out of concern that certain reforms may be premature or incomplete at this time or would result in unintended consequences. The Task Force instead focused on recommending statutory reform or practical guidance for issues that clearly warrant it based on the collective experience with Subchapter V thus far.
- Second, Subchapter V is flexible by design. Its overarching objectives are to promote reorganization of smaller businesses and payment to those businesses' creditors through an expedited, lower-cost restructuring mechanism. This flexibility ensures that courts have authority to oversee the reorganization of salvageable businesses while dismissing or converting other cases not suited for the Subchapter. The structure of Subchapter V also allows courts to use the Bankruptcy Code's existing tools to supervise and resolve cases without unnecessary delays. The Task Force throughout its study was careful to balance the flexibility Congress intentionally created in Subchapter V against the need for reform.
- Third, the Task Force's evaluation and recommendations considered the rights and interests of creditors in Subchapter V cases. Subchapter V gives smaller businesses an opportunity to reorganize that they would not otherwise have in standard Chapter 11, which—as a starting point in this context—is overall better for creditors. In addition, many creditor protections that would apply in a standard Chapter 11 apply equally in Subchapter V. The best interest of creditors test, for instance, applies in Subchapter V and ensures creditors do not receive less in a Subchapter V reorganization than they would in liquidation. Likewise, Chapter 11's feasibility test applies in Subchapter V. Moreover, although Subchapter V modifies the Chapter 11 absolute priority rule, it includes a projected disposable income test that sets the minimum requirements for a confirmable nonconsensual plan. The Task Force's study did not uncover evidence indicating that creditors are doing worse in Subchapter V than they would in any other scenario under bankruptcy law or state law.

¹⁹ See ABI Subchapter V Task Force, Purpose, <https://subvtaskforce.abi.org/purpose>.

- Fourth, the Task Force’s recommendations for legislative changes are *not* an indication that the Subchapter has failed. Rather, the Task Force’s study reveals that Subchapter V has been very effective. Thus, the Task Force’s recommendations herein target aspects of Subchapter V that are ambiguous or not operating as effectively as the rest of the statute, and in many of those instances, the Task Force concluded that reform or guidance would be helpful without negatively impacting the subchapter as a whole.
- Fifth, in studying the implementation and operation of Subchapter V only a few years after its creation, the Task Force endeavored to conduct a holistic investigation. The Task Force considered the various perspectives of bankruptcy judges, Subchapter V trustees, practitioners, commentators, academics, and other stakeholder groups, shared through witness testimony, roundtable discussions, survey responses, academic literature, commentary, and case law.

After extensive study, the Task Force has concluded that the overwhelming consensus of bankruptcy professionals, bankruptcy judges, and academics is that Subchapter V is functioning as Congress intended. Many have commented that Subchapter V is the most effective and useful bankruptcy legislation passed since enactment of the Bankruptcy Code in 1978.

The data show that confirmation in Subchapter V cases occurs more often, more quickly, and at lower cost than in non-Subchapter V small business cases and standard Chapter 11 cases, and that creditors are receiving more money in Subchapter V.²⁰ As with any piece of new legislation, however, the Task Force study also revealed aspects of Subchapter V cases that would benefit from more clarity in the statute or consistency in the case law. As such, this Report offers both potential statutory changes and practical guidance to strengthen Subchapter V for all constituencies.

This Report explains the components of the Task Force’s study process, summarizes the results of the study, and where appropriate, provides recommendations for statutory reform or other guidance. The Report organizes its recommendations based on key components of a Subchapter V case: eligibility, the role of the Subchapter V trustee, case administration matters, plan and confirmation issues, and postconfirmation administrative matters.

All decisions and recommendations set forth in the Report were made by the Task Force members. Academic Reporter Professor Alexandra Sickler worked closely with the Task Force members to draft the language of the recommendations, supporting principles, and narrative for each of the recommendations. Although the Reporter acted as the principal draftsman of the Report, the Task Force Members reviewed and commented on various iterations of this Report to achieve this final product. *The Task Force voted unanimously to approve each of the recommendations and principles set forth in this Report at various meetings over the course of the Task Force’s study and voted to adopt this Report on April 5, 2024.*

²⁰ See Section II *infra* (discussing the available data).

II. Executive Summary of Task Force Findings and Recommendations

The Task Force, after investigation and analysis, has concluded that Subchapter V is effective and functioning as Congress intended. Nearly all bankruptcy judges, practitioners, and Subchapter V trustees who provided testimony to the Task Force widely acclaim the subchapter as a success.²¹ Almost fifty witnesses across seven hearings testified that Subchapter V has already proven to be successful in saving smaller businesses.

Many witnesses observed that Subchapter V cases are faster, more affordable, and provide a more feasible path to reorganization. Bankruptcy Judge Hannah Blumenstiel (Northern District of California) testified that the Subchapter V cases in her district are shorter, less costly, and confirm plans at higher rates than non-Subchapter V cases:

Of the 110 Sub V cases filed in my district, 61 of them, or 55%, resulted in confirmed plans. Of the 295 non-Sub V Chapter 11 cases filed in the Northern District of California since February 19, 2020, just 99 of them, or 34%, resulted in a confirmed plan. The average duration of Sub V cases in my district was 407 days, more than 2 months shorter than a non-Sub V Chapter 11 case, which lasts an average of 470 days. But the most striking distinction was cost. The average amount of professional fees awarded in a non-Sub V Chapter 11 case filed in the Northern District of California was \$679,387. The average amount of professional fees awarded in a Sub V case in my district was \$145,790 – a staggering difference.²²

Bankruptcy professionals and judges repeatedly emphasized that Subchapter V allows businesses to reorganize that cannot afford the costs of a standard Chapter 11 case. For example, Bankruptcy Judge Michael E. Romero (District of Colorado) explained:

[Subchapter V] has opened up the ability for financial rehabilitation to entities previously priced out [of] the more standard Chapter 11 process. The value of extending a survival opportunity to financially challenged; but valuable members of our communities, can never be underestimated.²³

Practitioners and judges also agree that Subchapter V is more efficient. Bankruptcy Judge Paul M. Black (Western District of Virginia) stated:

Prior to the enactment of Subchapter V, my experience was that requiring a small[er] business to comply with the same Chapter 11 structure as a large commercial operation was not always

21 Different viewpoints exist about how to define “success” in reorganization cases. Some take a broad view of “success,” arguing that even if no plan is confirmed, success has been achieved where the case results in an orderly sale of assets or a negotiated solution without a formal plan. See NBRC Report, *supra* note 7, at 610.

22 *Written Statement of Hon. Hannah Blumenstiel, U.S. Bankruptcy Court for the Northern District of California*, at 2 (General Experiences with Subchapter V) (Jun. 9, 2023), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>.

23 *Written Statement of Hon. Michael E. Romero, U.S. Bankruptcy Court for the District of Colorado*, at 6, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023), <https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing>.

a good fit. The absolute priority rule was a practical impediment, and it was expensive, time-consuming, and fraught with battles that were often not worth engaging in for anyone . . . Subchapter V has eliminated a lot of the unnecessary battles and wheel spinning, keeping the focus on timely confirmation of a plan of reorganization.²⁴

The kinds of businesses that have been able to use Subchapter V to reorganize are varied and provide important services to the people in their local and regional economies.²⁵ Witnesses recounted successful reorganizations of businesses such as restaurants, construction companies, an engineering firm, medical practices, a nursing home operator, an underground utilities operator, a recycling center, a business providing cremation services, a litigation support business, a bowling alley, an event rental company, among many others.

The data also support the conclusion of the Task Force and almost all witnesses that Subchapter V is operating as intended. *Confirmation rates are higher, most debtors confirm plans more quickly, and dismissals occur earlier.* The data show that 50% of all Subchapter V cases confirm plans, and 69% of these confirmed plans were consented to by all creditor classes.²⁶ These confirmation rates are favorable compared with confirmation rates under standard Chapter 11 and other non-Subchapter V small business cases. Pre-SBRA, only about 25% of the debtors with assets or liabilities less than \$10 million were able to confirm a plan in standard Chapter 11.²⁷ Subchapter V cases also move more quickly, with most smaller businesses reaching confirmed plans within 6.4 months of filing under Subchapter V.²⁸ Thus, Subchapter V is effective, both in facilitating reorganization of those salvageable businesses and in filtering out cases that cannot reorganize.²⁹

The data also indicate that the businesses of many Subchapter V debtors continue to operate after bankruptcy. A recent study reports the survival rate for firms with confirmed Subchapter V plans as of December 2023 is 86.0%, higher than the 70.3% survival rate for non-Subchapter V cases.³⁰ The same study finds that Subchapter V more than doubles the probability of reorganization for firms near the \$7.5 million threshold, without harming expected recovery rates for unsecured creditors.³¹ Taken together, this data show that Subchapter V is working.

As with any piece of new legislation, however, the Task Force study also revealed aspects of Subchapter V cases that would benefit from more clarity in the statute or consistency in the case law. As such, this Report

24 *Written Statement of Hon. Paul M. Black, U.S. Bankruptcy Court for the Western District of Virginia*, at 1–2, ABI Subchapter V Task Force Hearing (Eligibility) (Jun. 23, 2023), <https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing>.

25 See Ed Flynn, *Subchapter V's First 1,000 Cases*, 39 Am. Bankr. Inst. J. 30, 42–44 (Nov. 2020) (enumerating the leading categories of businesses for the first 1,000 subchapter V cases).

26 See United States Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at <https://www.justice.gov/ust/page/file/1499276/dl?inline>.

27 Ed Flynn, *Chapter 11 Is for Individuals and Small Business?*, XXXVII ABI Journal 12, 102-03 (Dec. 2018).

28 See U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at <https://www.justice.gov/ust/page/file/1499276/dl?inline>.

29 See NBRC Report, *supra* note 7, at 610 (explaining that success in reorganization has different meanings).

30 Edith Hotchkiss, Benjamin Iverson, Xiang Zheng, *Can Small Business Survive Chapter 11?*, (Mar. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4726391. Survival rates are based on operating status from state-level business registry records.

31 *Id.*

offers both potential statutory changes and best practices to strengthen subchapter V for all constituencies. The Task Force's key recommendations are as follows:

Key Recommendations:

Eligibility

- The Task Force recommends that eligibility for Subchapter V should remain at \$7,500,000 in aggregate noncontingent, liquidated debt, subject to existing adjustment for inflation and the existing exclusion of insider and affiliate debt, to ensure consistency and access to Subchapter V as a debt restructuring tool for smaller businesses that cannot reorganize in a standard Chapter 11 case.
- A statutory change to section 1182(1)(A) is necessary to clarify how to treat outstanding liabilities under an unexpired lease for purposes of determining whether a debtor satisfies the debt limit requirement for Subchapter V eligibility.

The Role of the Subchapter V Trustee

- There is general agreement that the U.S. Trustee Program, Bankruptcy Administrators, bankruptcy professionals, and professional organizations like the American Bankruptcy Institute, the National Association of Bankruptcy Trustees, among others, should continue to provide training and other educational programming to support Subchapter V trustees, develop their skills, and to promote uniformity and consistency in skill sets among Subchapter V trustees.
- The Task Force recommends that courts use an interim compensation procedure or practice according to a set of key principles that include, as appropriate, establishing an escrowed fund or other mechanism to ensure payment of Subchapter V trustees' fees and expenses, subject to final approval by the court.
- The Task Force finds a statutory amendment is not necessary to clarify the scope of the Subchapter V trustee's duties and powers but offers some guidance for courts and parties involved in cases warranting an expansion of the Subchapter V trustee's duties and powers.
- If the parties and the court are considering appointment of the Subchapter V trustee to mediate a dispute, the Task Force urges those involved to use caution, acknowledge the potential issues involved, and insist on entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator.

Case Administration

- The Task Force concludes that amendment of section 1188(a) to require an earlier status conference or to state additional requirements for the status reports is not necessary.

- The Task Force finds that the provisions for removal of the debtor in possession in section 1189 should not be changed to permit anyone but the debtor to file a plan upon removal.
- The Task Force proposes a statutory amendment to section 1185 that would permit the court to approve the debtor's retention of professionals after removal of the debtor from possession, after notice and hearing, in certain limited circumstances, and provide for their compensation.

Plan and Confirmation Issues

- The Task Force declines to recommend a statutory amendment that sets a deadline for plan confirmation.
- The Task Force recommends an amendment to section 1191(a) to address the existing challenge of achieving a consensual confirmation where a class of creditors neither objects to the plan nor votes to reject the plan. In this situation, the class is silent, and under the current Bankruptcy Code, the plan cannot be confirmed as a consensual plan even though technically, the plan is not nonconsensual.
- The Task Force concludes that a corporation's (or other entity's) discharge after nonconsensual confirmation should not be subject to the section 523(a) exceptions for the same reasons that Congress chose to provide for an exceptionless discharge of a corporation when it enacted Chapter 11 in 1978. Because the Task Force agrees with the majority rulings of the courts that this is the result under the current statutory language of sections 1192(2) and 523(a) and properly reflects Congressional intent, an amendment is arguably not necessary. Nevertheless, the Task Force recommends that Congress amend section 1192 to confirm existing policy and clarify that the exceptions to discharge do not apply to non-individual Subchapter V debtors.

Postconfirmation Administrative Matters

- The Task Force recommends statutory amendments that would impose a uniform postconfirmation reporting requirement for Subchapter V debtors, to be filed by the debtor with the motion for final decree or application for discharge, and implemented through changes to the Bankruptcy Rules, the creation of a new official bankruptcy form, and a directive for collection and publication of pertinent data.
- The Task Force declines to recommend a statutory change to section 1194(b) which would make the debtor rather than the Subchapter V trustee the disbursing agent.
- The Task Force does not recommend any statutory changes to Subchapter V's existing standards for postconfirmation modification of plans.

III. Eligibility

A. The Amount of the Debt Cap Should Remain at \$7,500,000

Recommendation and Supporting Principles:

Recommendation

The ABI Subchapter V Task Force concludes that eligibility for Subchapter V should remain at \$7,500,000 in aggregate noncontingent, liquidated debt (subject to the existing adjustment for inflation and the existing exclusion of debts owed to affiliates and insiders, as discussed in the next section).

Supporting Principles

- Maintaining the debt cap at \$7,500,000 provides consistency and access to Subchapter V as a debt restructuring tool for smaller businesses that cannot reorganize in a standard Chapter 11 case.
- Because Congress raised the debt cap so soon after Subchapter V went into effect, most Subchapter V debtors have filed while the \$7,500,000 debt cap has been in place.
- Reverting to the lower debt cap, which is untested, would make reorganization inaccessible to many smaller businesses. More than a quarter of Subchapter V debtors would not have been eligible for Subchapter V under the lower cap.
- Bankruptcy professionals overwhelmingly support making the current \$7,500,000 debt cap permanent.
- No clear reason, supported by data, exists for reversion to the lower, untested debt cap.

In December 2023, the Task Force released a preliminary report recommending that Congress pass legislation that would make the current \$7,500,000 debt cap permanent (subject to existing adjustment for inflation).³²

After investigation and analysis, the Task Force concluded that maintaining the debt cap at \$7,500,000 provides consistency and access to Subchapter V. Because the current cap has been in effect far longer than it has not, most Subchapter V debtors have filed while it has been in place. The

32 American Bankruptcy Institute Subchapter V Task Force, Preliminary Report, Maintaining the \$7,500,000 Debt Cap for Subchapter V Eligibility, December 2, 2023, https://abi-org.s3.amazonaws.com/SubV/media/SubV_Report_Final1.pdf. The text of that report is replicated here in the Final Report and is also available online as a standalone report on the Task Force website: <https://subvtaskforce.abi.org/>. See also National Bankruptcy Conference, *Letter Re: Maintaining \$7.5 Million Debt Cap in Subchapter V of Chapter 11 of the Bankruptcy Code* (Dec. 8, 2023), <http://nbconf.org/wp-content/uploads/2023/12/Maintaining-Sub-V-Cap-12.5.2023.pdf> (letter to Congress in support of maintaining the debt cap for Subchapter V at \$7,500,000).

\$7,500,000 debt cap has existed for all but the first six weeks after the effective date of Subchapter V (February 19 to March 26, 2020) and two months in 2022 (March 27 to June 21, 2022) due to temporary legislation that increased the debt cap.

Because Congress raised the debt cap so soon after Subchapter V went into effect, no basis exists for evaluating how the lower debt cap version of the subchapter would work. The lower debt cap, therefore, has not been tested through experience. As one bankruptcy judge observed in a written statement to the Task Force, “[q]uery whether that is a test we want to run at the expense of America’s small businesses, especially now as filings are increasing.”³³

Reverting to the lower debt cap would make reorganization inaccessible to many smaller businesses. As of February 29, 2024, almost 7,500 Subchapter V cases have been filed,³⁴ representing more than a quarter of all Chapter 11 cases filed since February 2020.³⁵ Subchapter V filings reached record levels in 2023 and were 44% of all Chapter 11 filings for that year.³⁶ *Significantly, more than a quarter of these Subchapter V debtors would have been ineligible for Subchapter V relief under the lower cap.*³⁷ In addition, the confirmation rate has been higher for cases with debts above the original limit.³⁸

Moreover, the amount of debt for a small business varies based on the nature of the business, its location, and the reason bankruptcy relief is necessary. For instance, the debt cap may function as a measure of a case’s complexity rather than its size because a very small business could have a very large debt if something unexpected happens. As explained to the Task Force, “large debts do not always mean large businesses.”³⁹

A case study from the Western District of Virginia illustrates this point. Here, a Hepatitis A outbreak at a restaurant caused substantial injuries and several deaths, leading to an estimated \$40,000,000 in claims, which were contingent and unliquidated. Once insurance coverage was settled, a consensual Subchapter V plan was reached with the tort claimants participating in a \$14,000,000 recovery. Administrative costs were low, and insurance coverage proceeds were distributed exclusively to the tort claimants. In a standard Chapter 11 case, administrative costs would have impeded the debtor’s

33 *Written Statement of Hon. Laurel M. Isicoff, U.S. Bankruptcy Court for the Southern District of Florida*, ABI Subchapter V Task Force Hearing (Final Hearing), at 2 (Oct. 12, 2023), <https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing>.

34 See U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, <https://www.justice.gov/ust/page/file/1499276/dl?inline>.

35 See Appendix B (ABI Statistical Summary of Subchapter V Cases), at 1. Subchapter V cases likely represent a higher percentage of all Chapter 11 filings than the ABI data indicate. The U.S. Trustee Program’s data report a higher number of Subchapter V cases overall than the ABI’s data. There is a variance in the two datasets because the U.S. Trustee Program’s statistical summary includes cases that are pending while the ABI’s data, which combine data from PACER and the Federal Judicial Center’s Integrated DataBase (IDB), only become available after a case has been statistically closed.

36 Professor Robert M. Lawless, *About 44% of Chapter 11s are Subchapter V Cases*, Credit Slips: A Discussion on Credit, Finance, and Bankruptcy, (Mar. 26, 2024), <https://www.creditslips.org/creditslips/2024/03/about-44-of-chapter-11s-are-subchapter-v-cases.html> (reporting that Subchapter V cases constituted 44% of all Chapter 11 case filings in 2023).

37 See Appendix B (ABI Subchapter V Statistical Summary of Subchapter V cases), at 7 (“About 26.2% of Subchapter V cases have been between the old and new debt limits.”).

38 *Id.* at 7.

39 *Written Statement of Hon. Paul M. Black, supra* note 24, at 4.

ability to reorganize and continue operating, and the injured claimants likely would not have recovered as much.

Witnesses at the Task Force hearings overwhelmingly supported making the \$7,500,000 debt cap permanent to maintain consistent access to Subchapter V. At each of the Task Force’s seven public hearings, witnesses on panels comprised of bankruptcy judges, Subchapter V trustees, and practitioners advocated for maintaining the Subchapter V debt eligibility threshold at \$7,500,000 to preserve Subchapter V as a meaningful restructuring tool.⁴⁰

The Task Force also surveyed American Bankruptcy Institute members about their experiences with Subchapter V and circulated the survey to invite responses from members of other major insolvency organizations.⁴¹ Overall, the survey responses indicate that Subchapter V is achieving its goal of streamlining the reorganization process for smaller businesses.⁴² Relevant to eligibility, many respondents, when asked to identify one change to Subchapter V they would like made, advocated for making the \$7,500,000 debt cap permanent or increasing it, while only one advocated for a lower cap.⁴³ In short, most bankruptcy professionals involved in Subchapter V cases report that the \$7,500,000 debt cap is effective and appropriate and must be maintained.

Indeed, the Task Force heard some witnesses advocate for increasing the Subchapter V debt cap to \$10,000,000, which would align more closely with Chapter 12’s debt cap for family farmers.⁴⁴ In 2019, Congress enacted a permanent increase to the Chapter 12 debt cap, which is currently \$11,097,350.⁴⁵ Chapter 12-eligible family farmers are a specialized kind of smaller business, and the higher debt cap for these entities reflects the scale and scope of their operations. Prospective Subchapter V debtors are likewise smaller businesses, so some rationale exists for mirroring the debt limits of Subchapter V and Chapter 12.

In comparison, reverting to the lower cap would align Subchapter V eligibility more closely with Chapter 13 eligibility, which provides bankruptcy relief for consumers with regular income. In 2022,

40 See, e.g., *Written Statement of Hon. Laurel M. Isicoff*, *supra* note 33, at 2 (“I believe the debt limit should be maintained at least at the \$7.5 million level.”); *Written Statement of David Cox*, ABI Subchapter V Task Force Hearing (Final Hearing), at 2 (Oct. 12, 2023), <https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing> (“To date there seems to be a consensus that the temporary \$7.5 million debt limits should be made permanent (a position with which I concur), if not increased to \$10 million.”); *Written Statement of Adam Prescott*, ABI Subchapter V Task Force Hearing (Eligibility), at 7 (Jun. 23 2023), <https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing> (advocating for permanently extending the existing \$7.5 million debt cap); *Written Statement of Robert Gonzales*, ABI Subchapter V Task Force Hearing (Eligibility), at 4 (Jun. 23, 2023), <https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing> (“[I]t is crucial that Congress make the current debt limit permanent, or ideally increase it.”); *Written Statement of Hon. Hannah Blumenstiel*, *supra* note 22, at 3 (explaining that but for the increased debt limit, 38% of the cases filed under Subchapter V as of June 2023 would not have benefited from the Subchapter V.).

41 See Appendix C (ABI Subchapter V Task Force Survey: Summary of Key Insights and Feedback) (reporting an average overall positive sentiment about Subchapter V by respondents).

42 *Id.*

43 *Id.*

44 See, e.g., *Written Statement of David Mawhinney*, ABI Subchapter V Task Force Hearing (General Observations), at 4 (Jun. 9, 2023), <https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing> (“Congress should increase the debt cap for subchapter V eligibility to \$10 million and make it permanent.”); *Written Statement of Eyal Berger*, ABI Subchapter V Task Force (Postconfirmation Issues), at 6 (Sept. 22, 2023), <https://subvtaskforce.abi.org/hearings/september-22-2023-virtual-public-hearing>, (advocating for a debt cap higher than \$10 million); *Written Statement of Adam Prescott*, *supra* note 40, at 7 (same).

45 Family Farmer Relief Act of 2019, Pub. L. No. 116-51, 133 Stat. 1077 (Aug. 23, 2019).

Congress temporarily increased the debt cap for Chapter 13 eligibility to \$2,750,000.⁴⁶ While Subchapter V debtors may be more like Chapter 12 farm debtors subject to an \$11,097,350 debt cap than Chapter 13 consumer debtors subject to a \$2,750,000 debt cap, many small businesses may not have the same extensive debt structure as farms that would justify an increase of the debt cap to \$10,000,000 or more at this time. The Task Force concludes that further research, data, and study are needed prior to increasing the debt limit over \$ 7,500,000.

Some expressed concerns to the Task Force that the higher debt cap inadequately protects unsecured creditors.⁴⁷ The Task Force understands why creditors might voice these concerns, as Subchapter V does change the timetable for, and the scope of the absolute priority rule in, a small business case. There does not appear to be any quantifiable data to evaluate these concerns. The Task Force did, however, study these concerns under the statutory language and in light of the testimony and other evidence offered at the public hearings. The projected disposable income test, which requires payment of earnings to creditors over a three-to-five-year period and is a prerequisite to an owner retaining the business,⁴⁸ appears to be an effective substitute for the protections of the absolute priority rule in a non-Subchapter V case and as a practical matter is more beneficial to unsecured creditors.⁴⁹

In addition, creditors in a Subchapter V case have many of the protections that they would have in a standard Chapter 11 case,⁵⁰ including the ability to (i) seek conversion or dismissal of the case,⁵¹ (ii) request removal of the debtor in possession or expansion of the powers of the trustee,⁵² (iii) move for relief from the automatic stay or to compel assumption or rejection of an executory contract or lease,⁵³ and (iv) object to confirmation of the debtor's plan. Thus, although unsecured creditors' rights are different in a Subchapter V case, such concerns do not justify reducing the debt cap back to \$3,024,725.

A few also expressed concern about debtor abuse of Subchapter V if the \$7,500,000 debt cap remains in place. To be sure, not every kind of entity that meets the existing cap can or should be in a Subchapter V case. The Task Force heard testimony on this point throughout its hearings. Most of that commentary emphasized that the Bankruptcy Code has built-in mechanisms to deal with those entities and prevent such abuse.⁵⁴ The statute has other eligibility criteria that gate debtors from Subchapter V. Congress excluded categories of debtors—"single asset real estate" debtors and publicly traded companies and their affiliates—to ensure only small business debtors targeted by Subchapter V could elect Subchapter

46 Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (Jun. 21, 2022).

47 *Letter from American Bankers Association, and Independent Community Bankers Association to the ABI Subchapter V Task Force* (Oct. 23, 2023), <https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/joint-trades-statement-on-subchapter-v.pdf>.

48 See 11 U.S.C. § 1191(c).

49 *Written Statement of Richardo Kilpatrick*, ABI Subchapter V Task Force Hearing (General Observations) at 5 (Jun. 9, 2023) (explaining that "there are still substantial and meaningful rights that exist for creditors"), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>.

50 *Id.* at 5 (noting that the "other protections incorporated in the general provisions of the Code still exist.").

51 11 U.S.C. § 1112.

52 *Id.* § 1185, 1183(b)(2).

53 *Id.* §§ 362(d), 365.

54 See, e.g., *Written Statement of Richardo Kilpatrick*, *supra* note 49, at 5 ("There are some businesses that are ill-suited for Subchapter V but there are tools within the Subchapter V provisions to address those cases.")

V.⁵⁵ In addition, courts have proven themselves well-equipped to address eligibility issues that are appropriately raised by the United States Trustee and other parties in cases. Further, courts can remove Subchapter V debtors from possession and convert or dismiss cases in appropriate circumstances.⁵⁶ In short, courts have existing tools to filter out debtors that should not be in Subchapter V.

Moreover, the Task Force heard testimony that Subchapter V has improved the reorganization process and outcomes not only for debtors but also creditors. One experienced Subchapter V trustee described the higher debt cap as “an improvement in the [C]hapter 11 process, particularly because of the shift away from fights over class-gerrymandering and creditor vetoes, with a refocused emphasis on economic recovery by comparing liquidation to future plan projections.”⁵⁷ The trustee explained that:

In Subchapter V the parties tend to focus more quickly on economic recovery rather than creditor-veto holdout power. And prior to Subchapter V, in those cases where debtors could overcome an unsecured creditor veto with an impaired secured creditor class vote, debtors would often be incentivized to pay general unsecured creditors little or nothing and employ the new value corollary to circumvent the absolute priority rule on cramdown plans, and few of these types of cases for small business debtors seem to attract competing plans that render a better result for unsecured creditors.⁵⁸

Another practitioner testified that “Subchapter V has also proven effective for creditors,” because allocating payments over a three-to-five-year plan achieves a better result for creditors “as compared to the other viable alternatives for many of these debtors, such as shutting its doors and liquidating.”⁵⁹

Based on the foregoing, the Task Force strongly recommends Congress pass legislation that would make the current \$7,500,000 debt cap permanent (subject to existing adjustment for inflation and the existing exclusion of insider and affiliate debt, as discussed in next section).

⁵⁵ 11 U.S.C. § 1182(1)(A).

⁵⁶ *Id.* § 1112.

⁵⁷ Written Statement of John Patrick Fritz, ABI Subchapter V Task Force Hearing (General Experiences), at 8 (Jun. 9, 2023), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>.

⁵⁸ *Id.*

⁵⁹ *Written Statement of Brian Shaw*, ABI Subchapter V Task Force Hearing (General Observations), at 4 (Jun. 9, 2023), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>.

B. Debts Owed to Affiliates and Insiders Should Remain Excluded from the Debt Eligibility Calculation

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends no change to the Subchapter V eligibility standards with regard to debts owed to affiliates and insiders.

Supporting Principles

- Congress originally excluded debts owed to affiliates and insiders from the eligibility calculation in order to make Subchapter V widely available to small businesses.
- Smaller businesses often rely on loans or credit from shareholders or related entities. Requiring smaller businesses to include debts owed to affiliates and insiders in the Subchapter V eligibility calculation would discourage some individuals and entities from extending credit to and investing in smaller businesses.
- The Task Force did not receive or uncover any evidence that excluding debts owed to affiliates or insiders from the eligibility calculation was allowing larger or more complex businesses to file for Subchapter V.
- The Task Force's investigation shows that Subchapter V is working as Congress intended, helping smaller businesses that would benefit from the subchapter reorganize while dismissing or converting cases that should not be in Subchapter V.

Section 1182(1) currently excludes debts owed to affiliates and insiders from the debt eligibility calculation for Subchapter V.⁶⁰ The Task Force considered and rejected a revision to section 1182(1) which would include debts owed to affiliates and insiders in the Subchapter eligibility calculation.⁶¹

First, requiring smaller businesses to include debts owed to affiliates or insiders in the Subchapter V eligibility standard would discourage smaller business owners, shareholders, or related entities from extending loans or credit to the debtor business, which is a form of funding frequently relied upon by

⁶⁰ 11 U.S.C. §1182(1)(A).

⁶¹ This determination is consistent with that of the National Bankruptcy Conference. See National Bankruptcy Conference, *Letter: Re: Exclusion of Insider or Affiliate Debt in Determining Eligibility for Subchapter V of Chapter 11 of the Bankruptcy Code* (Mar. 26, 2024); <http://nbconf.org/wp-content/uploads/2024/03/NBC-SubV-and-Insider-Debt-Letter-final-March-26-2024.pdf>.

smaller businesses.⁶² The Task Force believes that such change would skew incentives to invest, and be vested, in the success of the debtor’s business operations and could negatively impact the ability of smaller businesses to obtain the necessary funding to sustain their businesses operations either outside of bankruptcy or through a Subchapter V reorganization.

In addition, the Task Force did not receive or uncover any evidence that including debts owed to affiliates or insiders in the eligibility calculation allows larger or more complex businesses to file for Subchapter V bankruptcy or otherwise abuse the system. Rather, the Task Force’s investigation shows that Subchapter V does an effective job of reorganizing smaller businesses intended to benefit from the subchapter and dismissing or converting those cases not well-suited for the subchapter.⁶³

Finally, the Task Force’s study demonstrates that Subchapter V is working as intended by Congress, helping smaller businesses reorganize their businesses and make payments to their creditors.⁶⁴ Indeed, at its inception and based on information provided to the Task Force, the exclusion of debts owed to affiliates and insiders from the eligibility calculation was originally included by Congress to make Subchapter V available to as many smaller businesses as possible.⁶⁵ The effectiveness of the subchapter over the past four years supports Congress’ original approach to the Subchapter V eligibility standards, and the Task Force has no evidence suggesting that a change is necessary.

Based on the foregoing, the Task Force strongly recommends no change to the Subchapter V eligibility standards concerning debts owed to affiliates and insiders.

62 See, e.g., *Oral Testimony of John Patrick Fritz*, ABI Subchapter V Task Force Hearing (General Observations) (Jun. 9, 2023) (explaining that many small businesses have substantial insider debt stemming from a capital infusion from owners or management), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>.

63 According to data from the U.S. Trustee Program, 50% of Subchapter V cases filed between fiscal year 2020 and fiscal year 2023 had confirmed plans, 29% were dismissed, and 11% were converted to another chapter. See U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at <https://www.justice.gov/ust/page/file/1499276/dl?inline>.

64 See *id.*; see *Hotchkiss, Iverson, & Zhang*, *supra* note 30.

65 The definition of “small business debtor” under section 101(51D) also excludes affiliate and insider debt for eligibility for non-Subchapter V small business cases and informed the eligibility provisions for Subchapter V.

C. Future Rent Payments on Unexpired Leases & Subchapter V Eligibility

Recommendation and Supporting Principles:

Recommendation

A statutory change to section 1182(1)(A) is necessary to clarify how to treat outstanding liabilities under an unexpired lease for purposes of determining whether a debtor satisfies the debt limit requirement for Subchapter V eligibility.

Supporting Principles

- Section 1182(1) excludes contingent and unliquidated debts from the Subchapter V debt eligibility calculation.
- A Subchapter V debtor may have one or more unexpired leases where the amount of future rent, if considered a noncontingent and liquidated debt, would be so large that the debtor would be excluded from Subchapter V.
- Disagreement exists in the case law about whether future rent payments on an unexpired lease are noncontingent and/or liquidated debt for purposes of this calculation.
- The Task Force recommends a statutory amendment to exclude future rent payments and lease obligations from the Subchapter V debt eligibility calculation because including these amounts in the Subchapter V debt eligibility calculation does not serve the underlying purpose of a debt cap, which generally indicates the complexity of issues in the underlying case, and the amounts are contingent and unliquidated on the petition date.

Section 1182(1) excludes contingent and unliquidated debts from the Subchapter V debt eligibility calculation.⁶⁶ A Subchapter V debtor may have one or more unexpired leases where the amount of future rent is so large that the debtor would be excluded from Subchapter V debt if all the future rent amounts are noncontingent or liquidated debts included in the eligibility calculation.

Disagreement has emerged among courts about whether future postpetition rents owed under an unexpired lease are included in the Subchapter V eligibility calculation. The disagreement turns on whether a debtor's future rents under an unexpired lease constitutes noncontingent, liquidated debt that must be included in the calculation. A related issue is whether the appropriate amount for purposes of

⁶⁶ See 11 U.S.C. § 1182(1)(A) (the debtor must have “aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition. . . in an amount not more than \$7,500,000 . . . not less than 50 percent of which arose from the commercial or business activities of the debtor.”).

calculating eligibility is the full amount remaining due under the lease or whether section 502(b)(6), which caps the allowed amount of a lessor's claim in the bankruptcy case, controls this question.⁶⁷

Several cases illustrate the disagreement. In *In re Parking Management*, the debtor moved to reject leases on the petition date.⁶⁸ The lease-rejection damages, if required by the Bankruptcy Code to be included in the eligibility calculation, would have rendered the debtor ineligible for Subchapter V.⁶⁹ The court, however, held that claims for damages arising from the rejection of unexpired leases were contingent for Subchapter V eligibility purposes because rejection required postpetition court approval in order to fix the amount of the lessor's rejection claim.⁷⁰ As a result, the amounts were excluded from the eligibility calculation.⁷¹

In contrast, in *In re Macedon Consulting*, the court held that a debtor's future rent payments owed under an unexpired lease constitutes noncontingent, liquidated debt that must be included in the Subchapter V debt eligibility calculation.⁷² The *Macedon* debtor, a tenant under prepetition leases with nearly \$14.4 million in future lease payments, listed in its schedules and statements only the lease-rejection damages in amounts capped by section 502(b)(6), as the amount owed, which resulted in its total debts being below the \$7.5 million debt cap.⁷³ The court held that the debtor's future rent payments under the leases was noncontingent and liquidated debt for purposes of assessing Subchapter V eligibility.⁷⁴ In doing so, the court distinguished between lease-rejection claims and future rent payments, explaining that the debtor's liability on the future rent payments arose prepetition on the dates the leases were executed.⁷⁵ As a result, the lease liabilities were included in the debt eligibility calculation, and the debtor was ineligible for Subchapter V because it had more than \$7.5 million in aggregate noncontingent debt.

More recently, a court expressly declined to follow the *Macedon* ruling in *In re Zhang Medical P.C.* and concluded that a debtor's future rent payments under an unexpired lease "should rarely, if ever," be included in the debt eligibility calculation.⁷⁶ The court observed that to hold otherwise "would greatly restrict Subchapter V eligibility, since many debtors otherwise eligible . . . are parties to long-term leases or contracts with future payment obligations well in excess of \$7.5 million."⁷⁷

⁶⁷ See 11 U.S.C. § 502(b)(6).

⁶⁸ *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020).

⁶⁹ *Id.*

⁷⁰ *Id.* at 554 ("[o]pening up eligibility determinations to postpetition events, even if deemed to apply retroactively, is contrary to the purpose and spirit of Subchapter V and could nullify the very benefits it is intended to convey.").

⁷¹ *Id.*

⁷² *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Va. 2023).

⁷³ *Id.* at 484.

⁷⁴ *Id.*

⁷⁵ *Id.* at 485–86.

⁷⁶ *In re Zhang Medical P.C.*, 655 B.R. 403, 407, 411 (Bankr. S.D.N.Y. 2023) (finding that the debtor did not qualify for Subchapter V on other grounds).

⁷⁷ *Id.* at 411 (noting also that the debtor's future base rent payments under the lease at issue were more than \$60 million).

According to *Zhang Medical*, because the Bankruptcy Code gives the debtor a right to assume or reject executory contracts and unexpired leases, the amount and nature of its obligations under that contract or lease are contingent and unliquidated until debtor elects either to assume or to reject the contract or lease.⁷⁸ If the debtor assumes, it will be responsible for the full amount of its contractual obligations.⁷⁹ If, however, a debtor rejects an unexpired lease, its obligation on the lease is the capped amount set by section 502(b)(6).⁸⁰ Because the amount and nature of the debtor's obligations depend on an uncertain future event (*i.e.*, the debtor's election to either assume or reject the unexpired lease), the future payments are both contingent and unliquidated prior to that election.⁸¹

The developing case law in this area creates substantial uncertainty about Subchapter V eligibility for many small businesses.⁸²

The Task Force agrees that the future rent liabilities and lease obligations are contingent and unliquidated on the petition date and should not be included in the debt eligibility calculation for the following reasons, among others:

1. *Including a Subchapter V debtor's future rent payments under an unexpired lease in the debt eligibility calculation does not advance the underlying purpose of the debt cap*, which is used to distinguish between smaller cases with potentially less complex issues from larger cases which are more likely require the standard Chapter 11 guidelines.
2. The petition date is an important demarcation in bankruptcy, separating a debtor's pre- and postpetition obligations. The debt cap focuses on the prepetition side of a debtor's financial affairs. As of the petition date, the amount of the debtor's liability on future rent payments under an unexpired lease is not yet due and owed. This approach aligns with the general approach of the Bankruptcy Code; for example, the Code in several places invalidates *ipso facto* clauses and precludes acceleration of certain kinds of prepetition obligations.⁸³ Thus, the amounts are contingent and unliquidated until the debtor decides to assume or to reject the lease under section 365. If the debtor rejects the lease, its obligation is the capped amount set by section 502(b)(6). In addition, the debtor's liability may be subject to adjustment under applicable nonbankruptcy law.

The Task Force also thinks that executory contracts and other kinds of unexpired leases may warrant similar treatment.

The Task Force concludes that a statutory change would provide much-needed clarity and allow both debtors and counterparties to assess and protect their respective rights in a Subchapter V case more readily.

78 *Id.* at 412.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 411 (rejecting the *Macedon* ruling “because of the enormous—and in the Court’s view detrimental—impact that ruling, if followed, would have in limiting eligibility for Subchapter V relief.”)

83 See 11 U.S.C. §§ 365(e)(1) and 541(c)(1).

Based on the foregoing, the Task Force proposes amending section 1182(1)(A) to clarify that, for purposes of calculating the debt eligibility cap, lease liabilities are limited to the amount due and payable as of the petition date without regard to any acceleration of the due date for any such payment.

Proposed Amended Text to 11 U.S.C. § 1182(1)(A)

1) DEBTOR. —The term “debtor”—

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

(B) does not include—

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

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

(iii) any debtor that is an affiliate of a corporation described in clause (ii).

(C) For the purposes of this section, any amounts payable under the terms of a lease after the date the petition is filed shall be considered contingent and unliquidated, without regard to any acceleration of the due date for any such payment, even if such liabilities are reflected on one or more of the debtor’s balance sheet as of the date of the filing of the petition.

IV. Role of the Subchapter V Trustee

A. In General

Recommendation and Supporting Principles:

Recommendation

There is general agreement that the U.S. Trustee Program, Bankruptcy Administrators,⁸⁴ bankruptcy professionals, and professional organizations like the American Bankruptcy Institute and the National Association of Bankruptcy Trustees, among others, should continue to provide training and other educational programming to support Subchapter V trustees, develop their skills, and to promote uniformity and consistency in skill sets among Subchapter V trustees.

Supporting Principles

- The U.S. Trustee Program's appointment of case-by-case trustees in Subchapter V has been largely effective. Throughout the Task Force's public hearings, bankruptcy judges emphasized that the success of any Subchapter V case depends in large part on the participation of a skilled and engaged Subchapter V trustee.
- According to the Task Force study, Subchapter V trustees have proven effective in fulfilling their statutory duties, including facilitating development of a plan and functioning as "utility players" in cases, responding to the needs of the cases in which they are appointed.
- There is general agreement about the set of skills and abilities Subchapter V trustees need to be effective. Not all Subchapter V trustees have the same background and experience, but they are typically lawyers, accountants, restructuring professionals, or financial advisors. The Task Force agreed that the implementation and administration of Subchapter V benefits from continued education and professional development for Subchapter V trustees.

⁸⁴ The scope of the Task Force's study encompassed testimony, and, where possible, data from bankruptcy professionals in the six Bankruptcy Administrator districts in North Carolina and Alabama. Because the study did not uncover any material differences in experiences in these districts, unless otherwise noted, any references in this Report to the U.S. Trustee Program also includes Bankruptcy Administrators in North Carolina and Alabama.

Section 1183 provides that a Subchapter V trustee shall be appointed in each Subchapter V case.⁸⁵ Although section 1183 also allows for appointment of a standing trustee, the U.S. Trustee Program, which appoints and supervises Subchapter V trustees, has instead selected a pool of persons who may be appointed on a case-by-case basis.⁸⁶ Those selected must have “a strong business acumen and include lawyers, CPAs, MBAs, restructuring consultants and financial advisors with diverse backgrounds in such areas as business, law, accounting, turnaround management and mediation.”⁸⁷

Section 1183(b) of the Bankruptcy Code enumerates the duties of a Subchapter V trustee. These duties include, among other things, accounting for property received, examining proofs of claim, furnishing information when requested by creditors, investigating the debtor’s business to determine its viability, and facilitating a consensual plan.⁸⁸ The Subchapter V trustee is also required to attend status conferences and other important hearings such as financing hearings, plan confirmation hearings and sale hearings.⁸⁹ The Subchapter V trustee may, in certain circumstances, be responsible for disbursing plan payments postconfirmation.⁹⁰ The Subchapter V trustee is also authorized to operate the business after the debtor has been removed from possession.⁹¹

Unlike other bankruptcy trustees, the Subchapter V trustee has the duty to “facilitate the development of a consensual plan of reorganization.”⁹² This duty is unique to Subchapter V trustees and distinguishes them from trustees in other chapters, where “trustees are adversarial to the debtor by virtue of their duties to protect the bankruptcy estate and its creditors.”⁹³

The Task Force solicited data and commentary about the role of the Subchapter V trustee.⁹⁴ Most think the use of case-by-case trustees has been largely effective. Throughout hearings, bankruptcy judges emphasized that the success of any Subchapter V case is due in large part to a skilled and

85 11 U.S.C. § 1183(a). *See Handbook for Small Business Chapter 11 Subchapter V Trustees (“Sub V Handbook”),* 1-1 (“In each case in which a small business debtor elects to proceed under SBRA, a subchapter V trustee is appointed immediately to perform certain duties in connection with the administration of the case.”).

86 Section 1183(a) also contemplates that the United States trustee shall appoint one disinterested person to serve as trustee in the case if the United States trustee has not otherwise appointed a standing trustee. *See also* Clifford J. White, III, *Small Business Reorganization Act: Implementation and Trends*, 40 Am. Bankr. Inst. J. 54 (Jan. 2021) (“In implementing the SBRA, the USTP recruited, vetted and trained approximately 250 selectees from more than 3,000 applicants.”); Sub V Handbook, *supra* note 85, at 2-1–2-2. The U.S. Trustee Program engaged in public advertising and outreach to identify individuals interested in serving as a Subchapter V Trustee. *Id.* at 2-1. Qualified individuals must be competent to perform the statutory duties set out in section 1183, successfully complete a background security investigation and post or maintain an appropriate bond. *Id.* at 2-1–2-2. They must also be disinterested as defined in section 101(14A). Additional considerations for selection may be based on the unique circumstances of the specific case. *Id.* at 2-2.

87 White, *Small Business Reorganization Act: Implementation and Trends*, *supra* note 86, at 54.

88 11 U.S.C. § 1183(b). *See also* Sub V Handbook, *supra* note 85, 1-1 (“In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor’s payments to creditors under the confirmed plan of plan reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor’s bankruptcy estate for the benefit of creditors.”).

89 *Id.* § 1183(b).

90 *Id.*

91 *Id.* § 1183(b)(5).

92 *Id.* § 1183(b)(7).

93 *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022).

94 *See* Appendix C (ABI Subchapter V Task Force Survey: Summary of Key Insights and Feedback); Appendix D (ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results).

engaged Subchapter V trustee. The consensus view is that the successes enjoyed by debtors and creditors alike under the subchapter is due in no small part to the work performed by the Subchapter V trustees.⁹⁵ One court described the Subchapter V trustees as an “honest brokers” who have provided “credibility in evaluating the debtor’s business’s prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor’s stakeholders, thereby enabling small business to reorganize.”⁹⁶

The testimony of bankruptcy professionals and judges shows that, in practice, the extent to which the Subchapter V trustee’s role emphasizes any one of the duties set forth in 11 U.S.C. § 1183(b) shifts both from case to case and over time within a single case. The Subchapter V trustee has been described as a “utility player” in cases, deploying different skills and abilities as needed to resolve whatever problems a case presents.⁹⁷ One Subchapter V trustee, who had been appointed in about 40 cases, explained that she fills in anywhere there are “gaps or she is needed to facilitate the administration of the bankruptcy case.”⁹⁸ In addition to working with debtors and creditors to reach agreement on a consensual plan, Subchapter V trustees in some circumstances assist the debtor’s counsel by informing them about deadlines, revising plans, and drafting pleadings, cash collateral orders and stipulations, as appropriate.⁹⁹

Subchapter V trustees are typically lawyers, accountants, or financial advisors, but they do not all have the same skills and experiences. All agree that Subchapter V trustees need a variety of legal knowledge and skills and business acumen to be effective, such as practical dispute resolution skills, experience in liquidating assets (including causes of action), forensic accounting, and if no Subchapter V experience, then experience representing debtors in Chapter 13 and/or Chapter 11 (particularly negotiating and confirming plans of reorganization).¹⁰⁰ Likewise, there is general agreement that the U.S. Trustee Program, Bankruptcy Administrators, bankruptcy professionals, and professional organizations like the American Bankruptcy Institute and the National Association of Bankruptcy Trustees, among

95 See, e.g., *Written Statement of Hon. Judge Goldblatt, U.S. Bankruptcy Court for the District of Delaware*, at 2, ABI Subchapter V Task Force Hearing (Role of the Subchapter Trustee) (Jul. 14, 2023) <https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing> (“I do want to emphasize the very high regard I have for the work of the subchapter V trustees that have appeared in cases before me.”); *Written Statement of Hon. Craig Gargotta, U.S. Bankruptcy Court for the Western District of Texas*, at 2, ABI Subchapter V Task Force Hearing (Plan and Confirmation Issues) (Sept. 8, 2023) <https://subvtaskforce.abi.org/hearings/september-8-2023-virtual-public-hearing> (“My perception of the subchapter V cases that I have seen in my court is that the most significant benefit in subchapter V cases has been the subchapter V trustees.”); *Written Statement of Hon. Deborah Thorne, U.S. Bankruptcy Court for the Northern District of Illinois*, at 2, ABI Subchapter V Task Force Hearing (Role of the Subchapter Trustee) (Jul. 14, 2023) <https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing> (describing concrete ways the bankruptcy court and the debtor benefit from the expertise of the Subchapter V trustee); *Written Statement of Hon. Hannah Blumenstiel*, *supra* note 22, at 4 (“Good trustees are invaluable . . .”).

96 *In re Corinthian Communications, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022).

97 *Written Statement of Hon. Meredith Grabill, U.S. Bankruptcy Court for the Eastern District of Louisiana*, at 3, ABI Subchapter V Task Force Hearing (Role of Subchapter V Trustee) (July 14, 2023), <https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing>.

98 *Written Statement of Susan Sefflin*, at 4, ABI Subchapter V Task Force Hearing (Role of the Subchapter V Trustee) (Jul. 14, 2023) <https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing> (stating that “the most important part of my job as trustee is to fill in anywhere there are ‘gaps’ and/or where I am needed to facilitate the administration of the bankruptcy case.”); see also *Written Statement of Hon. Meredith Grabill*, *supra* note 97, at 4 (“The Subchapter V Trustee has researched complex regulatory schemes or vetted proposed plans, as examples, to provide advice and an extra set of hands to the debtor’s counsel, who is herself, more often than not, a sole practitioner.”).

99 E.g., *Written Statement of Susan Sefflin*, *supra* note 98.

100 See, e.g., *Written Statement of Hon. Meredith Grabill*, *supra* note 97.

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others, should continue to provide training and other educational programming to support Subchapter V trustees, develop their skills, and to promote uniformity and consistency in skill sets among Subchapter V Trustees across the country.¹⁰¹

Based on the foregoing, the Task Force agreed that the implementation and administration of Subchapter V benefits from continued education and professional development for Subchapter V trustees.

B. Subchapter V Trustee Compensation

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends that courts use an interim compensation procedure or practice according to a set of key principles described below that include, as appropriate, establishing an escrowed fund or other mechanism to ensure payment of Subchapter V trustees' fees and expenses, subject to final approval by the court.

Supporting Principles

- Subchapter V trustees report that they often are not paid when cases are dismissed or resolved other than through a confirmed plan. Even when a plan is confirmed, 86% of Subchapter V trustees responding to a Task Force survey reported that they have been paid less than the amount of fees awarded in some cases.
- Testimony emphasized the need for interim compensation procedures to eliminate collection risk for the Subchapter V trustee, to ensure the appointment and retention of high-quality Subchapter V trustees, and to filter out the cases that are likely to result in dismissal or conversion because the debtor's business or plan is simply not feasible.
- Courts should use an interim compensation procedure or practice to ensure Subchapter V trustee compensation while preserving flexibility for courts to address the circumstances of individual cases.

The Subchapter V trustee is compensated through section 330(a)(1)(A), which allows for “reasonable compensation for actual, necessary services rendered by the trustee ... and by any paraprofessional

¹⁰¹ See, e.g., *id.*; *Written Statement of Marc Albert*, at 2, ABI Subchapter V Task Force Hearing (Role of the Subchapter V Trustee) (Jul. 14, 2023), <https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing>.

person employed by any such person.”¹⁰² The trustee may also be reimbursed for “actual, necessary expenses” pursuant to section 330(a)(1)(B).¹⁰³ In order for compensation to be awarded, a fee application must be filed with the court.¹⁰⁴

Confirmation requires that the Subchapter V plan provide for payment of the Subchapter V trustee’s fee. If the plan is confirmed consensually, the compensation must be paid on the plan’s effective date.¹⁰⁵ If nonconsensual or “cramdown” confirmation occurs, the plan may provide for payment of the Subchapter V trustee over the life of the plan.¹⁰⁶

Subchapter V trustees explained to the Task Force during hearings¹⁰⁷ and in survey data¹⁰⁸ that they face challenges being compensated for their work. When cases fail or are resolved in ways other than through a confirmed plan, Subchapter V trustees report they often do not get paid. Even in cases with confirmed plans, Subchapter V trustees informed the Task Force that payment of approved fees has been an issue. Responses to the Task Force’s survey show that Subchapter V trustees are not always paid the full amount of professional fees awarded by the court. Eighty-six percent of the respondents reported that they are paid less than the amount of fees awarded in some cases.¹⁰⁹

The bankruptcy system is addressing this issue both informally and, increasingly, formally through the promulgation of local rules and standing or scheduling orders designed to ensure compensation of Subchapter V trustees.¹¹⁰ For instance, some Subchapter V trustees report that their districts use an informal escrow procedure upon motion of the Subchapter V trustee. Essentially, at the outset of the case, the Subchapter V trustee asks that the debtor be required to pay a predetermined amount into an escrow account, the balance of which is used to pay all or a substantial part of the Subchapter V

¹⁰² 11 U.S.C. § 330(a).

¹⁰³ *Id.* § 330(b). These section 330 compensation provisions apply regardless of whether the Subchapter V trustee makes disbursements of estate funds.

¹⁰⁴ See Fed. R. Bankr. P. 2016(a) (“An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.”).

¹⁰⁵ See 11 U.S.C. § 1129(a)(9)(A) (requiring that a consensual plan provide for payment of claims under section 507(a)(2), which includes Subchapter V trustee claims for compensation under section 330 that are section 503(b) administrative expense claims entitled to section 507(a)(2) priority).

¹⁰⁶ See *id.* § 1191(e). (“Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.”).

¹⁰⁷ See, e.g., *Written Statement of Katharine B. Clark*, ABI Subchapter V Task Force Hearing (Jun. 9, 2023), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>. See also Editors, *Has Subchapter V Solved the Problems of Small Business Bankruptcies: Views and Reflections of Subchapter V Trustees on the First Two Years of the New Law*, 31 No. 3 J. Bankr. L. & Prac. NL Art. 1 (Jun. 2022) (compiling views of Subchapter V trustees who note, among other observations, that payment of fees is challenging in cases that do not confirm and uniformity in compensation procedure is desirable).

¹⁰⁸ See Appendix C (American Bankruptcy Institute Subchapter V Survey: Summary of Key Insights Feedback) (respondents frequently cited ensuring compensation of Subchapter V trustees as an area needing improvement); Appendix D (ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results).

¹⁰⁹ See Appendix D (ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results).

¹¹⁰ See Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* § IV.E.2. [hereinafter *SBRA Guide*] (Jun. 2022) (describing ways to address the problem, including (1) predicated dismissal orders on the payment of compensation to the Subchapter V trustee; (2) including compensation for the Subchapter V trustee in the debtor’s cash collateral budget; or (3) requiring periodic payments to be deposited and held in an escrow account for payment of the Subchapter V trustee’s fees).

trustee's fees and costs.¹¹¹ Then, upon confirmation of a Subchapter V plan, the Subchapter V trustee can file one fee application and get paid.

In addition, in cases where first day motions seek the use of cash collateral, particularly if the proposed use includes the creation of a reserve fund for professionals, some Subchapter V trustees have successfully obtained a line-item in the budget to provide a reserve for fees and costs to be held in trust by debtor's counsel. Some Subchapter V trustees file interim fee applications. In the context of dismissal, some Subchapter V trustees have succeeded in obtaining court orders that condition dismissal on the payment of their fees.¹¹²

Some districts formally require one of these methods in their local rules or standing orders.¹¹³ For example, the Eastern District of Missouri has promulgated a local rule that provides for an escrow procedure. Under local bankruptcy rules, the debtor must tender \$1,000 to the Subchapter V trustee within seven days after notification of the appointment of the Subchapter V trustee.¹¹⁴ The Subchapter V trustee holds the funds in escrow for the purpose of compensation for services rendered and reimbursement for out-of-pocket expenses.¹¹⁵ The court may adjust the dollar amount upon the request of any interested party.¹¹⁶ Payment of compensation and reimbursement to the Subchapter V trustee from the escrowed funds is subject to allowance and approval by court order.¹¹⁷

The Northern District of West Virginia has a General Order that requires an initial deposit of \$1,000 to be segregated and held by the debtor's attorney for purposes of compensating the Subchapter V trustee within seven days after notification of the appointment of the Subchapter V trustee.¹¹⁸ A *pro se* debtor must tender \$1,000 to the Subchapter V trustee to be held in escrow for purposes of compensating the Subchapter V trustee for services rendered and reimbursing out-of-pocket expenses. Here, too, the amount set aside is subject to adjustment by the court, and any payment of the segregated funds requires court approval.¹¹⁹

Meaningful testimony emphasized the need for implementation of interim compensation procedures to reduce collection risk for the Subchapter V trustee, to ensure the appointment and retention of high-

111 See *Written Statement of Hon. Michael E. Romero*, *supra* note 23, at 4; *Written Statement of Hon. Craig Gargotta*, *supra* note 95, at 3.

112 See, e.g., *In re New York Hand & Physical Therapy PLLC*, No. 21-35911, 2023 WL 2962204, at *4 (Bankr. S.D.N.Y. Apr. 14, 2023) (conditioning dismissal of Subchapter V debtor's case on payment in full of Subchapter V trustee's fees); *Written Statement of Geoff Groshong*, at 3, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023), <https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing>. But see *In re East Coast Diesel, LLC*, 2022 WL 19078763 (Bankr. M.D.N.C. 2022) (declining to condition dismissal on payment of the trustee's fees and postpetition taxes because the evidence did not establish that all postpetition wages had been paid and that disputes over the amount of the prepetition taxes existed).

113 See Appendix F (Chart of Subchapter V Local Bankruptcy Rules by State and District /Division).

114 Local Bankruptcy Rule 2015-3(C) (Bankr. E.D. Mo.), <https://www.moeb.uscourts.gov/sites/moeb/files/USBC%20EDMO%20Local%20Rules%20Rev%20120123.pdf>.

115 *Id.*

116 *Id.*

117 *Id.*

118 General Order 21-5 Establishing an Initial Deposit for Cases Filed Under Subchapter V of Chapter 11 (Bankr. N.D. W.Va.), <https://www.wvnb.uscourts.gov/sites/wvnb/files/general-ordes/General%20Order%2021-5.pdf>.

119 *Id.*

quality Subchapter V trustees, and to filter out the cases that are likely to result in dismissal or conversion because the debtor's business or plan is simply not viable.¹²⁰ If the debtor cannot allocate some amount for the trustee's fees at the outset of the case or at periodic intervals during the pendency of the case, it is unlikely that the debtor will be able to propose, confirm, and perform under a plan.¹²¹ A set-aside also assists the debtor in budgeting and gives the debtor a trial run at performing on obligations prior to confirmation.

The Task Force evaluated whether a statutory amendment to address the problem is necessary. Specifically, the Task Force debated whether an amendment should expressly authorize or require courts to implement an escrow or deposit procedure, or whether the debtor should be required to fund an escrow account for eventual payment of the trustee's compensation in a prescribed amount, such as \$1,000 per month or \$5,000 on the first day. The Task Force concluded that Subchapter V contains sufficient tools that permit courts to deal with the problem of payment of fees of Subchapter V trustees without a statutory amendment that mandates a particular procedure or prescribed amount.

The Task Force believes that the need for flexibility trumps uniformity here. Mandating a uniform procedure or fixed escrow amount diminishes the court's flexibility and discretion and would adversely impact the ability of some smaller business debtors to reorganize. Bankruptcy judges need flexibility so they can exercise discretion to set an amount at an appropriate level on a case-by-case basis. If the escrow amount is set too high for a particular debtor, the burden of excessive administrative costs may make it difficult or even impossible to confirm a plan or make ongoing payments during the case.¹²² One of Subchapter V's stated goals is a more feasible, cost-effective reorganization for small business.¹²³ Requiring a debtor to escrow amounts that impair or prohibit a debtor's ability to reorganize is contrary to this purpose.

Although the Task Force does not recommend a statutory amendment, the Task Force encourages courts to use an interim compensation procedure or practice that ensures payment of the Subchapter V trustee's fees and expenses, or other administrative expenses that the court deems appropriate.¹²⁴ Ensuring payment of professional fees and expenses, such as through a set-aside or carve-out in a cash collateral order, is not novel. Carve-outs are common in standard Chapter 11 cases for the payment of debtor's counsel and for the unsecured creditors' committee professionals.¹²⁵ As such, courts have the

120 *Written Statement of Amy Denton Mayer*, 8–10, ABI Subchapter V Task Force Hearing (Role of the Subchapter V Trustee) (Jul. 14, 2023), <https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing>.

121 *Written Statement of Katharine B. Clark*, *supra* note 107, at 2.

122 The size of cases and businesses also appear to vary by geographic location and district, making a local approach to any early-case escrow or set aside more appropriate.

123 H.R. Rep. No. 116-171, at 4 (2019), *as reprinted in* 2019 U.S.C.C.A.N. 366.

124 A local or case-specific approach also allows courts to consider the overall circumstances of a case and whether other administrative expenses should be included in any set-aside or carve-out. *But see In re Roe*, No. 23-32077, 2024 WL 206678, at *3 (Bankr. D. Or. Jan. 18, 2024) (grappling with the appropriateness of requiring an escrow of only the Subchapter V trustee's compensation rather than for all administrative expenses).

125 *Basics of Professional Retention and Compensation*, 24-Feb. Am. Bankr. Inst. J. 18, 60 (Feb. 2005) (explaining the use of negotiated "carve-outs" in cash collateral motion to ensure payment of professional fees); Bruce H. White & William L. Medford, *Obtaining Attorney Fee Carve-Outs in Cash Collateral Orders*, 19-Oct. Am. Bankr. Inst. J. 28, 28 (2001) ("It is also quite common for cash-collateral orders to provide 'carve-outs' for professionals. Specifically, debtors often . . . include provisions in proposed cash-collateral orders that segregate, *i.e.*, carve-out . . . an amount sufficient . . . for the payment of professional fees and expenses. A carve-

requisite experience and sufficient discretion to determine what is necessary and appropriate based on the circumstances of individual cases.

In addition, not all Subchapter V debtors are able to confirm plans and their cases are dismissed or converted. The risk of nonpayment for Subchapter V trustees is higher in this context. An interim compensation procedure that provides for a set-aside amount to compensate the trustee would minimize such risk.

After reviewing various methods that courts have adopted, the Task Force offers the following guidance and best practices for ensuring Subchapter V trustee compensation. This guidance aligns with parameters set forth by the U.S. Trustee Program relating to Subchapter V trustee compensation.¹²⁶

- First, any escrowed or deposited amounts to provide a fund for payment of the Subchapter V trustee’s fees should be approved by the court or by local rule. Some courts have entered scheduling or standing orders or amended their local rules to require the debtor’s counsel to pay initial or monthly amounts to the Subchapter V trustee to hold in a trust account or to segregate these amounts.¹²⁷ Some have also required that debtors include anticipated trustee fees in their cash-collateral budgets or pay the fees as a condition of dismissing a case.
- Second, any escrowed or deposited amounts should not be in an amount that adversely affects the debtor’s cash flow or its ability to reorganize.¹²⁸ One of Subchapter V’s stated goals is a more feasible, cost-effective reorganization for small business.¹²⁹ Paying deposit amounts or advance fees that impair or prohibit a debtor’s ability to reorganize is contrary to this purpose.
- Third, Subchapter V trustees must obtain court approval before drawing on any funds set aside for Subchapter V trustee compensation.¹³⁰ Funds should be deposited in an escrow or trust account, and like any other estate professionals, Subchapter V trustees may submit interim fee applications but should not be paid until the court approves a fee request pursuant to section 330.
- Fourth, any procedure should not prevent the debtor from paying administrative expenses over time in the case of a nonconsensual plan pursuant to section 1191(e).¹³¹

out assures that unencumbered assets will exist for the payment of debtor’s counsel’s fees and expenses in the event of an insolvent estate. Additionally, a carve-out may provide for statutory fees and, sometimes, fees and expenses of other professionals.”).

126 Daniel J. Casamatta & Michael J. Bujold, *The USTP’s Positions on Select SBRA Legal Issues*, 41-Nov Am. Bankr. Inst. J. 14, 63-64 (Nov. 2022).

127 Some courts require the debtor’s counsel to segregate the funds unless the debtor is pro se, in which case the Subchapter V trustee establishes a trust account. A second approach directs the Subchapter V trustee to set up the account for the funds. The Task Force does not endorse any particular approach but notes that requiring the Subchapter V trustee to establish the account imposes an administrative burden on the Subchapter V trustee.

128 See Casamatta & Bujold, *supra* note 126, at 64.

129 H.R. Rep. No. 116-171, at 4 (2019), *as reprinted in* 2019 U.S.C.C.A.N. 366.

130 See Casamatta & Bujold, *supra* note 126, at 64.

131 See *id.* (observing that “requiring the debtor to pay significant monthly retainers or trustee fees may obviate or infringe upon the debtor’s rights” to pay the trustee’s fees over the life of the plan when the plan confirmed is nonconsensual).

C. Expanding the Duties and Powers of the Subchapter V Trustee

Recommendation and Supporting Principles:

Recommendation

The Task Force finds a statutory amendment is not necessary to clarify the scope of the Subchapter V trustee's duties and powers but offers some guidance for courts and parties involved in cases warranting an expansion of the Subchapter V trustee's duties and powers.

Supporting Principles

- The Bankruptcy Code dictates the scope of Subchapter V trustee's duties, which vary depending on whether the debtor remains in possession. The Subchapter V trustee has inherent power to act to carry out those statutory duties.
- The Bankruptcy Code contemplates expansion of those duties and powers, either by removing the debtor from possession or by court order conferring expanded duties to investigate and report on the debtor's business and financial affairs.
- A Subchapter V trustee has automatically expanded duties and powers under section 1183(b)(5) when the court orders removal of debtor from possession pursuant to section 1185. Upon dispossession, the trustee is automatically authorized to operate the business of the debtor and has additional duties specified in section 704(a)(8) and section 1106(a)(1), (2), and (6) of the Bankruptcy Code.
- Under section 1183(b)(2), the court may for cause enter an order expanding the trustee's duties to investigate and report, even if the debtor is not removed.
- The Task Force offers some considerations for courts and parties when expanded duties and powers are necessary.

Section 1183 enumerates the Subchapter V trustee's duties. In general, the role of the Subchapter V trustee is to supervise and monitor the case and to participate in the development and confirmation of the plan.¹³² In addition, the Subchapter V trustee must appear and be heard at the status conference¹³³ and at any hearing concerning the value of property subject to a lien, confirmation of a plan, modification

¹³² 11 U.S.C. § 1183(b).

¹³³ *Id.* § 1188.

of a plan after confirmation, and the sale of property of the estate.¹³⁴ As in Chapter 11, Chapter 12, and Chapter 13 cases, the Subchapter V debtor remains in possession of assets and operates the business.¹³⁵ The Subchapter V trustee has a right to obtain information about the debtor's business and financial condition in order to carry out the duties to participate in the plan process and to be heard on the plan and other matters.¹³⁶

The Subchapter V trustee does not have investigative duties at the outset of the case. Section 1106, which specifies the duties of the trustee in a standard Chapter 11 case, does not apply in Subchapter V. Section 1183, however, makes some of its provisions applicable if the court so orders for cause.¹³⁷ Among those is the duty to investigate the debtor's financial affairs.¹³⁸

When the court orders removal of the debtor from possession pursuant to section 1185,¹³⁹ a Subchapter V trustee has automatically expanded duties and powers under section 1183(b)(5).¹⁴⁰ Upon dispossession of the debtor, the trustee is automatically authorized to operate the business of the debtor.¹⁴¹ Section 1183(b)(5) also assigns to the Subchapter V trustee the duties specified in section 704(a)(8) and section 1106(a)(1), (2), and (b).¹⁴²

The Task Force surveyed Subchapter V trustees about the expansion of their duties under section 1183(b)(2) and the expansion of their powers under section 1185.¹⁴³

Survey respondents described their expanded duties as including: investigating the debtor's finances; investigating avoidance actions; investigating insider loans; reviewing and reporting on whether the debtor follows the sale procedures; operating the business; exercising control over sales proceeds pending plan approval; controlling the debtor's bank accounts while business operations continued postconfirmation; reporting on the debtor's operations; preparing monthly financial reports; determining whether creditors' claims were noncontingent for eligibility purposes; liquidating assets

134 *Id.* §1183(b)(3).

135 *Id.* § 1184.

136 *In re Ozcelebi*, 639 B.R. 365, 382 (Bankr. S.D. Tex. 2022) ("The responsibility of the subchapter V trustee to participate in the plan process and to be heard on the plan and other matters cloaks the subchapter V trustee with the statutory right to obtain information about the debtor's property, business, and financial condition.").

137 *Id.* § 1183(b)(2) ("The trustee shall perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders."); *In re Corinthian Communications, Inc.*, 642 B.R. 224, 233 (Bankr. S.D. N.Y. 2022) ("A court may *sua sponte* issue an order expanding the Subchapter V Trustee's duties under section 1183(b), even though the subsection contains the phrase 'on request of a party in interest.'"); *In re AJEM Hospitality, LLC*, Case No. 20-80003 (Jointly Administered), 2020 WL 3125276, *2 (Bankr. M.D. N.C. 2020) (court allowed for limited expansion of trustee's duties based on § 1106(a)(3) language "to the extent that the court orders").

138 11 U.S.C. § 1183(b)(2).

139 *Id.* § 1185 ("On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.").

140 *Id.* § 1183(b)(5) ("The trustee shall if the debtor ceases to be a debtor in possession—(A) perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title; and (B) be authorized to operate the business of the debtor.").

141 *Id.* § 1183(b)(5)(B).

142 In addition, Federal Rule of Bankruptcy Procedure 2012(a) provides for the automatic substitution of the Subchapter V trustee in any pending action, proceeding or contested matter.

143 See ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results.

postconfirmation; facilitating settlement conferences on contested matters and adversary proceedings; objecting to claims; and analyzing and prosecuting causes of action.¹⁴⁴

Many respondents indicated that their powers had not been expanded in any cases.¹⁴⁵ Most commonly, respondents indicated that their expanded powers included operating the business following removal of the debtor in possession.¹⁴⁶ They also were authorized to conduct and/or finalize section 363 sales, carry out liquidating plans, assist in the transition of the business from the debtor to a related entity, review potential avoidance actions for Chapter 7 liquidation analysis purposes, and negotiate mass tort scenarios to reduce claims against the estate.¹⁴⁷

The Task Force study revealed that some Subchapter V trustees are uncertain about the scope of their authority when the debtor has been removed from possession. Although section 1183(b)(5) imposes certain duties on the Subchapter V trustee when the debtor is dispossessed, the testimony and survey data suggest that some subchapter V trustees are concerned that the scope of the trustee's powers is unclear in some instances. This kind of ambiguity can create unwanted delay, cost, and litigation in the case.

Clarity in this area is paramount. Subchapter V trustees need to be able to perform duties and exercise powers necessary and beneficial to the estate with confidence in their authority to do so.

The Task Force does not find a statutory amendment necessary for such clarity. The Bankruptcy Code dictates the scope of Subchapter V trustee's duties, which vary depending on whether or not the debtor remains in possession. The Subchapter V trustee has inherent power to act to carry out those statutory duties. In addition, the Bankruptcy Code contemplates expansion of those duties and powers, either by removing the debtor from possession or by order conferring expanded duties and authorizing expanded powers to investigate and report.

When the debtor is removed, the Subchapter V trustee has substantially the same rights, powers, and duties that a Chapter 11 trustee has in a standard Chapter 11 case, except the ability to file the plan, which is exclusive to the debtor under section 1189. This means that, upon removal of the debtor from possession, the Subchapter V trustee has automatically expanded powers that authorize the trustee to operate the debtor's business pursuant to section 1183(b)(5)(B), to sell estate assets under section 363, to obtain credit for the estate under section 364 (if the trustee decides to operate debtor's business), to recover possession of estate assets under sections 542 and 543, to avoid transfers under sections 544, 545, 547, 548 and 549, and to abandon property of the estate under section 554.

The Task Force heard a concern that some courts and bankruptcy professionals hold the view that the Subchapter V trustee lacks some of these powers, such as the authority to conduct a 363 sale, when

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

the debtor has been dispossessed, without a court order granting such powers.¹⁴⁸ The Task Force does not share that view, but the court can address the matter in the removal order if requested by the parties.

Likewise, the court may enter an order expanding the Subchapter V trustee's duties even if the debtor is not removed, though only to investigate and report on the debtor.¹⁴⁹

The Task Force debated offering a framework for considering how to delineate expanded duties and powers of the Subchapter V trustee in court orders. The Task Force considered whether such orders should be drafted with specificity or in more general terms. The Task Force ultimately concluded that the language of such an order, including its degree of specificity, depends on the circumstances of the individual case.

For instance, a Subchapter V trustee may need the order to be drafted in general language, so the trustee has broad authorization to do what is necessary and beneficial for the estate and creditors. One approach, as a matter of best practice, is to draft an order expanding the Subchapter V trustee's powers by identifying and specifying any limitations on those powers and explaining the purpose of such limitations. In effect, the Subchapter V trustee would have clarity concerning what actions are not permissible. A different approach would specifically enumerate the Subchapter V trustee's expanded powers and duties, with the implication that anything not included is not authorized by the court.¹⁵⁰

The Task Force also observes that the Subchapter V trustee is included in the *Barton* doctrine.¹⁵¹ This doctrine, which stems from *Barton v. Barbour*, 104 U.S. 126 (1881), is a common law principle that bars suits against court-appointed trustees and other fiduciaries absent permission of the appointing forum.¹⁵² Although the *Barton* case did not deal with bankruptcy trustees, all the courts of appeals that have considered the issue have extended its applicability to such trustees and their counsel.¹⁵³ The doctrine applies to Subchapter V trustees to the same extent it has been held to apply, or not, to other

148 This view is that the statutory rights, powers, and functions that revert to the trustee upon removal of a debtor from possession in standard Chapter 11 cases and Subchapter V cases are not the same because section 1181 makes section 1106 inapplicable in Subchapter V cases except as otherwise stated in section 1183. Close scrutiny of section 1183's references to section 1106 indicates that when the debtor has been removed from possession, there are no material differences in duties, and the powers necessary to exercise those duties, between the trustee in a standard Chapter 11 case and the trustee in Subchapter V except for the ability to file a plan.

149 11 U.S.C. § 1183(b)(2).

150 See, e.g., *In re Frasier Contracts, Inc.*, No. 22-03776, ECF No. 206, Order on Agreed Motion to Expand the Scope of Subchapter V Trustee's Powers (Bankr. M.D. Fla. Jul. 5, 2023) (specifically enumerating trustee's expanded powers).

151 *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (holding that leave of court must be obtained before a receiver can be sued in another forum).

152 *Id.* at 126 (“[i]t is a general rule that before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained.”).

153 See *Alexander v. Hedback*, 718 F.3d 762, 767 (8th Cir. 2013); *In re VistaCare Group, LLC*, 678 F.3d 218, 224 (3d Cir. 2012); *Satterfield v. Malloy*, 700 F.3d 1231, 1234–35 (10th Cir. 2012); *McDaniel v. Blust*, 668 F.3d 153, 156–57 (4th Cir. 2012); *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 970 (9th Cir. 2005); *Muratore v. Darr*, 375 F.3d 140, 147 (1st Cir. 2004); *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000); *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998); *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996); *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993); *Anderson v. United States*, 520 F.2d 1027, 1029 (5th Cir. 1975); *Vass v. Conron Bros. Co.*, 59 F.2d 969, 970 (2d Cir. 1932); 1 Collier on Bankruptcy ¶ 10.01 (16th ed. 2023) (“All circuits except the District of Columbia Circuit have ruled upon the vitality of the *Barton* doctrine, and all have concluded that it applies to suits against bankruptcy trustees.”).

trustees.¹⁵⁴ However, conflicting authority exists about whether the *Barton* doctrine applies when the case has been closed.¹⁵⁵

Based on the foregoing, the Task Force finds a statutory amendment is not necessary to clarify the scope of the Subchapter V trustee's duties and powers but offers some guidance for courts and parties involved in cases warranting an expansion of the Subchapter V trustee's duties and powers.

D. Subchapter V Trustee as Mediator

Recommendation and Supporting Principles:

Recommendation

If the parties and court are considering appointment of the Subchapter V trustee to mediate a dispute, the Task Force urges those involved to use caution, acknowledge the potential issues involved, and insist on entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator.

Supporting Principles

- Even though Subchapter V trustees perform mediator-like functions in carrying out the duty to facilitate development of the plan, they are not mediators because classic mediation involves requirements of neutrality and confidentiality, both of which are potentially inconsistent with the role and duties of the Subchapter V trustee.
- The Subchapter V trustee has statutory duties the trustee must fulfill that can conflict with the requirements of neutrality and confidentiality in mediation.
- The Subchapter V trustee is not neutral. The Subchapter V trustee is an independent third party with fiduciary duties who must be fair and impartial to all parties in the case. Thus, the trustee is also involved in the underlying case as a party in interest and must take positions on issues that arise in the case, such as confirmation of the plan.

¹⁵⁴ The *Barton* doctrine does not apply when the trustee's actions exceed the bounds of his or her official authority, known as the "*ultra vires*" exception. See *In re Ondova Ltd. Co.*, 914 F.3d 990, 993 (5th Cir. 2019); *In re Christensen*, 598 B.R. 658, 665 (Bankr. D. Utah 2019); *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 545 B.R. 91, 105 (Bankr. W.D. Pa. 2015); see Hon. Harlin D. Hale & Amber Carson, *You Can't Sue Me: Claims Against Professionals*, 36-AUG Am. Bankr. Inst. J. 28 (Aug. 2017).

¹⁵⁵ See, e.g., *Chua v. Ekonomou*, 1 F.4th 948 (11th Cir. 2021) (ruling that the *Barton* doctrine no longer applies once the case is closed); *Tufts v. Hay*, 977 F.3d 1204, 1209–10 (11th Cir. 2020) (stating that "the *Barton* doctrine has no application when jurisdiction over a matter no longer exists in the bankruptcy court" and that, although there is "no categorical rule that the *Barton* doctrine can never apply once a bankruptcy case ends," in cases where any decision by a district court would have "no conceivable effect" on a bankruptcy estate, the *Barton* doctrine does not deprive the district court of subject matter jurisdiction).

- The Subchapter V trustee in carrying out their duties may not be able to maintain confidentiality of information learned during mediation.
- To the extent that the court and parties determine to have the Subchapter V trustee serve as mediator in the particular case, the Task Force urges those involved to use caution. The court and the parties should evaluate the nature of the mediation and the necessity of a confidentiality waiver to the extent necessary for the trustee to fulfill those duties. The Task Force also recommends entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator.
- This guidance is not meant to disrupt how courts and parties are navigating these challenges. The guidance merely offers alternatives for using mediation as a tool in Subchapter V cases while acknowledging that the Subchapter V trustee must fulfill statutory duties that require careful consideration of the requirements of neutrality and confidentiality in mediation.

Unlike trustees in other kinds of bankruptcy cases, the Subchapter V trustee has the duty to “facilitate the development of a consensual plan of reorganization.”¹⁵⁶ This duty is unique to Subchapter V trustees. The role distinguishes them from trustees in other chapters, who occupy a more adversarial posture to the debtor due to their duties to protect the estate and creditors.¹⁵⁷ Unlike their counterparts in other chapters, Subchapter V trustees do not take possession of estate property unless the debtor is removed¹⁵⁸ and are not required to investigate the debtor’s financial affairs unless the court orders it for cause.¹⁵⁹

The duty to facilitate the development of a consensual plan has led some to conclude that the Subchapter V trustee functions like a mediator.¹⁶⁰ At first blush, the analogy seems apt. The Subchapter V trustee must work with the parties—the creditors and the debtor—to help them reach agreement on a plan.¹⁶¹ One Subchapter V trustee has explained that the trustee’s role in a Subchapter V case is like a mediator’s role in settlement negotiations because the trustee is “actively analyzing issues, questioning

¹⁵⁶ 11 U.S.C. § 1183(b)(7).

¹⁵⁷ *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022); *In re 218 Jackson LLC*, 631 B.R. 937, 947 (2021); Patricia Redmond & Ashley D. Champion, *Come Together: The Unique Role of Subchapter V Trustees and the Cautionary Tale of 218 Jackson*, 40 Am. Bankr. Inst. J. 12 (Nov. 2021) (“[T]he subchapter V trustee’s role is intended to be one of mediator rather than adversary.”).

¹⁵⁸ See 11 U.S.C. § 1183(b)(5).

¹⁵⁹ *Id.* § 1183(b)(2).

¹⁶⁰ See, e.g., *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022); *In re 218 Jackson LLC*, 631 B.R. 937, 947 (2021); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020) (“A substantial part of the Subchapter V trustee’s pre-confirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors.”); Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 Am. Bankr. Inst. L. Rev. 25 (2020); Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 Amer. Bankr. Inst. J. 8 (Nov. 2019) (the statutory goal of a consensual plan suggests that the trustee also fill a mediation role).

¹⁶¹ *In re 218 Jackson, LLC*, 631 BR. at 937.

perceptions, conducting private caucuses, stimulating negotiations between opposing sides, suggesting alternatives, and keeping order amongst the parties and counsel.”¹⁶²

Another Subchapter V trustee has described the trustee’s role as that of a “mediator with an eye towards compromise.”¹⁶³ In this sense, the Subchapter V functions like a mediator in fulfilling the duty to facilitate the development of consensual plan, including the facilitation of resolution of other, related conflicts along the way.

It is true that the Subchapter V trustee performs mediator-like functions in carrying out the duty to facilitate development of the plan. But they are not mediators because, among other things, classic mediation involves requirements of neutrality and confidentiality, both of which are inconsistent with the role and duties of the Subchapter V trustee.¹⁶⁴

Mediator and facilitator have different meanings. A mediator is a “[a] neutral person who tries to help disputing parties reach an agreement.”¹⁶⁵ Facilitator means “[s]omeone who helps a group of people engage in discussions or work together . . . one who interacts with parties in negotiations, exchanging information and trying to further the process.”¹⁶⁶ Thus, both mediators and the Subchapter V trustee working as “plan facilitator” are third parties helping disputing parties reach an agreed resolution. But the Subchapter V trustee’s role is distinct from that of a pure mediator in several respects.¹⁶⁷

A mediator is neutral. A mediator is not involved in the underlying case, and the mediator cannot take a position before the court on issues being mediated. A Subchapter V trustee, while disinterested,¹⁶⁸ is not necessarily neutral.¹⁶⁹

The trustee is an independent third party with fiduciary duties who must be fair and impartial to all parties in the case,¹⁷⁰ making the trustee uniquely positioned to facilitate a consensual confirmation.

162 *Written Statement of Amy Denton Mayer*, *supra* note 120, at 5 (Jul. 14, 2023), <https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing>.

163 *Written Statement of Marc Albert*, *supra* note 101, at 2–3.

164 *See, e.g., Written Statement of Hon. Craig Gargotta*, *supra* note 95, at 2 (observing that “the subchapter V trustees in our district strike a good balance between remaining neutral yet serving almost as mediators between creditors and the debtor”).

165 Black’s Law Dictionary (11th ed. 2019).

166 *Id.*

167 Even though the Subchapter V trustee is not, in a technical sense, a mediator in the bankruptcy case, unless appointed to fulfill that role in a dispute, mediation skills are helpful in carrying out the Subchapter trustee’s duty to facilitate the development of a consensual plan. *See, e.g., Written Statement of Susan Seftin*, *supra* note 98, at 4–5 (“In January of 2021, the subchapter v trustees in the Central District of California participated in a weeklong mediation training program to improve our mediation skills and it was incredibly helpful. With that training and my experience as chapter 11 debtor counsel, I have helped facilitate many consensual subchapter v plans and I have been appointed as the mediator in two of my subchapter v trustee cases.”).

168 To be appointed, a Subchapter V trustee must be a “disinterested person” within the meaning of section 101(14). Therefore, the Subchapter V trustee cannot be a creditor, equity holder, officer, employee or other stakeholder in the debtor and cannot have an interest “material adverse” to the estate, any class of creditors or equity security holders. *Id.* Simply put, the Subchapter V trustee must have no pecuniary interest in the outcome of the case. *See also Written Statement of Hon. Judge Goldblatt*, *supra* note 95, at 2 (“From what I have seen, a large part of the success in some of these cases is attributable to the presence of a party-in-interest who does not have his or her own financial stake in the case.”).

169 Black’s Law Dictionary defines “neutral” as “not supporting any of the people or groups involved in an argument or disagreement; indifferent to the outcome of a dispute; refraining from taking sides in a dispute; impartial; unbiased.” *Neutral*, Black’s Law Dictionary (11th ed. 2019).

170 Sub V Handbook, *supra* note 85, at 2-2.

But the trustee is also involved in the underlying case as a party in interest and must take positions on issues that arise in the case, such as plan confirmation.¹⁷¹ In these instances, the trustee is not neutral. Thus, the Subchapter V trustee is not a mediator, in the formal sense, even though the duty to facilitate development of a consensual plan necessarily involves some of the functions of a mediator in order to facilitate conflict resolution on the path to a confirmable plan.

In addition, a mediator has the duty to maintain confidentiality of information learned during the mediation.¹⁷² In contrast, the Subchapter V trustee has no such duty. The Subchapter V trustee is an estate fiduciary and party in interest in the bankruptcy case.

Not every disclosure to the Subchapter V trustee is protected. Unless the court orders otherwise, the Subchapter V trustee must furnish information concerning the estate and the estate's administration if requested by a party in interest under section 1183(b)(1) and section 704(a)(7).¹⁷³ The trustee may be called upon by the court to express positions on other matters, such as asset sales and plan confirmation, and in that process, may be required to disclose confidential info learned during a mediation.¹⁷⁴ When the Subchapter V trustee is appointed to mediate a dispute, a conflict arises because the trustee may be required to make disclosure to the court with respect to matters learned during the mediation even if the parties requested or directed the trustee to maintain confidentiality.

The Task Force heard concerns from Subchapter V trustees about being formally appointed by the court to mediate disputes between the debtor and creditors.¹⁷⁵ When the Subchapter V trustee is appointed to formally mediate a dispute between the debtor and a creditor, how the trustee navigates the conflict between the mediator's duty of confidentiality and the trustee's duties as the Subchapter V trustee in the case presents a challenge.

Anecdotal evidence underscores both the challenge and divergent viewpoints here. One Subchapter V trustee, in compiling materials for a presentation at the National Conference of Bankruptcy Judges in 2022, asked Subchapter V trustees to answer the following question:

171 See 11 U.S.C. §1183(b)(3) (requiring the trustee to appear and be heard at the section 1188 status conference and any hearing that relates to valuing property subject to a lien, plan confirmation, modification of the plan after confirmation, sale of estate property); Bonapfel, *SBRA Guide*, *supra* note 110, § IV.B (“Because the subchapter V trustee is a fair and impartial fiduciary with monitoring and supervisory duties and the duty to facilitate a consensual plan, courts are likely to request that the subchapter V [trustee] advise the court of the trustee’s positions and recommendations concerning issues affecting administration of the case.” (citing *In re Major Model Management, Inc.*, 641 B.R. 302, 321-22 (Bankr. S.D.N.Y. 2022) (Requesting Subchapter V trustee’s views concerning whether class proof of claim should be permitted and agreeing that claims allowance process was the better approach)).

172 See, e.g., *Written Statement of Amy Denton Mayer*, *supra* note 120, at 5 (“Mediators typically sign, and require the parties to sign, confidentiality agreements. Mediators are also subject to strict limitations on disclosures pursuant to professional and ethical standards. Thus, they are required to maintain the parties’ confidences.”); Mediation, *Black’s Law Dictionary* (11th ed. 2019) (Mediation means “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. . . . Mediation is a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action.”).

173 11 U.S.C. § 1183(b)(1) (requiring the Subchapter V trustee to perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a)).

174 See *id.*; Amy Denton Mayer, *How to Effectively Utilize the Subchapter V Trustee to Make Your Subchapter V Case Magical: The Statutory Role of the Subchapter V Trustee, the Subchapter V Trustee as Facilitator/Mediator, and Other Ways to Effectively Utilize the Subchapter V Trustee*, 96th Annual National Conference of Bankruptcy Judges (Oct. 19-22, 2022) <https://ncbjmeeting.org/2022/materials/NCBJ%20Five%20Secrets%20to%20Magical%20Sub-V.pdf>.

175 See *Written Statement of Amy Denton Mayer*, *supra* note 120.

Have you ever entered into a formal agreement with the parties to mediate a dispute in a subchapter V case? Do you discuss confidentiality (or lack thereof) with the debtor and other parties in interest?¹⁷⁶

Some Subchapter V trustees responded with an unequivocal “no” to the first question.¹⁷⁷ Others responded “yes” and explained they have experienced some success in this context.¹⁷⁸ But one story is a cautionary tale:

I conducted a formal mediation in one of my subchapter V cases, with the normal sort of confidentiality provisions (which I consider critical to a successful mediation process)... [T]he mediation resulted in an impasse . . . confirmation was denied and the case got dismissed. I’ve had a couple dozen subchapter V cases as trustee, and only one case — this one case where I conducted a formal (failed) mediation with strict confidentiality — did not result in a confirmed plan. Also, the confidentiality provision in the mediation agreement limited my ability to “appear and be heard” in the hearings in the case, which jeopardized my ability to adequately honor my duties under section 1183. When I did pipe up at the hearings, one or more lawyers got annoyed and suggested that I might be breaching mediation confidentiality. I’m never doing it again... [A]s I have learned the hard way, although facilitating the development of a consensual plan is like mediation, it is not mediation. I think confidentiality is key to a successful mediation, but a subchapter V trustee cannot agree to mediation level confidentiality and still adequately fulfill her or his responsibilities. Or, at least I am unable to do that.¹⁷⁹

176 Compiled by David Mawhinney, *Subchapter V Trustees In Their Own Words*, 96th Annual National Conference of Bankruptcy Judges, Five Secrets for a Magical SubV (Oct. 19-22, 2022) <https://ncbjmeeting.org/2022/materials/NCBJ%20Five%20Secrets%20to%20Magical%20Sub-V.pdf>.

177 *See id.*:

Never. I could not serve as a mediator in a case where I have duties as a subchapter V trustee. I always tell parties that nothing they say to me is protected by any confidentiality or privilege. On the other hand, I can still have private conversations with each side and, for strategic reasons, I can coordinate communications with the debtor or a creditor, agreeing not to speak to another side (for now) unless spoken to. I will initially defer to the debtor on how and when it wants to approach a key creditor.

I have never done so, because I don’t think that I can agree to confidentiality that mediation usually requires due to the multiple duties to the estate/creditors under the trustee duties. I have one case that is in mediation, and I was unable to participate for those reasons also.

No- I’ve participated in numerous Sub V mediations - usually conducted by another Bankruptcy judge in the district- but not act as mediator- I’m usually confronted with conflict issues when considering role a formal mediator.

178 *See id.*:

Yes, and yes. I believe that as long as all of the parties agree, in writing, then the content of settlement discussions with me as trustee/mediator could remain confidential. In both instances where we did a formal mediation, the parties agreed and that is how it was conducted. One led to a consensual plan and the other is still in the works, but hopefully headed to a consensual plan.

179 *Id.*

The Task Force study indicates that in some instances, the debtor and other parties in interest are amenable to the Subchapter V trustee being appointed to mediate a dispute and are willing waive any potential conflict.¹⁸⁰ They simply enter into an agreement to appoint the Subchapter V trustee to mediate the dispute.¹⁸¹

The Task Force offers the following guidance when the parties and the court are considering appointment of the Subchapter V trustee as a mediator. This guidance is not meant to disrupt how courts and parties are navigating these challenges. The guidance merely offers alternatives for using mediation as a tool in Subchapter V cases while acknowledging that the Subchapter V trustee must fulfill statutory duties that may impede the requirements of neutrality and confidentiality in mediation.

If formal mediation is appropriate for a dispute, the Subchapter V trustee does not need to fill the role of mediator. The court can enter an order appointing a mediator other than the Subchapter V trustee to mediate a dispute. If, however, the parties and court are considering appointment of the Subchapter V trustee to formally mediate a dispute in the case, the Task Force urges those involved to use caution, acknowledge the potential issues involved, and consider entry of a mediation order.

The Task Force recommends entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator. Such an order would provide and structure for the mediation and clarity about obligations of the Subchapter V trustee serving as mediator. In addition, the parties should waive confidentiality in the context of the mediation to the extent necessary for the trustee to fulfill those duties.

¹⁸⁰ See *Oral Testimony of Heidi Sorvino*, ABI Subchapter V Task Force Hearing (Oct. 12, 2023) <https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing>.

¹⁸¹ *Id.*

V. Case Administration

A. Status Conference and Status Report

Recommendation and Supporting Principles:

Recommendation

The Task Force concludes that amendment of section 1188(a) to require an earlier status conference or to state additional requirements for the status reports is not necessary.

Supporting Principles

- Section 1188(a) requires the court to hold a status conference within 60 days of the petition date.
- Nothing in section 1188 precludes the court from setting an earlier status conference as a matter of practice. An earlier status conference could provide the court and parties in interest an earlier assessment of the case and promote efficient prosecution of the case, including the development of a plan by the 90-day statutory deadline.
- These potential advantages, however, do not warrant a statutory change in view of the discretionary authority to adopt these practices.
- Under section 1188, the debtor must file and serve a report detailing the efforts the debtor has undertaken and plans to take to develop a consensual plan of reorganization no later than 14 days before the status conference.
- Neither Subchapter V nor the Federal Rules of Bankruptcy set forth the requisite contents of the debtor's status report. It is inappropriate to impose additional mandatory requirements for the status report because such matters are best left to the discretion of the bankruptcy judge.
- The orders, rules, and forms that some courts have promulgated with regard to the contents of the status report vary in the information they require, but nonetheless provide some guideposts for consideration.
- The Task Force offers as guidance certain categories of information that are minimally sufficient for the court and other parties in interest to understand the nature of the debtor's case.

Subchapter V emphasizes speed and flexibility. Section 1188(a) requires the court to hold a status conference within 60 days of the petition date.¹⁸² No later than 14 days before the status conference, the debtor must file and serve a report detailing the efforts the debtor has undertaken and plans to take to develop a consensual plan of reorganization.¹⁸³ The purpose of the status conference is to “further the expeditious and economical resolution” of the case,¹⁸⁴ including discussion of how the debtor intends to achieve plan confirmation.

The Task Force heard testimony on the utility of an early mandatory status conference. Some agree that an early status conference is invaluable to “canvass the issues, set expectations, and move the case forward expeditiously.”¹⁸⁵ But others have found the status conference unhelpful¹⁸⁶ or observe that “some lawyers have had some difficulty in providing useful information” in the status report.¹⁸⁷

One witness suggested the Task Force consider recommending an earlier status conference based on the practice of some courts. Some courts have a practice of setting an earlier status conference, around one to two weeks into the case, to outline the issues and develop a strategy for reorganization.¹⁸⁸ These courts often convene a second status conference on or before the sixtieth day after the petition date.¹⁸⁹

Another witness recommended requiring the section 1188(a) status conference no later than 30 days after the petition date and eliminating the requirement of section 1188(c) to file a status report.¹⁹⁰ The earlier status conference would give the court, the trustee, and creditors a preview of the debtor’s case at the inception of the case, and the later one would provide an opportunity to gauge the debtor’s success in addressing the challenges outlined and discussed during the initial status conference.

182 11 U.S.C. § 1188(a). The court may extend the 60-day deadline if the debtor demonstrates that “the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.” *Id.* § 1188(b).

183 *Id.* § 1188(c).

184 *Id.* § 1188(a).

185 *Written Statement of Hon. Elizabeth S. Stong, U.S. Bankruptcy Court for the Eastern District of New York*, at 6, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023), <https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing>; *Written Statement of Richardo Kilpatrick*, note 49, at 4; *Written Statement of Rebecca Redwine*, ABI Subchapter V Task Force Hearing (Plan and Confirmation Issues), at 3 (Sept. 8, 2023) <https://subvtaskforce.abi.org/hearings/september-8-2023-virtual-public-hearing> (“The two components of Sub-V that have assisted in obtaining consensual plans in my cases are the § 1188(c) status report requirement and the confirmation standards of § 1191(a) versus (b). The status report immediately sets the tone for confirmation and forces debtor’s counsel to reach out to creditors to begin negotiating almost immediately upon filing. The status report also requires counsel to analyze and address potential confirmation issues at the very start of the case.”).

186 *Written Statement of Craig Geno*, at 2, ABI Subchapter V Task Force Hearing (Jul. 28, 2023) (Operation of the Case), <https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing> (“Unfortunately, for the most part, the status conference is somewhat of a non-event, and a perfunctory function that does not accomplish much. My experience has been this is true whether or not there are significant first day motions or whether the case has proceeded without a lot of judicial involvement.”).

187 *See, e.g., Written Statement of Hon. Craig Gargotta*, *supra* note 95, at 2.

188 *Written Statement of Hon. Laurel M. Isicoff*, *supra* note 33, at 3, (explaining that she sets an early status conference within two weeks of the petition date, unless there are first day hearings); *Written Statement of Richardo Kilpatrick*, *supra* note 49, at 4.

189 *Id.*

190 *Written Statement of Hon. Scott M. Grossman, U.S. Bankruptcy Court for the Southern District of Florida*, at 5, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023) <https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing>.

Nothing in section 1188 precludes the court from setting an earlier status conference as a matter of practice.¹⁹¹ It merely mandates a status conference no later than 60 days after the order for relief.¹⁹² The Task Force concurs that an earlier status conference could provide the court and parties in interest an earlier assessment of the case to discover what the case is about, issues that may be encountered, and how the debtor intends to achieve confirmation of a plan.

Moreover, an earlier assessment could further the efficient prosecution of the case, including the development of a plan by the 90-day deadline. And an earlier status conference allows for an additional, later one, the purpose of which would be to assess the progress toward achieving a reorganization plan.¹⁹³

Nevertheless, the Task Force concluded that these potential advantages do not warrant a statutory change in view of the discretionary authority to adopt these practices. The Task Force encourages courts to schedule earlier or additional status conferences as appropriate, but in doing so, to be mindful of the mandated status report which must be filed within 14 days before the section 1188 status conference. Debtors need sufficient time to prepare a status report that contains minimally sufficient information to be useful to the court and the interested parties in the case. Thus, if a court prefers to convene a status conference earlier than the sixtieth day, such as one to two weeks into the case, the court should, as a matter of best practices, consider scheduling a second, later conference that functions as the section 1188 conference for which the status report is required.

The Task Force also heard some testimony on the utility of the status report which must be filed no later than 14 days before the initial status conference. The status report must describe “the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.”¹⁹⁴

One witness viewed some merit in the status report because it forces the debtor to focus on the case, and the report may highlight or reflect some of the challenges in the case early.¹⁹⁵ The status report also can function as mechanism for opening negotiations with creditors. But some testimony expressed the view that the preparation of the status report is an exercise that consumes the debtor’s time that might be better spent focused on a reorganization plan.¹⁹⁶

Neither Subchapter V nor the Federal Rules of Bankruptcy Procedure set forth the requisite contents of the debtor’s status report. Some courts use local rules, standing orders, and scheduling

191 See 11 U.S.C. § 1188(a).

192 See *id.*

193 Courts can continue and reconvene the section 1188 status conference during the case. See *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016) (“This Court has also held that district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.”).

194 *Id.* § 1188(c).

195 *Written Statement of Craig Geno, Subchapter V trustee, supra* note 186, at 1–2.

196 *Written Statement of Hon. Scott M. Grossman, supra* note 190, at 4. See Section VI.A *infra*, (debtors and their counsel might file a reorganization plan before or on the ninetieth day that complies with section 1190, sets forth adequate information, and contains substantive terms for parties to evaluate even though the debtor has not yet reached agreement with the creditors or completed discussions with the Subchapter V trustee).

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orders¹⁹⁷ to outline what information to include in the status report.¹⁹⁸ Some districts have mandatory¹⁹⁹ or recommended forms.²⁰⁰

The Task Force concludes that it is inappropriate to impose additional mandatory requirements for the status report because such matters are best left to the discretion of the bankruptcy judges. At the same time, it is useful for the Task Force to offer guidance about the contents of the report to maximize its usefulness in promoting the goals of the subchapter.

The orders, rules, and forms that some courts have promulgated with regard to the contents of the status report vary in the information they require, but nonetheless provide some guideposts for consideration.

The Task Force suggests that the following categories of information are minimally sufficient for the court and other parties in interest to understand the nature of the debtor's case:

1. A description of the nature of the debtor's business;
2. A description of the efforts the debtor has undertaken or will undertake to obtain a consensual plan of reorganization, including a description of communications with parties in interest in the case;²⁰¹
3. The estimated time by which the debtor plans to file the reorganization plan and any complications the debtor anticipates in complying with the 90-day deadline for filing a plan;
4. Any anticipated issues the debtor might encounter during this case, including but not limited to valuation, leases and contracts, and the sale or surrender of real or personal property;²⁰² and
5. "[A]ny other issues the debtor expects the court will need to address before confirmation or that could have an effect on the efficient administration of the case."²⁰³

197 See, e.g., *Written Statement of Hon. Craig Gargotta*, *supra* note 95, at 3.

198 See Hon. Paul W. Bonapfel, *SBRA Guide*, *supra* note 110, § VI.C (outlining the specific items that courts might require in the report).

199 The bankruptcy court in the District of New Jersey requires use of its status report form, available at: http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms.

200 Some courts with suggested forms include the District of Maryland, <https://www.mdb.uscourts.gov/content/local-bankruptcy-forms>, Central District of California, https://www.cacb.uscourts.gov/forms/local_bankruptcy_rules_forms; and the Southern District of Indiana, <https://www.insb.uscourts.gov/sites/insb/files/SubVStatusReport.pdf>.

201 See, e.g., Subchapter V Status Report Pursuant to 11 U.S.C. §1188(c) (Bankr. S.D. Ind.), <https://www.insb.uscourts.gov/sites/insb/files/SubVStatusReport.pdf> ("Provide a description of the Debtor's communications with applicable parties in interest (including, e.g., secured creditors, priority creditors, unsecured creditors, equity interest holders, the case trustee, or others) concerning the Debtor's proposed plan or explain the Debtor's rationale for not discussing the plan with parties in interest.[")

202 *Id.*

203 Hon. Paul W. Bonapfel, *SBRA Guide*, *supra* note 110, § VI.C.

B. Removal of the Debtor in Possession and Consequences for the Case

Recommendation and Supporting Principles:

Recommendation

The Task Force finds that the provisions for removal of the debtor in possession in section 1189 should not be changed to permit anyone but the debtor to file a plan upon removal.

Supporting Principles

- Under section 1189, only the debtor may file a plan in a Subchapter V case.
- When the debtor is removed from possession for cause under section 1185(a), questions arise about how to resolve the case if the Subchapter V trustee or some other party in interest cannot file a plan.
- Nothing prohibits the Subchapter V trustee from drafting a plan for the debtor to file and communicating with debtor's counsel about that plan and its feasibility.
- If the removed debtor does not cooperate with the Subchapter V trustee to develop and file a plan of reorganization, then the court may (and likely should) consider other alternatives to resolve the pending case, such as conversion or dismissal under section 1112 or a sale of the business as a going concern.
- Whatever post-removal path is necessary is ultimately a fact-dependent determination subject to the court's discretion.

As under any chapter of the Bankruptcy Code, some Subchapter V cases will involve debtors who do not comply with their obligations under the Bankruptcy Code. One way Subchapter V addresses this issue is removal of the debtor from possession for cause.²⁰⁴ A court also, for example, has the power to convert or dismiss the case under section 1112 of the Bankruptcy Code.

Removal of the debtor in possession may be necessary either to help the debtor take steps to “right the ship”²⁰⁵ (so to speak) or to determine the best alternative to resolve the case for the estate and

²⁰⁴ 11 U.S.C. § 1185(a) (“[T]he court shall order that the debtor shall not be a debtor in possession for cause.”).

²⁰⁵ *In re Corinthian Communications, Inc.*, 642 B.R. 224, 226 (Bankr. S.D.N.Y. 2022)

creditors. In the latter scenario, Subchapter V grants the Subchapter V trustee enhanced duties upon removal of the debtor in possession.²⁰⁶

The Subchapter V trustee does not, however, have the ability to file a plan of reorganization, at least not without the cooperation of the debtor.²⁰⁷ This inability to file a plan has led to some confusion and frustration concerning the role of the Subchapter V trustee and the resolution of the case after dispossession of the debtor.

The Task Force reviewed the meaningful testimony on the challenges faced by a Subchapter V trustee when the trustee has an enhanced role but no ability to independently file a plan. Many bankruptcy judges, Subchapter V trustees, and other bankruptcy professionals suggested giving the trustee the ability to file a plan when the debtor has been removed from possession.²⁰⁸ The Task Force understands these concerns, particularly in light of the potential value of some Subchapter V debtors as a going concern despite the removal of the debtor in possession.

Indeed, this kind of assessment is so case-specific and fact-driven that it is difficult to articulate a blanket rule that would be fair and warranted in every Subchapter V case. The Task Force is also mindful of the Subchapter V trustee's duty to help facilitate a consensual plan of reorganization.²⁰⁹ The current statutory framework requiring a Subchapter V trustee to continue to work with a debtor after removal from possession arguably aligns with that duty and the general objective of Subchapter V to rehabilitate smaller businesses to preserve the business as a going concern.²¹⁰ Here, the Task Force observes that nothing prohibits the Subchapter V trustee from drafting a plan for the debtor to file and communicating with debtor's counsel about that plan and its feasibility.

That said, if a debtor has been removed from possession and does not cooperate with the Subchapter V trustee to develop and file a plan of reorganization, then the court should consider other alternatives to resolve the pending case.

206 11 U.S.C. §1183(b)(5) (“The trustee shall if the debtor ceases to be a debtor in possession—(A) perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title; and (B) be authorized to operate the business of the debtor.”).

207 *Id.* § 1189(a) (“Only the debtor may file a plan under this subchapter.”). When compared to a regular Chapter 11 case, the Subchapter V trustee's inability to file a plan may seem incorrect or at odds with the objectives of the Code. When that limitation on the trustee's powers is, however, viewed through the objectives of Subchapter V (particularly, encouraging and helping smaller businesses to reorganize while preserving their prepetition ownership structure), its potential value in the Subchapter V context becomes more apparent. These competing considerations are discussed below.

208 See, e.g., *Written Statement of Hon. Hannah Blumenstiel*, *supra* note 22, at 4; *Written Statement of Hon. Michael E. Romero*, *supra* note 23, at 6 (“Perhaps it is time to consider adding a provision which allows creditors, or at the very least, the Sub V Trustee an opportunity to file a plan in those instances where the debtor is simply treading water.”); *Written Statement of Sumner Bourne*, at 7, ABI Subchapter V Task Force Hearing (Eligibility) (Jun. 23, 2023), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing> (“The Subchapter V trustee should be authorized to file a plan, if the debtor is not an individual and the debtor has been removed as a debtor in possession under Section 1185.”). But see *Oral Testimony of Brian Shaw*, ABI Subchapter V Task Force Hearing (General Observations) (Jun. 9, 2023) (arguing that giving the trustee power to file a plan will increase administrative costs, and require them, in some instances, to hire counsel, making the subchapter less affordable), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>; *Oral Testimony of David Mawhinney*, ABI Subchapter V Task Force Hearing (General Observations) (Jun. 9, 2023) (expressing concerns about valuing assets, determining projected disposable income, among others, if given the ability to file a plan as Subchapter V trustee), <https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing>.

209 *Id.* § 1183(b)(7).

210 See H.R. Rep. No. 116-171, at 4 (2019), as reprinted in 2019 U.S.C.C.A.N. 366, 369.

When reorganization is not likely and sale of the business as a going concern is not a viable option, conversion or dismissal under section 1112 of the Bankruptcy Code is the proper result. For example, if the case involves a recalcitrant debtor and if liquidation is the best resolution, conversion to a Chapter 7 case (despite the possible appointment of a different individual to serve as trustee) is likely best for all parties in interest and preserves the integrity of the system. If the case is converted to Chapter 7, it is possible the Subchapter V trustee could be appointed as the Chapter 7 trustee.²¹¹

If, however, a debtor might be sold as a going concern and pursuing such a sale in a Subchapter V case could produce value for the estate, resolution of the case under Subchapter V may better serve the goals of the Bankruptcy Code and be in the best interests of the estate and creditors.

Liquidation of the debtor through a going concern sale is possible in a Chapter 7 case. Section 721 permits the court to authorize a chapter 7 trustee to operate the business of the debtor “for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.” But liquidation of a going concern business under Chapter 7 poses significant problems. Conversion to Chapter 7 may adversely affect the business’s relationships with its customers, suppliers, and employees, who may perceive Chapter 7 as the end of the debtor’s business. If the Subchapter V trustee is not appointed as the Chapter 7 trustee, it may be difficult to effect an optimal continuation of the business pending sale. And the Chapter 7 trustee is charged with the expeditious liquidation of assets, which may result in the realization of less value than would occur in a Subchapter V case.²¹²

The “real world,” practical considerations in many cases require continuation of the case in Subchapter V to realize the highest possible value from the sale of the debtor’s business. Given the Subchapter V trustee’s familiarity with the case, the debtor’s business, and the creditors, the Subchapter V trustee may be in the best position to maximize the estate’s value. Although, without the debtor’s participation, the disbursement of sales proceeds cannot occur through a plan of reorganization, the proceeds can be administered through conversion to Chapter 7 after the sale or a structured dismissal.²¹³

The Subchapter V trustee—precisely because of its pre-removal dealings with the debtor and stakeholders—might be exactly the right individual to lead the case to resolution. These are fact-specific determinations that should be left to the discretion of the court. Again, however, the Task Force would encourage courts to be specific in the role, duties, and powers of the Subchapter V trustee after

211 See 11 U.S.C. §701(a)(1) (trustee may appoint disinterested person “that is serving as trustee in the case immediate before the order for relief” under chapter 7).

212 See *In re Boteilho Hawaii Enterprises Inc.*, Case No. 22-00827, 2023 WL 7117223 (Bankr. D. Haw. Oct. 24, 2023). In its discussion of the hypothetical chapter 7 liquidation of the debtor, the court noted that a trustee must liquidate assets “as expeditiously as is compatible with the best interests of parties in interest” under section 704(a)(1) and that, therefore, the trustee must “always dispose of the property quickly (although not necessarily at ‘fire sale’ prices.”) *Id.* at * 2.

213 A “structured dismissal” is not expressly defined or mentioned in the Bankruptcy Code, but it is a term used to refer to a “hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case.” Chapter 11 Commission Report, *supra* note 3, at 270). Structured dismissals can “facilitate efficient case resolutions” when the “actual or perceived costs and delays associated with the plan-confirmation process or a conversion to chapter 7 of the Bankruptcy Code.” *Id.* at 271. Nevertheless, bankruptcy courts may not approve structured dismissals or other final distributions of property that violate the Bankruptcy Code’s priority rules without the affected creditors’ consent. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017).

removal of the debtor in possession to ensure that all parties have clarity concerning the timing, cost, and anticipated actions to resolve the Subchapter V case.²¹⁴

If the court, after removal of the debtor from possession, does not dismiss or convert the case, the Task Force concludes that courts should clearly define the role of the Subchapter V trustee, including the powers that the court finds applicable to a resolution of the case. For a Subchapter V trustee to serve that role effectively, all parties, including the debtor, must have confidence in the objectives and motivations of the trustee. A court may want to hear and consider the Subchapter V trustee's perspective regarding the discussions, negotiations, and dealings among all the parties in the case before deciding to keep a case in Subchapter V after removal of the debtor in possession. In some cases, the Subchapter V trustee may not be the best individual to sell or liquidate the debtor; a Chapter 7 trustee might be a better alternative.

Otherwise, questions may arise concerning the trustee's authority to sell the debtor's assets under section 363 or to pursue avoidance claims arising from the trustee's initial role in the case with the responsibility to facilitate a consensual plan.

The Task Force considered the recommendations of many bankruptcy professionals and judges that, upon removal of the debtor in possession, the trustee should be permitted to file a plan of reorganization. The Task Force concluded that such a change is not warranted for the following reasons.

- First, given the nature of most businesses in Subchapter V cases, if the debtor after removal declines to work with the trustee to file a plan that is feasible and capable of confirmation, the prospects for a stand-alone reorganization are not good.
- Second, the possibility that someone other than the debtor could file a plan of reorganization is contrary to a fundamental policy of Subchapter V that leaves the debtor in charge of the outcome of the case. Congress's decision to not terminate plan exclusivity for the Subchapter V debtor serves core objectives of the subchapter. Subchapter V is designed, among other things, to help smaller companies retain ownership through a lower-cost path to reorganization. Many of these businesses are of little value without the owner's or entrepreneur's involvement.
- Although reserving plan exclusivity to the debtor is a difficult policy decision, on balance, it better serves the objectives of Subchapter V, encouraging smaller business to use the subchapter but discouraging its abuse with a stark consequence, namely conversion or dismissal. Permitting the trustee to file a plan could deter the willingness of smaller businesses to file Subchapter V if faced with the loss of control that plan exclusivity provides. Moreover, if the prepetition owners or management are not cooperating in the case, a reorganization through a sale is the most viable path where the business retains any value without them.
- Finally, although it is possible in rare cases that the filing of a plan by the trustee after removal of the debtor could be appropriate (such as to resolve disputes among holders of equity interests

214 See Section IV.C *supra*.

in a debtor with good prospects for reorganization and equity value), that rare situation does not warrant a general rule permitting the trustee to file a plan after removal which could have adverse consequences in many other cases.

In light of the foregoing, the Task Force does not recommend any changes to section 1189 at this time.

C. Compensation of the Debtor's Professionals for Services After the Debtor Has Been Removed from Possession

Recommendation and Principles:

Recommendation

The Task Force proposes a statutory amendment to section 1185 that would permit the court to approve the debtor's retention of professionals after removal of the debtor from possession, after notice and hearing, in certain limited circumstances, and provide for their compensation.

Supporting Principles

- When the court orders removal of the debtor in possession, the Subchapter V trustee is authorized, under section 1183(b)(5), to step in and run the business of the debtor. Upon dispossession, however, the debtor ceases to be the debtor in possession and therefore loses its status as the "trustee." Yet the debtor retains permanent exclusivity to file a plan pursuant to section 1189(a).
- Absent dispossession, debtor's counsel would be paid for work on a plan of reorganization by filing an application for compensation under section 330(a), which allows all professionals properly retained under section 327 to be compensated for services rendered to the estate. Section 327, in turn, authorizes the "trustee," in the traditional sense, to retain professionals, and, in a Subchapter V case, section 1184 gives the debtor in possession all the rights and obligations of a trustee. When the debtor no longer has the rights of a "trustee," section 327 arguably no longer authorizes the attorney's retention and, therefore, there is statutory uncertainty about whether the attorney may receive compensation for post-removal services.
- When removal of the debtor from possession occurs but the filing of a plan by the debtor is a feasible alternative, the problem is that the debtor's counsel cannot be properly compensated for the work it does on behalf of the debtor.

- The Task Force heard repeated requests for a recommendation for a statutory amendment to close the gap in the Bankruptcy Code relating to compensation of the debtor’s counsel when the debtor has been dispossessed.
- The Task Force proposes a statutory amendment to section 1185 that would permit the court to approve the debtor’s retention of professionals after the debtor has been removed from possession, after notice and hearing, in certain limited circumstances, and provide for their compensation.

When the court orders removal of the debtor in possession, the Subchapter V trustee is authorized, under section 1183(b)(5), to step in and run the business of the debtor. Upon dispossession, however, the debtor ceases to be the debtor in possession and therefore loses its status as the “trustee.” Yet the debtor retains permanent exclusivity to file a plan pursuant to section 1189(a).

Absent dispossession, debtor’s counsel would be paid for work on a plan of reorganization by filing an application for compensation under section 330(a), which allows all professionals properly retained under section 327 to be compensated for services rendered to the estate. Section 327, in turn, authorizes the “trustee,” in the traditional sense, to retain professionals, and, in a Subchapter V case, section 1184 gives the debtor in possession all the rights and obligations of a trustee. When the debtor no longer has the rights of a “trustee,” section 327 arguably no longer authorizes the attorney’s retention and, therefore, there is statutory uncertainty about whether the attorney may receive compensation for post-removal services.

This potential statutory uncertainty creates challenges for a debtor that has been removed but may nonetheless be able to propose and confirm a Subchapter V plan. To accomplish this task and properly work with the Subchapter V trustee, a debtor needs, and the case likely benefits from, the continued assistance of the debtor’s counsel. An additional concern is that section 1185(b) permits reinstatement of the debtor in possession, after notice and a hearing. A debtor without counsel who can be paid is unlikely to be able even to attempt reinstatement.

The Supreme Court addressed a similar issue in a different context in *Lamie v. United States Trustee*.²¹⁵ In that case, counsel to a former Chapter 11 debtor in possession continued to provide services to the estate after the case was converted to one under chapter 7.²¹⁶ When counsel moved for compensation under section 330, his motion was denied.²¹⁷ This issue ultimately reached the Supreme Court, which held that section 330 authorized only counsel to the trustee to seek compensation out of

²¹⁵ 540 U.S. 526 (2004).

²¹⁶ *Id.* at 529.

²¹⁷ *Id.*

the estate.²¹⁸ Conversion, the Court reasoned, ended the debtor's tenure as trustee and therefore ended counsel's position as a professional retained by the trustee.²¹⁹ As a result, if debtor's counsel wished to be compensated out of the estate for postconversion services, counsel needed to be retained by the Chapter 7 trustee going forward.²²⁰

When a Subchapter V debtor is removed as debtor in possession, however, the potential gap in the statute creates a more serious obstacle to the successful resolution of the bankruptcy case. On the one hand, only the Subchapter V debtor may propose a plan. Drafting and filing a plan requires the assistance of counsel. But because of *Lamie*, there are potential challenges to compensating the Subchapter V debtor's counsel out of the estate for doing this necessary work. The Subchapter V trustee's role is limited in the case of a debtor who is dispossessed under 11 U.S.C. § 1185(a).

The current legal landscape provides no clear path to allowing debtor's counsel to continue to be compensated following dispossession.²²¹ Despite the expanded powers provided under 11 U.S.C. § 1183(b)(5), if the debtor ceases to be a debtor in possession, the Subchapter V trustee's role is not such that the trustee can step into the shoes of advisor to the debtor.

Some courts are identifying potential statutory solutions to this problem, but each is subject to potential counterarguments.²²² In *In re ComedyMX, LLC*, the court articulated three possibilities for compensating the dispossessed debtor's counsel.²²³ First, the court stated that the fees may be awardable on the basis that they are actual, necessary costs and expenses of preserving the state under section 503(b)(1)(A).²²⁴ Second, the court argued that an award of fees could be appropriate under section 330 because, as prior counsel to the debtor, the firm is a professional person employed under section 327.²²⁵ As a third alternative, the court said that the effect of section 1189 is to leave a debtor that has been removed from possession under section 1185(a) with certain limited obligation of a trustee, such that the disposed debtor remains entitled to retain counsel under section 327(a) to carry out this role.²²⁶ As no party objected to compensating the removed debtor's counsel for actual necessary work performed for the benefit of the estate after the dispossession date, the court did not address the counterarguments to these potential solutions.²²⁷

Throughout the Task Force study, bankruptcy judges and practitioners emphasized to the Task Force the need for a statutory amendment to the Bankruptcy Code that would ensure the debtor's counsel is

218 *Id.* at 537.

219 *Id.* at 532, 537.

220 *Id.* at 538.

221 *See, e.g., In re NIT West Coast, Inc.*, 638 B.R. 441 (Bankr. E.D. Cal.) (citing *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (denying compensation for services provided by counsel after debtor was removed as debtor in possession).

222 *Written Statement of Hon. Judge Goldblatt, supra* note 95, at 5–6 (explaining the problems with the possible statutory workarounds).

223 *In re ComedyMX, LLC*, No. 22-11181, ECF No. 153, Order Regarding the Motion to retain Leech Tishman Fuscaldo & Lampl as Attorneys for the Debtors Effective as of the Petition Date, ¶5 (Bankr. D. Del. April 25, 2023).

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.*

properly compensated for the work it does on behalf of the debtor in filing a plan in this context. The Task Force agrees that statutory clarity is necessary here and proposes an amendment to the Bankruptcy Code. The Task Force's proposed amendment, however, is not intended to disrupt current practices to ensure that the debtor's counsel can be compensated for providing actual and necessary services that are beneficial to the estate.

The Task Force proposes amending section 1185 by adding subsection (c) which allows the dispossessed debtor to apply for the court's approval to retain counsel who would be treated and compensated as an estate professional.

Retention would not be authorized in all circumstances. The proposal enumerates limited circumstances in which the debtor would be permitted to retain professionals, subject to court approval after notice and hearing. Under proposed section 1185(c)(1), the court could approve the debtor's request to retain professionals if:

1. there is a reasonable likelihood that the debtor can file a confirmable plan of reorganization within a reasonable period of time and the debtor requires the services of a professional to do so;
2. the debtor requires the services of a professional to perform any duties of the debtor; or
3. the debtor's employment of a professional is in the best interests of creditors and the estate.

The first situation recognizes that in Subchapter V only the debtor may file a plan and the Bankruptcy Code should provide for retention of the debtor's counsel following removal of the debtor so that the debtor can try to file a confirmable plan and reorganize under the subchapter. The latter two situations are meant to provide flexibility for situations where the debtor needs the assistance of counsel for some purpose other than filing a plan. These situations give courts discretion to determine that the debtor may need to retain a professional in other circumstances in order to reorganize under the subchapter.

Proposed section 1185(c)(2) provides for the compensation of professionals the court permits the debtor to retain under proposed section 1185(c)(1). The court may approve reasonable compensation for actual, necessary services rendered by the professional and by any paraprofessional person employed by such person and reimbursement for actual, necessary expenses based on a consideration of the necessity and benefit of such services and the other factors set forth in section 330. Proposed section 1185 (c)(3) makes it clear that the court may limit the scope of the services approved under section 1185 (c)(1) and compensated under section 1185 (c)(2).

Proposed Section 1185(c)

1185(c) Retention and compensation of professionals.—*After removal of the debtor in possession, the court may authorize the employment and compensation of professionals by the debtor in accordance with this subsection.*

(1) The court after notice and a hearing may approve the debtor's employment of one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, if the court finds—

(A) That there is a reasonable likelihood that the debtor can file a confirmable plan of reorganization within a reasonable period of time and the debtor requires the services of a professional to do so;

(B) The debtor requires the services of a professional to perform any duties of the debtor; or

(C) The debtor's employment of a professional is in the best interests of creditors and the estate.

(2) The court after notice and a hearing may award to a professional employed under this subsection reasonable compensation for actual, necessary services rendered by the professional and by any paraprofessional person employed by such person and reimbursement for actual, necessary expenses based on a consideration of the necessity and benefit of such services and the other factors set forth in section 330.

(3) The court may limit the scope of the services of any such professional.

VI. Plan and Confirmation Issues

A. Plan and Confirmation Deadlines

Recommendation and Supporting Principles:

Recommendation

The Task Force declines to recommend a statutory amendment that sets a deadline for plan confirmation.

Supporting Principles

- The Task Force is concerned that imposing a fixed deadline could prematurely end cases for viable smaller companies that need more time to negotiate and finalize the terms of the plan.
- The Task Force encourages the use of the Bankruptcy Code's existing tools to dispose of cases that would not benefit from such additional time. Tools such as motions to modify the automatic stay or to convert/dismiss the case remain available to creditors, and courts can use status hearings, scheduling orders, and show cause orders, among other things, to keep cases moving.
- Plans that are filed solely to satisfy the 90-day deadline in section 1189(b) and do not comply with the minimum requirements set forth in section 1190 are incomplete and improper placeholder plans. A plan that is a good faith proposal containing adequate and reasonably complete information in compliance with section 1190 is not an improper placeholder plan, even if the plan is not final, may be nonconsensual, or the debtor and its counsel may contemplate modifications to the plan before confirmation.

Subchapter V is designed to be a streamlined and accelerated process.²²⁸ The Subchapter V plan process, as codified, reflects this objective. The Bankruptcy Code offers general guidance, including a relatively short deadline for filing the plan of reorganization, and provides the court appropriate flexibility to set other deadlines and requirements for solicitation and confirmation of the plan.²²⁹

²²⁸ *In re Ikalowych*, 629 B.R. 261, 266 (Bankr. D. Colo. 2021) (observing that Subchapter V is “designed to streamline the reorganization and rehabilitation process”); *In re Trepetin*, 617 B.R. 841, 846 (Bankr. D. Md. 2020) (“Congress contemplated an accelerated process for Subchapter V cases.”); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 340 (Bankr. S.D. Fla. 2020) (“Subchapter V by its very nature is intended to be an expedited process.”); *In re Online King LLC*, 629 B.R. 340, 350 (Bankr. E.D.N.Y. 2021). (Subchapter V “is a fast-tracked process aimed at giving the qualifying debtor a less expensive and accelerated path to reorganize...”).

²²⁹ The Task Force heard testimony about prepackaged Subchapter V bankruptcies as a mechanism for further accelerating reorganization for smaller businesses, but because the topic is so new, the Task Force did not have sufficient information to study the issue. *See*

More specifically, section 1189(b) requires the debtor to file a plan no later than 90 days after the petition.²³⁰ The court may allow for more time to file the plan if the debtor can show that the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.²³¹

No deadline for confirmation exists. Once a debtor has filed a plan, it can be modified at any time before confirmation.²³² This statutory scheme raises two problems. First, without a deadline for confirmation, a Subchapter V case may languish instead of moving quickly as contemplated. Second, some practitioners file incomplete or bare-bones plans solely to meet the 90-day statutory deadline with the expectation that they can remedy the deficiencies prior to the confirmation hearing. Some practitioners refer to such plans generally as “placeholder plans.” The case law expresses concerns about the inappropriate use of placeholder plans by practitioners where those plans are incomplete or facially deficient.²³³

The Task Force heard testimony suggesting that the imposition of an outside deadline for plan confirmation would ensure cases move quickly, consistent with congressional intent.²³⁴ That approach would mirror, in many ways, the 45-day deadline imposed on regular small business cases under Chapter 11.²³⁵

The Chapter 11 Commission, however, recommended elimination of the deadline for plan confirmation in non-Subchapter V small business cases.²³⁶ The Chapter 11 Commission debated the utility of firm deadlines in the context of small business cases, balancing the need to “assess the viability

Written Statement of Eyal Berger, supra note 44, at 4–5; Christopher Hampson & Jeffrey Katz, The Small Business Prepack: How Subchapter V Paves the Way for Bankruptcy’s Fastest Cases, 92 Geo. Wash. L. Rev.— (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4595995. The concept of a “prepackaged” or “pre-arranged” Subchapter V plan may warrant further study as the law develops.

230 11 U.S.C. § 1189(b). Courts agree the debtor has the burden of proof to demonstrate grounds that justify an extension of time under section 1189(b). *In re Signia, Ltd.*, No. 23-14384, 2024 WL 331967, at *3 (Bankr. D. Colo. Jan. 29, 2024); *Online King*, 629 B.R. at 349 (“the burden of proof rests with the debtor to establish the limited circumstances under which a court may grant an extension of the statutory deadline.”); *In re Excellence 2000, Inc.*, 636 B.R. 475, 480 (Bankr. S.D. Tex. 2022) (same); *In re HBL SNF, LLC*, 635 B.R. 725, 729 (Bankr. S.D.N.Y. 2022) (same); *In re Trinity Legacy Consortium, LLC*, No. 22-10973-j11, 2023 WL 6217784, at *3 (Bankr. D.N.M. Sept. 25, 2023) (same); *Seven Stars*, 618 B.R. at 340 (same).

231 11 U.S.C. § 1189(b).

232 *Id.* § 1193(a) (allowing the debtor to modify the plan at any time before confirmation).

233 See *In re United Safety and Alarms, Inc.*, Case No. 23-14861-SMG, 2024 WL 973674, at *1 (Bankr. S.D. Fla. Mar. 6, 2024) (converting Subchapter V case to Chapter 7 in part because the debtor’s plan did not contain any liquidation analysis or projections, as required by section 1190(1), and was therefore incomplete and deficient); *In re Signia, Ltd.*, Case No. 23-14384-TBM, 2024 WL 331967, at *1 (Bankr. D. Jan. 29, 2024) (“[S]ome debtors and their counsel manipulate the deadline by filing bogus placeholder plans of reorganization on the ninetieth day. Such plans are obviously deficient (many containing blanks, inadequate information, and missing financials) and have no chance of confirmation. However, they seem to be filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement while obviously skirting the import of the statute.”).

234 *Written Statement of Hon. Michael E. Romero, supra note 23, at 4–5* (“It has been my experience that in many . . . cases, a bare-bones or ‘placeholder’ plan is filed merely to satisfy the statutory requirement. . . . If there are no adverse creditors nor an engaged Sub V Trustee, the matter tends to languish unless the Court actively monitors the case. This is the very antithesis of the speed and cost savings goals of the Subchapter. If my experience is similarly shared by other courts, perhaps the Task Force might consider adding an outside date by which confirmation of a plan must occur.”); see also Jonah R. Hall, *A Creditor’s Kerfuffle: How the SBRA Harms Creditors in Small Business Cases*, 25 N.C. Banking Inst. 595, 612 (2020) (observing that the lack of a plan confirmation deadline allows the debtor to hold up the case through modifications to the plan so long as it remains unconfirmed).

235 *Id.* § 1129(e) (“In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).”).

236 Chapter 11 Commission Report, *supra* note 3, at 295 (describing testimony that the 45-day deadline for plan confirmation is “nearly impossible for small business debtors to achieve”).

of the debtor earlier rather than later in the case” against “handcuffing debtors to artificial deadlines that might not facilitate the debtor’s reorganization or serve the interests of the estate in the particular case.”²³⁷ The Chapter 11 Commission determined that the deadline was, on balance, detrimental to small business debtors and their creditors.²³⁸

After weighing the burdens against the benefit of imposing another statutory deadline, the Task Force agrees with the Chapter 11 Commission. A deadline for confirmation would reduce Subchapter V’s flexibility and impose an artificial deadline without regard for the needs of a particular case. Such a deadline could prematurely end cases for viable smaller companies that need more time to negotiate and finalize the terms of the plan.

The Task Force also believes that the Bankruptcy Code currently provides more than adequate tools to the court and creditors in cases that would not benefit from such additional time. Tools such as motions to modify the automatic stay or to convert/dismiss the case remain available to creditors, and courts can use status hearings, scheduling orders, and show cause orders, among other things, to keep cases moving.²³⁹ Overall, the Task Force is concerned that imposing a fixed deadline for confirmation or a fixed standard for determining such a deadline could adversely affect reorganization prospects for Subchapter V debtors.

The Task Force study also revealed different views about the practice of filing “placeholder plans.” But the differences seem to be based on the nature and content of these plans and not necessarily what has been coined a “placeholder plan.”

Some debtors file a plan solely to satisfy the 90-day statutory deadline in section 1189(b), but the plan filed is incomplete or deficient rather than a substantive reflection of the debtor’s proposed reorganization. Other debtors may file a plan by the deadline that sets forth adequate information and contains substantive terms for parties to evaluate, but the debtor has not yet reached agreement with the creditors or completed discussions with the Subchapter V trustee.²⁴⁰ Both of these kinds of plans are often generically referred to as placeholder plans but in the latter instance, that may be a misnomer. The fact that a plan is nonconsensual or not final, or that the debtor and their counsel anticipate further negotiations and modifications to the plan should not be determinative. The Task Force offers the

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Federal Rule of Bankruptcy Procedure 3017.2 authorizes courts to fix various deadlines in Subchapter V cases in which there is no disclosure statement including for notice and transmission of the plan, voting, and confirmation. Fed. R. Bankr. P. 3017.2. This rule was added to authorize the bankruptcy court to set times and dates appropriate to the circumstances of each case. Some districts have developed a template or form proposed order for setting such deadlines under Rule 3017.2. *See, e.g.,* Order on Debtor’s Motion to Set Deadlines Pursuant to Interim Rule 3017.2 (setting deadlines for voting on the plan and confirmation); *Written Statement of Hon. Craig Gargotta, supra* note 95, at 3 (describing proposed local scheduling order developed to provide guidance to both the debtor and creditors as to when to vote and solicit ballots, and when confirmation of the plan will occur).

²⁴⁰ Among the functions of the status report is to initiate negotiations about the plan. *See* Section V.A *supra*. A nonfinal plan that complies with the requirements of Subchapter V may also serve the purpose of opening negotiations. Practitioners should be aware that some courts may prefer the debtor file a status report before any plan is filed, and where no such preference, whether they use the status report or a substantive, nonfinal plan to open negotiations is a strategic decision that might turn on the complexity of the case and how many parties are involved.

following guidance to distinguish between the kinds of plans that a debtor may file within the time provided by section 1189.

- The debtor must comply with the Bankruptcy Code's 90-day deadline. Filing a plan before the ninetieth day ensures that the debtor has met that requirement.
- The plan filed must also comply with the requirements stated in section 1190, for instance, by including a brief history of the business operations, a liquidation analysis, and projections indicating the ability of the debtor to make payments under the proposed plan, among others.²⁴¹ The debtor may modify the plan any time before confirmation.²⁴²
- Filing a plan that is incomplete or deficient or otherwise noncompliant with section 1190 is inappropriate. But the plan does not need to be the debtor's final plan, reflecting full negotiations with creditors, or even a plan that has creditor support.

The Task Force acknowledges the concerns articulated about placeholder plans that are filed solely to satisfy the 90-day deadline without reflecting the substantive terms of the debtor's proposed reorganization. Such plans are improper placeholder plans because they do not comply with section 1190. In addition, practitioners should not use the practice of filing a placeholder plan as a substitute for requesting an extension of time under section 1189(b).

However, a debtor and their counsel should not be discouraged from filing a plan early in the case or with the petition, or one just prior to the 90-day deadline that is nonconsensual, even if the debtor and their counsel contemplate ongoing negotiations and preconfirmation modifications. The critical inquiry is whether the plan filed is a good faith proposal that contains adequate and reasonably complete information in compliance with section 1190. Such a plan is not appropriately called a placeholder plan; rather, such a plan sets forth the debtor's preferred reorganization strategy.

Based on the foregoing, the Task Force declines to recommend a statutory amendment that sets a deadline for plan confirmation.

²⁴¹ 11 U.S.C. § 1190.

²⁴² *Id.* § 1119(3)(a).

B. Accounting for the Silent Class

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends an amendment to section 1191(a) to address the existing challenge of achieving a consensual confirmation where a class of creditors neither objects to the plan nor votes to reject the plan. In this situation, the class is silent, and under the current Bankruptcy Code, the plan cannot be confirmed as a consensual plan even though technically, the plan is not nonconsensual.

Supporting Principles:

- Subchapter V has two types of confirmation: consensual (section 1191(a)) and nonconsensual (section 1191(b)), also referred to as “cramdown” confirmation. In a Subchapter V case, the consequences of confirmation are different depending on whether the confirmation is consensual or cramdown.
- One of the statutory requirements for consensual confirmation is acceptance by all impaired classes. An obstacle to consensual confirmation occurs when all actively involved parties have agreed on a plan but one (or more) class of creditors have neither voted nor objected to confirmation. The class is silent.
- Unless the court deems the failure to object an acceptance of the plan or declines to count the nonvoting class—two approaches courts have developed to address the silent class—the plan is nonconsensual under the Bankruptcy Code.
- The Task Force believes that a silent class should not prevent confirmation of a consensual plan because, in this situation, the plan is effectively and practically consensual even if not statutorily consensual.
- Yet the Task Force also thinks that the absence of an affirmative vote on the plan should not allow the debtor to avoid payment of the minimum that Subchapter V requires for confirmation when an impaired class has not affirmatively accepted the plan. Therefore, with regard to the silent class, the plan must comply with the cramdown requirements of section 1191(b).
- Thus, the Task Force recommends amending section 1191(a) to permit confirmation notwithstanding failure to comply with section 1129(a)(8) because of a silent class if the plan meets the requirements of section 1191(b) with regard to the silent class.

Subchapter V has two types of confirmation: consensual and nonconsensual, also referred to as “cramdown” confirmation. Section 1191(a) provides for consensual confirmation and states that “[t]he court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.”²⁴³ Confirmation under section 1191(a) is considered “consensual” if all impaired classes of creditors have accepted the plan pursuant to section 1129(a)(8).²⁴⁴

Section 1191(b) provides for nonconsensual confirmation. Under section 1191(b), a Subchapter V debtor must demonstrate that the plan does not discriminate unfairly and is “fair and equitable” with respect to each impaired class that has not accepted the plan.²⁴⁵ If creditors do not consent to the plan, Subchapter V requires that debtors commit their projected disposable income to creditors for a period of three to five years.²⁴⁶

In a standard chapter 11 case, the consequences of confirmation are the same, whether the plan is consensual or cramdown. The timing and scope of the discharge and other consequences of confirmation are the same.

In a Subchapter V case, however, the consequences of confirmation are different depending on whether the confirmation is consensual or cramdown. The discharge that a debtor receives in a Subchapter V case and its timing depend on whether the plan confirmed is consensual or not. If the plan is consensual, then the debtor’s discharge is governed by section 1141(d) which would also apply in a standard chapter 11 case.²⁴⁷ A Subchapter V debtor with a confirmed consensual plan receives the discharge immediately upon confirmation.²⁴⁸ When the court confirms a cramdown plan, the Subchapter V debtor instead receives a discharge under section 1192 “as soon as practicable” after the debtor completes plan payments.²⁴⁹

Other provisions of Subchapter V are affected by cramdown confirmation. If the plan is not consensual, then the trustee remains in place to administer the plan payments unless the plan or the order confirming the plan provides otherwise.²⁵⁰ In addition, the postpetition property of a debtor that confirms a nonconsensual plan remains property of the estate, whereas with a consensual plan, the debtor retains such property outside of the estate.²⁵¹ The rules for postconfirmation modification differ depending on whether the court has confirmed a consensual plan or a cramdown plan.²⁵² The debtor may modify a consensual plan for only a short period of time before the plan is substantially consummated,

²⁴³ *Id.* § 1191(a).

²⁴⁴ *See id.*

²⁴⁵ *Id.* § 1191(b).

²⁴⁶ *Id.* § 1191(c)(2), (d).

²⁴⁷ *See id.* § 1191(a), 1141(d).

²⁴⁸ *See id.* 1141(d).

²⁴⁹ *Id.* §§ 1181(c), 1192.

²⁵⁰ *Id.* § 1194(b).

²⁵¹ *Id.* § 1186.

²⁵² *See id.* § 1193.

which typically occurs upon commencement of payments under the plan.²⁵³ In contrast, a cramdown plan may be modified at any time postconfirmation during the plan commitment period.²⁵⁴

Subchapter V encourages consensual confirmation. The Bankruptcy Code charges the Subchapter V trustee with the unique duty to facilitate development of a consensual plan, a duty that does not exist under any other chapter of the Bankruptcy Code.²⁵⁵ Subchapter V debtors are incentivized to pursue a consensual plan because the consequences of a cramdown plan are less favorable.²⁵⁶

But an obstacle to consensual confirmation occurs when all actively involved parties have agreed on a plan but one or more class of creditors have neither voted nor objected to confirmation. In this circumstance, the plan is arguably consensual because no one opposes it. Nevertheless, one of the statutory requirements for consensual confirmation is affirmative acceptance by all impaired classes.²⁵⁷ Thus, the silent class prevents the plan from being consensual as a statutory matter.

Courts have developed three approaches to dealing with the silent class.²⁵⁸ The prevailing view is that affirmative acceptance of the plan is required. These courts infer rejection from the silence, and confirmation of the plan when a class is silent must be decided under the cramdown provisions in section 1191(b).²⁵⁹

A second approach deems the failure to object an acceptance of the plan. Such plans may still be confirmed as consensual under section 1191(a).²⁶⁰ Deemed acceptance is based on a pre-SBRA case decided in the Tenth Circuit, *Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.)*.²⁶¹ The Tenth Circuit concluded that when no vote is cast in an impaired class that the class should be deemed to have implicitly accepted the plan.²⁶² Many of the courts adopting *Ruti-Sweetwater*'s "deemed acceptance" rule in Subchapter V cases are in the Tenth Circuit.²⁶³

253 *Id.* § 1193(b). *See id.* § 1101(2) (defining "substantial consummation").

254 *Id.* § 1193(c).

255 *Id.* § 1183(b)(7); *In re Ozcebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) (noting that this duty is "unique" to a Subchapter V trustee).

256 *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023) ("Subchapter V is intended to encourage consensual plans confirmed under § 1191(a).").

257 *Id.* §§ 1191(a), 1128(a)(8).

258 *In re Hot's Power Wash, Inc.*, 655 B.R. 107, 115 (Bankr. S.D. Tex. 2023) ("Courts have generally followed one of three approaches when presented with a plan in which there is a non-voting impaired creditor class: (a) a nonvoting class is deemed to have accepted the plan for purposes of § 1129(a)(8); (b) a nonvoting class is deemed to have rejected the plan for purposes § 1129(a)(8); and (c) a nonvoting class is not counted for purposes of § 1129(a)(8).").

259 *See, e.g., In re Creason*, 2023 WL 2190623, at *2 (Bankr. W.D. Mich. Feb. 23, 2023) (rejecting "deemed acceptance" as irreconcilable with the formal requirements of Federal Rule of Bankruptcy Procedure Rule 3018(c) governing the "form of acceptance or rejection"). Even though no party had balked at "deemed acceptance" as a practice, the bankruptcy court rejected *Ruti-Sweetwater*'s holding *sua sponte*, calling it a "minority position," and quoted a leading bankruptcy treatise's description of the decision as unfortunate. *See id.* at *2 (citing 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2022)).

260 *See, e.g., In re Jaramillo*, Case No. 21-10306-t11, 2022 WL 4389292, at *2 (Bankr. D.N.M. Sept. 22, 2022).

261 836 F.2d 1263 (10th Cir. 1988).

262 *Id.*

263 *See, e.g., In re Jaramillo*, 2022 WL 4389292, at *2; *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 Lost Cajun Enterprises, LLC*, 634 B.R. 1063, 1072–73 (Bankr. D. Colo. 2021) (nonvoting creditor deemed to have accepted the plan in a subchapter V case); *In re Olson*, 2020 WL 10111637, at *2 (Bankr. Utah Sept. 16, 2020) (same); and *In*

Some of those courts also articulate independent reasons, separate from precedent, for applying the “deemed acceptance” rule in Subchapter V cases. These reasons are based on policy and practicality. One explained that the “deemed acceptance” rule promotes Subchapter V’s legislative goal to streamline the reorganization process for smaller businesses.²⁶⁴ Another pragmatically observed that certain unsecured creditors, such as the IRS, credit card companies, or others often do not vote in Subchapter V cases and such nonvoting creditors should not be permitted to derail the confirmation process.²⁶⁵

A third approach has developed.²⁶⁶ This approach disregards the silent class for purposes of 1129(a)(8) because it is mathematically impossible to determine acceptance or rejection when no vote is cast in the class.²⁶⁷ These courts observe that section 1126, which governs acceptance of a plan, generally requires at least two-thirds in amount of the claims in a class and one-half in number of claimants in a class vote to accept a plan.²⁶⁸ Noting that the legislative history of section 1126 specifies that mathematical calculation requires the number of accepting votes be divided the total votes cast in class,²⁶⁹ these courts explain that when no vote is cast, the equation cannot be solved because the denominator is zero.²⁷⁰ These courts conclude that the result of the calculation for a nonvoting class is “absurd” and not contemplated by Congress, which based on the legislative history, “presumed the existence of at least one vote in each class.”²⁷¹

The Task Force heard ample testimony about the challenges of achieving consensual confirmation when a class of creditors remains silent and neither objects nor votes to accept or reject a plan.²⁷²

re Desert Lake Group, LLC, No. 20-22496, ECF 114 (Bankr. D. Utah Sept. 30, 2020) (unpublished) (concluding that all impaired classes of claims and interests had accepted the debtor’s plan — either by affirmatively voting to accept the plan or were deemed to have accepted the plan, by not objecting to confirmation and not returning a ballot).

264 See, e.g., *In re Robinson*, 632 B.R. at 220 (following deemed acceptance rule for nonobjecting creditors to satisfy section 1191(a)’s consensual confirmation requirement).

265 *In re Jaramillo*, 2022 WL 4389292, at *3 (“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.”).

266 *In re Franco’s Paving LLC*, 654 B.R. at 110 (explaining that the court was not limited to a “binary choice between a ‘deemed acceptance’ and a ‘deemed rejection’ when an impaired class is silent”).

267 *Id.* (“In a situation where no votes are cast, the . . . the class should not be counted for purposes of § 1129(a)(8).”); *In re Hot’z Power Wash, Inc.*, 655 B.R. 107, 118 (Bankr. S.D. Tex. 2023) (“[S]ince the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted . . .”).

268 11 U.S.C. § 1126 (c) (“A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . .”).

269 *In re Franco’s Paving LLC*, 654 B.R. at 109 n.1 (quoting Rep. No. 95-989 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5909 (“[t]he amount and number are computed on the basis of claims actually voted for or against the plan”); *In re Hot’z Power Wash, Inc.*, 655 B.R. at 117 (same)).

270 *In re Hot’z Power Wash, Inc.*, 655 B.R. at 117 (“dividing zero by zero was absurd and could not have been intended by Congress”); *In re Franco’s Paving LLC*, 654 B.R. at 109 (“In practical terms, the equation cannot be solved.”).

271 *In re Hot’z Power Wash, Inc.*, 655 B.R. at 118; *In re Franco’s Paving LLC*, 654 B.R. at 110.

272 See *Written Statement of Craig Geno*, *supra* note 186, at 1 (“As another Subchapter V Trustee has written to the Task Force, the vast majority of my cases are “technically” non-consensual—due to lack of creditor involvement in voting—but they are more “non-technically” consensual because the actual participants either vote for the plan or resolve their claims/objections.”); *Written Statement of Rebecca Redwine*, *supra* note 185, at 4 (“One concern I have with current Sub-V law is the risk of subjecting a debtor to cramdown due to the inability to obtain a ballot. After conferring with counsel both in my district and throughout the state, this is a common problem. This issue has arisen in multiple cases where the SBA or another government entity is a party in the case.”); *Written Statement of Hon. Craig Gargotta*, *supra* note 95, at 2 (“[T]he biggest challenge that debtor’s counsel has in obtaining confirmation of a plan is an affirmative vote in support of the plan.”); *Written Statement of Geoff Groshong*, *supra* note 110, at 2

The Task Force believes that a silent class should not prevent confirmation of a consensual plan. In such a situation, the plan is effectively and practically consensual even if not statutorily consensual. Where active parties have negotiated terms and do not require continued trustee monitoring, deferral of discharge, or provisions to address property of the estate, the silent class should not require a different result.²⁷³

Yet the Task Force also thinks that the absence of an affirmative vote should not result in the ability of a debtor to avoid payment of the minimum that Subchapter V requires for confirmation when a class has not affirmatively accepted the plan. Therefore, with regard to the silent class, the plan must comply with cramdown requirements of 1191(b).

The Task Force recommends amending section 1191(a) to permit confirmation notwithstanding failure to comply with 1129(a)(8) with regard to a silent class if the plan meets the requirements of 1191(b) with regard to that silent class. The proposed change does not diminish protections for the silent class or change its substantive rights. The change simply clarifies the postconfirmation consequences for the Subchapter V debtor who would have had a purely consensual plan but for the silent, nonvoting, nonobjecting class. In particular, the effects of the proposed change to permit consensual confirmation in the silent class situation are (1) elimination of trustee monitoring (and related expense) after confirmation;²⁷⁴ (2) immediate discharge of the debtor; and (3) elimination of the debtor's postconfirmation modification rights.

This proposed change is in line with the objectives of Subchapter V, namely to streamline reorganization for smaller businesses without altering the balance of protections and rights afforded creditors. The proposed change does not preclude creditors from objecting to, or voting on, the plan and may in fact encourage creditor participation. Indeed, the statutory recognition of a creditor's existing ability to object to the plan (even if the creditor does not vote) may promote more creditor engagement. Regardless, the proposed change would not alter the standards for confirmation and creditors would continue to receive certain protections under section 1191.

In conclusion, the Task Force recommends amending section 1191(a) to permit confirmation notwithstanding failure to comply with section 1129(a)(8) with regard to a silent class if the plan meets the requirements of section 1191(b) with regard to that silent class. The proposed statutory change is below.

Section 1191(a) currently states: "The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met."²⁷⁵

(explaining that a key reason for nonconsensual plans in cases in which he serves as Subchapter V trustee is the failure of a creditor, such as the Small Business Administration, to vote).

273 See *In re Franco's Paving LLC*, 654 B.R. at 110 ("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.").

274 See *In re Creason*, Case No. 22-00988-swd, 2023 WL 2190623 (Bankr. W.D. Mich. Feb. 23, 2023) (allowing the debtor, rather than requiring the trustee, to disburse plan payments even though the plan confirmed was nonconsensual because the plan was not consensual due to the nonparticipation of a single creditor in their own class).

275 11 U.S.C. § 1191(a).

The Task Force recommends the following proposed amendment to subsection (a).

§ 1191. Confirmation of plan

(a) Terms. – The court shall confirm a plan under this subchapter only if *either* –

(1) all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met; *or*

(2) (A) *all of the requirements of section 1129(a), other than paragraphs (8), (10), and (15) of that section, of this title are met;*

(B) *all of the requirements of section 1191(b) are met; and*

(C) *no class of claims or interests that is impaired under the plan votes to reject the plan and no creditor within such class objects to confirmation of the plan.*

C. Scope of the Discharge in Nonconsensual Entity Plans

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends a statutory amendment to section 1192 to clarify the scope of a discharge for a corporate (or other entity) debtor with a nonconsensual confirmed plan.

Supporting Principles

- Disagreement has emerged in the case law and among commentators about whether the exceptions to discharge in section 523(a) apply to the discharge a corporation (or other entity) receives under section 1192 in a Subchapter V case when the plan is confirmed as nonconsensual under section 1191(b). The disagreement turns on how sections 1192(2) and 523(a) interact.
- After examining the case law’s competing interpretations and weighing the testimony on this issue, the Task Force finds that a corporation’s (or other entity’s) discharge under a nonconsensual Subchapter V plan should not be subject to the section 523(a) exceptions.
- In particular, the Task Force proposes adding a new subsection (2) to section 1192 which makes it clear that the section 523 exclusions from the discharge apply only in Subchapter V cases with individual debtors who have nonconsensual confirmed plans.

- The proposed change aligns the Subchapter V discharge with Congressional policy and Subchapter V's legislative history. In addition, the proposed change does not alter the balance of creditor protections that currently exist for nonconsensual plans; it merely clarifies existing Congressional intent.
- The Task Force also recommends an additional amendment to section 1192 to make section 1141(d)(6) apply to a Subchapter V debtor with a plan confirmed nonconsensually under section 1191(b). Section 1141(d)(6) excepts certain fraudulent False Claim Act and tax claims from the discharge of a corporation under § 1141(d)(1) and, therefore, applies to a Subchapter V discharge after confirmation of a consensual plan. The proposed amendment makes section 1141(d)(6) applicable to the discharge of a Subchapter V debtor after non-consensual confirmation.

Two provisions govern the discharge of the Subchapter V debtor: sections 1141(d) and 1192. Which provision applies depends on whether the debtor's confirmed plan is consensual or nonconsensual. If the plan is consensual and confirmed under section 1191(a), then section 1141(d) governs the debtor's discharge.²⁷⁶ If the plan is nonconsensual and confirmed under section 1191(b), then section 1192 controls the scope of the Subchapter V debtor's discharge entered after completion of payments.²⁷⁷

Disagreement has emerged in the case law and among commentators about whether the exceptions to discharge in section 523(a) apply to the discharge a corporation (or other entity) receives under section 1192 in a Subchapter V case when the plan is confirmed as nonconsensual under section 1191(b).²⁷⁸ The disagreement turns on how sections 1192(2) and 523(a) interact.²⁷⁹

Section 1192 provides that "any debt—of the kind specified in section 523(a)" is excepted from discharge when a plan is confirmed nonconsensually under section 1191(b).²⁸⁰ In turn, section 523(a) provides that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title

²⁷⁶ 11 U.S.C. § 1141(d).

²⁷⁷ See *id.* § 1192.

²⁷⁸ For a thorough explanation and examination of the competing interpretations and the reasons supporting them, see Hon. Paul W. Bonapfel & Robert Schaaf, *Do 523(a) Exceptions to Discharge Apply to the Discharge of a Corporation in a Subchapter V case after "Cramdown" Confirmation under section 1191(b)?*, 32 No. 4, Norton J. Bankr. L. & Prac. NL Art. 1 (Dec. 2023). See also *Subchapter V discharge*, 4 Norton Bankr. L. & Prac. 3d § 107:20; compare James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, Norton Bankr. L. Adviser (exceptions are applicable to discharge of Subchapter V entity debtor) with Richard P. Cook, *Discharges in Subchapter V: What Has Changed? What Remains the Same? Are Elephants Hiding in Mouseholes?*, 41-Jun Am. Bankr. Inst. J. 24 (Jun. 2022) (exceptions should not be applicable to discharge of Subchapter V entity debtor).

²⁷⁹ *Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862, 866 (B.A.P. 9th Cir. 2023) ("Facially, these sections appear to be in conflict because § 523(a) refers to individual debtors, while § 1192 provides for discharge of both individual and corporate debtors and does not distinguish between them when excepting debts "of the kind specified in section 523(a)"); *Nutrien Ag Sols., Inc. v. Hall (In re Hall)*, 651 B.R. 62, 67 (Bankr. M.D. Fla. 2023) ("[t]he two sections ostensibly conflict"); *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337, 341 (Bankr. W.D. Tex. 2022).

²⁸⁰ 11 U.S.C. § 1192(2).

does not discharge an *individual debtor* from any debt” enumerated in section 523(a).²⁸¹ Section 1192(2) does not expressly limit the applicability of the section 523(a) exceptions to individuals. Section 523(a), however, does. The implication of this language is that section 1192(2)’s reference to debts “of a kind specified” in section 523(a) includes only debts excepted by 523(a), which are only debts of individuals.²⁸²

Most courts and the one Bankruptcy Appellate Panel that have considered the issue have reached the same conclusion: Section 1192 does not make Section 523(a) exceptions to discharge for individual debtors applicable to entity Subchapter V debtors with nonconsensual confirmed plans.²⁸³ Two courts and the Fourth Circuit, however, have ruled that section 523(a) applies both to individuals and corporations receiving a discharge under section 1192.²⁸⁴ These courts examine the text of sections 1192(2) and 523(a) along with their context, chapter 11 policy, and legislative history to reach their contrasting conclusions.²⁸⁵

The Bankruptcy Appellate Panel and many of the courts that have addressed this issue agree that the text of section 523(a) unambiguously applies only to debts in individual cases.²⁸⁶ Section 1192’s reference to debts “of the kind specified in section 523(a)” means the list of 21 kinds of nondischargeable debts under section 523(a), but nothing in the text of section 1192 eliminates the “express limitation in the preamble of § 523(a) or otherwise expands its scope to corporate debtors.”²⁸⁷

281 *Id.* § 523(a) (emphasis added).

282 Even though the Bankruptcy Code does not define “individual,” bankruptcy professionals understand the word to mean natural person. Moreover, the Bankruptcy Code clearly distinguishes between an “individual” and a “corporation.”

283 *See Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. 2023) (nondischargeability provisions were not applicable to corporate debtor with nonconsensual plan in Subchapter V of Chapter 11); *In re Ra Custom Design, Inc. v. Ra Custom Design, Inc.*, No. 23-58494, 2024 WL 607716, at *1 (Bankr. N.D. Ga. Feb. 13, 2024) (holding that the exceptions to discharge under section 523(a) of the Bankruptcy Code do not apply to corporate debtors with a nonconsensually confirmed plan under Subchapter V); *In re R&W Clark Construction, Inc.*, 656 B.R. 628 (Bankr. E.D. Ill. 2024) (same); *BenShot, LLC v. 2 Monkey Trading, LLC (In re Monkey Trading, LLC)*, 650 B.R. 521 (Bankr. M.D. Fla. 2023) (same), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023); *Nutrien Ag Sols., Inc. v. Hall (In re Hall)*, 651 B.R. 62 (Bankr. M.D. Fla. 2023) (same); *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337 (Bankr. W.D. Tex. 2022) (same), notice of appeal filed, No. 23-60034 (5th Cir., Apr. 7, 2023); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, No. 21-31500, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022) (same); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021) (same); *Cantwell-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) (same); *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021) (same).

284 *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 517-18 (4th Cir. 2022); *In re Duntov Motor Co., LLC*, No. 21-40348, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021) (ruling that section 1192(2) applies to except from discharge debts of the kind specified in section 523(a) for a Subchapter V debtor that is a limited liability corporation); *In re Tonka International Corporation*, Case No. 20-40731, 2020 WL 13881422, at *5 (Bank E.D. Tex. Sept. 16, 2020) (“Section 1192, by its terms, expands the exclusion from discharge of debts of a kind specified in § 523(a) ‘beyond debtors who are individuals to include all subchapter V debtors.’” (quoting Collier on Bankruptcy § 1192.03)). One bankruptcy court ruled that a judgment for patent infringement against a corporation in a Subchapter V case was excepted from discharge under § 523(a)(6) as a willful and malicious injury without addressing whether section 523(a) exceptions apply to the discharge of a corporation or citing the applicable subchapter V discharge provision, 11 U.S.C. § 1192(2). *Concrete Log Systems, Inc. v. Better Than Logs, Inc. (In re Better Than Logs, Inc.)*, 631 B.R. 670, 688–89 (Bankr. D. Mont. 2021).

285 *See Bonapfel and Schaaf, supra* note 284, Part IV.

286 *In re Off-Spec Solutions, LLC*, 651 B.R. at 867; *In re GFS Indus., Inc.*, 647 B.R. at 341-43 (“§ 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.”).

287 *In re Off-Spec Solutions, LLC*, 651 B.R. at 867.

In *In re GFS Industries, LLC*, the court observed that the discharge provisions in section 1141(d) demonstrate that Congress knows how to distinguish dischargeability based on the type of debtor.²⁸⁸ Section 1141(d)(6) states: “the confirmation of a plan does not discharge *a debtor that is a corporation* from any debt (A) of the kind specified in paragraph 2(A) or 2(B) of section 523(a) that is owed to a governmental unit...”²⁸⁹ In contrast, section 1141(d)(2) states that the section 523(a) exceptions apply to the discharge of an individual.²⁹⁰ Section 1192(2), the court reasoned, does not make this distinction.²⁹¹ “Thus, in order to determine to which debtors § 1192(2) refers, one must look to the language of § 523(a), which unequivocally applies only to individuals.”²⁹²

In *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*,²⁹³ the Fourth Circuit examined the text of the two statutes and concluded that the text of section 1192 refers to the types of debts, not the types of debtors, and consequently, makes those types of debts nondischargeable to all debtors under § 1192.²⁹⁴ The Fourth Circuit explained:

[W]hile § 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).²⁹⁵

The Fourth Circuit held that any tension between the language of section 523(a) addressing individual debtors and the language of section 1192(2) addressing both individual and corporate debtors could be resolved by explaining that the more specific language of section 1192(2)—dealing only with Subchapter V discharges—should govern over the more general provisions of section 523(a) that reference other discharges under the Bankruptcy Code.²⁹⁶

The Task Force concludes that a corporation’s (or other entity’s) discharge after nonconsensual confirmation should not be subject to the section 523(a) exceptions for the same reasons that Congress chose to provide for an exceptionless discharge of a corporation when it enacted Chapter 11 in 1978. Because the Task Force agrees with the majority rulings of the courts that this is the result under the

²⁸⁸ *In re GFS Industries, LLC*, 647 B.R. at 343.

²⁸⁹ 11 U.S.C. § 1141(d)(6) (emphasis added).

²⁹⁰ *Id.* § 1141(d)(2).

²⁹¹ *In re GFS Industries, LLC*, 647 B.R. at 343.

²⁹² *Id.* at 343.

²⁹³ 36 F.4th 509 (4th Cir. 2022).

²⁹⁴ *Id.* at 515.

²⁹⁵ *Id.* (original emphasis).

²⁹⁶ *Id.*

current statutory language of sections 1192(2) and 523(a) and properly reflects Congressional intent, an amendment is arguably not necessary.

Nevertheless, the Task Force recommends that Congress amend section 1192 to confirm existing policy and make it clear that the exceptions do not apply.

The proposed amendment reflects Congressional policy with regard to discharge of entities in Chapter 11 and Subchapter V's legislative history.

Congress enacted comprehensive bankruptcy reform in 1978, replacing the previous reorganization chapters of the Bankruptcy Act of 1898²⁹⁷ (chapters X, XI, and XII), as amended by the Chandler Act of 1938,²⁹⁸ with a unitary Chapter 11.²⁹⁹ The discharge provisions in the repealed chapters varied.³⁰⁰ Chapter X governed corporate reorganizations and allowed for discharge with a limited exception for priority tax debts, defined as those owed to the United States or a state within one year before the filing of the case that had not been assessed before confirmation or that arose postpetition.³⁰¹ Chapter XI, however, made the discharge subject to exceptions. Chapter 11 in the new Bankruptcy Code provided for a corporation to receive a discharge under § 1141(d)(1) upon confirmation of a plan without any exceptions if the corporation remained in business.

The legislative history makes it clear that Congress, in enacting Chapter 11 as part of the Bankruptcy Code in 1978, made an intentional policy choice when it chose to limit the section 523(a) exceptions to discharge in Chapter 11 cases to individuals. Congress made it explicit that a discharge eliminates all of a corporate debtor's debt.³⁰² Currently, the only exception to discharge of corporate debt is set forth in section 1141(d)(6), which Congress added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.³⁰³ No other exceptions to discharge under section 523(a) have been incorporated into Chapter 11.

Nothing in the legislative history of the SBRA, consisting of the Report of the House Judiciary Committee, indicates that Congress intended for section 523(a) to apply to corporate (or other entity) debtors in Subchapter V cases.³⁰⁴ It merely mentions that section 1192 excepts "any debt that is otherwise nondischargeable."³⁰⁵ This language logically refers to section 523(a), which applies only to debts of individuals. Had Congress intended to expand the application of the section 523(a) exceptions

297 See Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544 (repealed 1978).

298 See Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840.

299 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

300 See Bonapfel and Schaaf, *supra* note 284, Part III.B (describing the exceptions to discharge under chapters X, XI, XII, and XIII under the Chandler Act Amendments).

301 See Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Amer. Bankr. Inst. L. Rev. 757, 762-63 and n. 38 (2005) (quoting the Bankruptcy Act of 1898, Sec. 271).

302 See *id.* (tracing the history of the dischargeability of corporate debts).

303 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Pub. L. No. 109-8, Title VII, § 708, 119 Stat. 23, 126-27 (emphasis added) (codified at 11 U.S.C. § 1141(d)(6)).

304 H.R. Rep. No. 116-171 (2019), as reprinted in 2019 U.S.C.C.A.N. 366.

305 H.R. Rep. No. 116-171, at 8 (2019), as reprinted in 2019 U.S.C.C.A.N. 366, 374.

to discharge to individuals, a significant departure from the longstanding scope of the discharge in Chapter 11 cases, surely it would have more clearly stated such a change.³⁰⁶

This recommended amendment does not alter the balance of creditor protections that currently exist for nonconsensual plans; it merely clarifies existing Congressional intent. Nonconsensual plans must commit projected disposable income to the plan,³⁰⁷ demonstrate a reasonable likelihood the debtor will complete plan payments, and provide for appropriate remedies if the debtor does not make payments under the plan.³⁰⁸

Accordingly, the Task Force recommends a statutory change to section 1192 to clarify the scope of a discharge for an entity debtor with a nonconsensual confirmed plan.³⁰⁹ Adding a new subsection (2) to section 1192 which makes it clear that the section 523 exclusions from the discharge apply only in Subchapter V cases with individual debtors who have nonconsensual confirmed plans.

The Task Force also recommends an additional amendment to section 1192 to make section 1141(d)(6) apply to a Subchapter V debtor with a plan confirmed nonconsensually under section 1191(b), as it does in the case of a debtor who receives a discharge under section 1141(d)(1) after consensual confirmation.

Section 1141(d)(6) provides an exception to the § 1141(d)(1) discharge for debts of a kind specified in section 523(a)(2) that are owed by a corporation to a domestic governmental unit under the False Claims Act or similar state law and for debts for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat.³¹⁰ Because a debtor after confirmation of a nonconsensual plan receives a discharge under section 1192 rather than section 1141(d)(1), the section 1141(d)(6) exception does not appear to apply.

The proposed amendment makes it clear that the exception in section 1141(d)(6) applies to all Subchapter V debtors, regardless of the type of confirmation that occurs.

306 See *Cleary Packaging, LLC*, 630 B.R. at 476, rev'd, 36 F.4th 509 (4th Cir. 2022) (quoting *Whitman v. American Trucking Associations*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1, (2001)):

“[T]he suggestion that Congress incorporated [21] new exceptions to discharge for small corporations in a bill [the SBRA] that was introduced in April 2019, and signed into law by the President in August 2019, seems not only improbable but also contradicts years of bankruptcy law and policy. ‘Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.’”

Hon. Paul W. Bonapfel, *SBRA Guide*, *supra* note 110, §X.D (“Moreover, if the drafters had intended to expand §523(a) to permit exceptions to the discharge of non-individuals — a significant change in existing chapter 11 law — one would expect the House Judiciary Committee Report to point that out. It does not.”).

307 11 U.S.C. § 1191(c)(2).

308 *Id.* § 1191(c)(3).

309 Task Force member, Judge Harner, abstained from the vote on this issue given her involvement in the *Cleary* matter, which is part of the case law split under section 1192.

310 *Id.* § 1141(d)(6) (“Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or (B) for a tax or customs duty with respect to which the debtor—(i) made a fraudulent return; or (ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.”).

Although the § 1141(d)(6) exception applies by its terms only to the discharge of a corporation, debts within its scope are excepted from the discharge of an individual under § 523(a). Subparagraph (A) defines a subset of debts that are not dischargeable under § 523(a). Subparagraph (B) defines debts that are excepted from discharge under § 523(a)(1)(C).

The proposed amended language for both changes follows.

Proposed Amended Section 1192

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 an individual debtor of the kind specified in section 523(a) of this title; or
- (3) of the kind specified in section 1141(d)(6) of this title.

VII. Postconfirmation Administrative Matters

A. Postconfirmation Reporting Requirement

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends statutory amendments that would impose a uniform postconfirmation reporting requirement for Subchapter V debtors, to be filed by the debtor with the motion for final decree or application for discharge, and implemented through changes to the Bankruptcy Rules, the creation of a new official bankruptcy form, and a directive for collection and publication of pertinent data.

Supporting Principles

- Although Subchapter V contemplates that either debtors in possession or trustees will file postconfirmation reports, no specific postconfirmation reporting requirements exist for Subchapter V debtors unless required by local rule or court order.
- Although this keeps administrative costs low, in keeping with the legislative goals of the SBRA, it means courts and creditors have little information about the progress of plan implementation.
- A uniform postconfirmation report would provide better information to the court and creditors about the progress of plan implementation; it also would better inform bankruptcy policy, permitting Congress, courts, scholars, other parties in interest, and the public to better evaluate the efficacy of Subchapter V.
- The recommended change would not affect the ability of courts to order pre- or postconfirmation reporting under section 1106(a)(7) of the Code.

No postconfirmation reporting requirements exist for Subchapter V debtors unless required by local rule or court order. A streamlined postconfirmation process holds a reorganized debtor accountable and may encourage more attention to, and thoughtfulness about, plan implementation by the debtor following confirmation. The lack of postconfirmation reporting also keeps administrative costs low, in

keeping with the legislative goals of the SBRA, but courts and creditors have little information about the progress of plan implementation as a result.

A Subchapter V debtor that confirms the plan consensually under section 1191(a) must file a notice of substantial consummation of the plan pursuant to section 1183(c)(2) no later than 14 days after the plan is substantially consummated.³¹¹ After substantial consummation, defined in section 1101(2),³¹² and termination of the trustee's services pursuant to section 1183(c)(1), the debtor may seek entry of a final decree closing the case pursuant to section 350(a) and Federal Rule of Bankruptcy Procedure 3022, upon a showing that the estate has been fully administered and that there are no remaining matters for which the court must continue to exercise jurisdiction.

The situation is different for a Subchapter V debtor that confirms a nonconsensual plan under section 1191(b). If the confirmed plan is nonconsensual, the case ordinarily will remain open after substantial consummation until plan payments are completed, the trustee has filed the final report and accounting of the administration of the estate,³¹³ and there are no remaining matters for which the court must continue to exercise jurisdiction.³¹⁴

Uniform postconfirmation reporting is required in non-Subchapter V, non-small business debtor Chapter 11 cases.³¹⁵ Specifically, debtors in possession or trustees in non-small business or non-Subchapter V cases must file with the court postconfirmation reports (PCR-11s) about the progress of plan implementation. These reports also assist with calculating any postconfirmation fees that must be paid by the debtor.³¹⁶

In Subchapter V, and as discussed further below, any postconfirmation reporting requirement arguably would serve a different purpose. It would provide a mechanism to assess the efficacy of the subchapter and also allow courts and creditors to gauge the debtors' progress in plan implementation and performance.

Subchapter V contemplates some kind of postconfirmation reporting by debtors in possession. Under section 1106(a)(7), made applicable to Subchapter V debtors by section 1184, debtors have the duty "to file such reports as are necessary or as the court orders." At present, there is no uniform or standardized requirement for postconfirmation reporting.

311 11 U.S.C. § 1183(c)(2). *See* Section VI.C, *infra* (explaining substantial consummation).

312 *Id.* § 1101(2).

313 *Id.* § 1183(b)(1) (incorporating section 704(a)(9)).

314 *See id.* § 350(a).

315 *See* 28 U.S.C. 589b(a) (requiring the Attorney General to issue rules requiring uniform forms for final reports by trustees in Chapter 7, Chapter 12, Chapter 13, and Subchapter V cases and periodic reports by debtors in possession or trustees in cases under chapter 11 of title 11).

316 The Task Force notes that Subchapter V cases are not subject to the general reporting or fee guidelines applicable to standard Chapter 11 debtors, and this aspect of Subchapter V has, from the Task Force's review of the cases, been critical to the success of the subchapter. The Task Force's recommendation regarding a uniform postconfirmation report should not be read as similar to those reports used for, among other things, calculating postconfirmation fees in Chapter 11. Subchapter V's objective of reducing fees and costs associated with bankruptcy for smaller debtors is paramount and should be preserved.

For example, some courts have implemented postconfirmation reporting requirements for Subchapter V debtors through local bankruptcy rules. The District of Maryland, for instance, has implemented a streamlined postconfirmation reporting requirement in Subchapter V by local rule.³¹⁷ The notice of substantial consummation, which under section 1183(c)(2) must be filed within 14 days after the plan is substantially consummated, must include a certification by the debtor that includes a summary report of the disbursements, distributions, and transfers that have been made pursuant to the plan, together with a description of other acts taken to consummate the plan. The certification must also describe any matters involving consummation of the confirmed plan that have not been fully resolved. Likewise, the Eastern District of Texas requires a postconfirmation report within 60 days after the order confirming the plan in Subchapter V cases with consensual confirmed plans.³¹⁸ The report must inform the court of the postconfirmation actions taken by the confirmed debtor or the Subchapter V trustee and the progress made toward substantial consummation of the plan.³¹⁹

Other courts require periodic reporting for Subchapter V debtors until a final decree is entered in the case.³²⁰ Subchapter V debtors with confirmed plans, whether consensual under section 1191(a) or nonconsensual under section 1191(b), must file quarterly reports after confirmation pursuant to Local Bankruptcy Rule 3020-2 in the Central District of California.³²¹ These reports must include:

1. Progress that has been made toward substantial consummation of the confirmed plan;
2. A schedule listing for each debt and each class of claims; the total amount required to be paid under the plan; the amount required to be paid as of the date of the report; the amount actually paid as of the date of the report; and the deficiency, if any, in required payments;
3. A schedule of any and all postconfirmation tax liabilities that have accrued or come due and a detailed explanation of payments thereon;
4. Projections as to the reorganized debtor's, postconfirmation trustee's, or other responsible party's continuing ability to comply with the terms of the plan;
5. An estimate of the date for plan consummation and application for final decree; and

317 L.B.R. 3022-1(e) (Bankr. D. Md.), <https://www.mdb.uscourts.gov/files/localrules.pdf>.

318 L.B.R. 2015-1(d) (Duty to Keep Records, Make Reports, and Give Notice of Case) (Bankr. E.D. Tex.), https://www.txeb.uscourts.gov/sites/txeb/files/2022%20LOCAL%20RULES_rev%20as%20of%208-22-22.pdf.

319 *Id.*

320 *See, e.g.*, L.B.R. 3021-1 Post-Confirmation Reporting Requirements in Chapter 11 Small Business and Subchapter V Cases (Bankr. E.D. Wash) (requiring quarterly postconfirmation reports in Subchapter V cases using the appropriate mandatory form until a final decree is entered or the case is dismissed or converted to another chapter); L.B.R. 2015-1(d) (Duty to Keep Records, Make Reports, and Give Notice of Case) (Bankr. E.D. Tex.) (requiring annual reports in Subchapter V cases with nonconsensual confirmed plans), https://www.txeb.uscourts.gov/sites/txeb/files/2022%20LOCAL%20RULES_rev%20as%20of%208-22-22.pdf.

321 Local Bankruptcy Rule 3020-2 (Bankr. C.D. Cal.) (requiring Subchapter V debtors to file postconfirmation quarterly reports) and Local Bankruptcy Rule 3020-01 (Bankr. C.D. Cal.) (enumerating required contents of reports), https://www.cacb.uscourts.gov/sites/cacb/files/documents/local_rules/LBRs%203003-1%20through%203022-1.pdf.

6. Any other pertinent information needed to explain the progress toward completion of the confirmed plan.³²²

Pursuant to this particular local rule, unless otherwise ordered, the first postconfirmation status report must be filed within 120 days of entry of the order confirming the plan unless the court orders otherwise.³²³ Subsequent reports are due on the 15th day of the month following each successive 120-day reporting period until a final decree is entered.³²⁴

The Task Force heard testimony that the addition of uniform postconfirmation reporting requirements for Subchapter V debtors would be helpful to understanding how Subchapter V debtors fare after their plans are confirmed.³²⁵ It also might assist courts and creditors in monitoring the debtor's progress and implementation under the plan.

In evaluating the merits of this suggestion, the Task Force balanced the benefits of have a reporting mechanism to evaluate both plan implementation within an individual case and the effectiveness of the subchapter overall against the costs of imposing an additional requirement and its costs on smaller business debtors.

After weighing the broader perspectives shared with the Task Force about the utility of a postconfirmation reporting requirement, the Task Force has concluded that the implementation of some required postconfirmation report would be useful. To that end, the Task Force proposes statutory language and amendments which require the Subchapter V debtor to file a postconfirmation report using a uniform form designed by the Judicial Conference.

A postconfirmation report would provide information to the court about how the implementation of the plan is progressing. The Task Force recognizes that some jurisdictions currently require some kind of postconfirmation reporting requirements. The national reporting requirement proposed herein is not meant to displace the role of the court to impose reporting requirements either before or after confirmation. Rather, the proposal introduces a uniform report that would be filed in every Subchapter V with a confirmed plan, in addition to other reporting obligations of the Subchapter V debtor in the particular case or jurisdiction. Such a requirement also would hold Subchapter V debtors more accountable for postconfirmation performance and encourage some continued level of disclosure from debtors to the courts and creditors.

In addition, the reporting requirement would provide a mechanism for aggregating and analyzing data about Subchapter V plans in order to better inform bankruptcy policy, permitting policymakers, courts, scholars, and the public to more accurately assess whether the subchapter is effective as a

322 L.B.R. 3020-1(b) (Bankr. C.D. Cal.)

323 L.B.R. 3020-1(c) (Bankr. C.D. Cal.).

324 *Id.*

325 See *Written Statement of Dan Etlinger*, ABI Subchapter V Task Force Hearing (Plan and Confirmation Issues) (Sept. 8, 2023), <https://subvtaskforce.abi.org/> (supporting periodic reports that describe a Subchapter V efforts towards substantial consummation and general case updates); *Written Statement of Keri Riley*, ABI Subchapter V Task Force Hearing (Postconfirmation Issues) (Sept. 22, 2023), <https://subvtaskforce.abi.org/> (supporting post confirmation reporting requirements).

reorganization tool. As such, ensuring consistency and uniformity in the contents, form, and timing of the report is critically important. Consistency and uniformity will facilitate the aggregation of the data, which will assist Congress in its efforts to analyze bankruptcy trends and make policy decisions, without imposing significant additional burdens upon trustees and debtors in possession.

The Task Force proposes statutory changes to implement this recommendation. In evaluating different alternatives for such a statutory change, the Task Force considered the various ways that national reporting requirements could be designed and implemented. The Task Force notes that others, such as the United States Trustee program, could conceivably perform this role. The Task Force finds, however, that the Judicial Conference and the Administrative Office of the United States Courts are the best resources here based on their vast experience and methodical procedures (as well as the similar role they served under BAPCPA). The Task Force does not make this suggestion lightly and appreciates the significant responsibilities already placed on the Judicial Conference and the Administrative Office. Nevertheless, the proposal outlined below represents the most effective and expedient path to a solution.

Accordingly, the Task Force makes the following recommendations. First, the Task Force proposes that Congress direct the Judicial Conference to propose (in accordance with section 2073 of title 28) amended Federal Rules of Bankruptcy Procedure, and to prescribe (in accordance with Rule 9009 of the Federal Rules of Bankruptcy Procedure) official forms for postconfirmation reporting by Subchapter V debtors.³²⁶ Official Bankruptcy Forms are approved by the Judicial Conference and must be used under Bankruptcy Rule 9009.

The Task Force recommends identifying the following data points to be disclosed by Subchapter V debtors in their postconfirmation reports:

1. U.S. Bankruptcy Court;
2. Name of Debtor;
3. Case Number;
4. Whether the case is jointly administered, and if jointly administered, identify the lead case number;
5. Information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor;
6. Petition date;
7. Confirmation date;

³²⁶ In the alternative, the Task Force proposes that Congress direct the Attorney General (who presumably would delegate authority to the Executive Office for U.S. Trustees as a component of the U.S. Department of Justice) to issue rules creating a uniform form for postconfirmation reporting by Subchapter V debtors. Section 589b(a) of title 28 already directs the Attorney General to issue rules requiring uniform forms for final reports by trustees in Subchapter V cases and periodic reports by debtors in possession or trustees in cases under Chapter 11 of title 11. The statute would require an amendment to section 589b(a) to authorize the Attorney General to issue rules requiring a uniform form for a final report by Subchapter V debtors.

8. Effective date of the plan;
9. Whether the plan was confirmed under section 1191(a) or section 1191(b) of the Bankruptcy Code;
10. The amount of administrative expense claims incurred in the case and the amount of those claims actually paid in accordance with the plan as of the date of the filing of the report;
11. A list of each class of claims or interests under the plan; the amount required to be paid on account of each such class of claims or interests under the plan; and the amount actually paid on account of each such class of claims or interests under the plan as of the date of the filing of the report; and
12. Any other pertinent information needed to explain the completion, or the progress toward completion, of the confirmed plan.

Second, the Task Force proposes that Congress direct the Director of the Administrative Office to collect and publish the aggregated data captured in the new postconfirmation Subchapter V official form annually pursuant to an amendment to 28 U.S.C. § 159.

Proposed Amended Section 1187

The Task Force recommends an amendment to the Bankruptcy Code to implement the postconfirmation reporting requirement for Subchapter V debtors. The Task Force recommends providing for the postconfirmation reporting duty for Subchapter V debtors by adding a new subsection (d) to section 1187.

(a) Filing Requirements.

Upon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.

(b) Other Applicable Provisions.

A debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6), and (7) of section 1116 of this title.

(c) Separate Disclosure Statement Exemption.

If the court orders under section 1181(b) of this title that section 1125 of this title applies, section 1125(f) of this title shall apply.

(d) *Postconfirmation Report.* In addition to any reporting ordered by the court under section

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1106(a)(7), the debtor shall file a report disclosing information relevant to the implementation of the debtor's confirmed plan, including the amount required to be paid on account of claims and interests under the plan and the amount actually paid on account of such claims and interest as of the date of the filing of the report, as follows:

- (1) If the plan of the debtor is confirmed under section 1191(a), the debtor shall file the report with the motion for final decree.*
- (2) If the plan of the debtor is confirmed under section 1191(b), the debtor shall file the report with the application for a discharge.*

<<NOTE: 11 USC 1187 note.>> Effective Date. The amendments made by subsection (d) shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 1187(d) of title 11, United States Code, as added by subsection ().

Proposed Statutory Language Directing Judicial Conference

PROPOSAL OF RULES AND FORMS.—The Judicial Conference of the United States shall propose in accordance with section 2073 of title 28 of the United States Code amended Federal Rules of Bankruptcy Procedure,³²⁷ and shall prescribe in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure official bankruptcy forms, directing debtors filing cases under subchapter V of chapter 11 to file a final report containing information, including information relating to—

- (1) U.S. Bankruptcy Court;*
- (2) Name of Debtor;*
- (3) Case Number;*
- (4) Whether the case is jointly administered, and if jointly administered, identify the lead case number;*
- (5) Information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor;*
- (6) Petition date;*
- (7) Confirmation date;*
- (8) Effective date of the plan;*
- (9) Whether the plan was confirmed under section 1191(a) or section 1191(b) of the Bankruptcy Code;*
- (10) The amount of administrative expense claims incurred in the case and the amount of those claims actually paid in accordance with the plan as of the date of the filing of the report;*
- (11) A list of each class of claims or interests under the plan; the amount required to be paid on account of each such class of claims or interests under the plan; and the amount actually paid on account of each such class of claims or interests under the plan as of the date of the filing of the report; and*
- (12) Any other pertinent information needed to explain the completion, or the progress toward completion, of the confirmed plan.*

(b) Purpose. The rules and forms proposed under subsection (a) shall be designed to achieve a practical balance among—(1) the reasonable needs of the bankruptcy court, the United States trustee, creditors, and other parties in interest for reasonably complete information; (2) a small business debtor’s

³²⁷ This would require an amendment to Fed. R. Bankr. P. 2015(a)(6).

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interest that required reports be easy and inexpensive to complete; and (3) the interest of all parties that the required reports help understand the debtor's financial condition and successful consummation of its plan.

Proposed Amended 28 U.S.C. § 159

The Task Force recommends several amendments to 28 U.S.C. § 159 to direct the Director of the Administrative Office to compile and publish the aggregated data collected in the new official form postconfirmation report.

(a) The clerk of the district court, or the clerk of the bankruptcy court if one is certified pursuant to section 156(b) of this title, shall collect statistics regarding (1) debtors who are individuals with primarily consumer debts seeking relief under chapters 7, 11, and 13 of title 11 *and (2) debtors who elect to seek relief under subchapter V of chapter 11 of title 11 who complete the postconfirmation report required under 11 U.S.C. § 1187(d)*. Those statistics shall be in a standardized format prescribed by the Director of the Administrative Office of the United States Courts (referred to in this section as the "Director").

(b) The Director shall—

- (1) compile the statistics referred to in subsection (a);
- (2) make the statistics available to the public; and
- (3) not later than ~~July 1, 2008~~ [insert date], and annually thereafter, prepare, and submit to Congress
 - (A) a report concerning the information collected under subsection (a)(1) that contains an analysis of the information; and
 - (B) *a report concerning the information collected under subsection (a)(2) that contains an analysis of the information, which report shall also be made available to the public within 30 days of its submission to Congress.*

* * *

(d) *The compilation required under subsection (b)(3)(B) shall—*

- (1) *include in the aggregate and for each district all the data reported in the official postconfirmation report prescribed pursuant to sections 2073 and 2075 of this title and required to be filed by subchapter V debtors pursuant to 11 U.S.C. § 1187(d).*

B. Subchapter V Trustee as the Default Disbursing Agent

Recommendation and Supporting Principles:

Recommendation

The Task Force declines to recommend a statutory change to section 1194(b) which would make the debtor rather than the Subchapter V trustee the disbursing agent.

Supporting Principles

- The existing statutory language is sufficiently flexible to permit the debtor to function as the disbursing agent instead of the Subchapter V trustee.
- As currently written, the Bankruptcy Code permits charging the debtor rather than the trustee with the duty to make plan payments so long as that responsibility is allocated either in the plan or the order confirming the plan.

The Bankruptcy Code currently provides for the Subchapter V trustee to serve as the default disbursing agent for nonconsensual confirmed plans. Under section 1194(b), if a plan is confirmed under section 1191(b) of this title, except *as otherwise provided in the plan or in the order confirming the plan*, the trustee shall make payments to creditors under the plan.³²⁸

Some trustees prefer not to act as disbursing agents because it imposes administrative burden and expense. That expense also adds to the overall cost of a Subchapter V reorganization. Anecdotal evidence suggests that the plan provides, or the court orders, otherwise, in many nonconsensual plans, allowing debtors to make plan payments. In addition, testimony to the Task Force and some case law indicate that courts have routinely permitted debtors to make plan payments for confirmed plans that are nonconsensual due to a nonvoting, nonparticipating creditor with control of an entire class.³²⁹ Typically, in this situation, the trustee will ask the court to permit the debtor to serve as the disbursing party to mitigate some of the hardship that accompanies cramdown confirmation.³³⁰

The Task Force considered a possible amendment to section 1194(b) that would change this default rule and instead permit the debtor to make plan payments for nonconsensual plans unless cause is

³²⁸ 11 U.S.C. § 1194(b) (emphasis added).

³²⁹ *Written Statement of Rebecca Redwine*, *supra* note 185, at 4; *Written Statement of Hon. Craig Gargotta*, *supra* note 95, at 2-3 (noting that the Subchapter V trustee usually asks the court to authorize the debtor to act as the disbursing party for plan payments when the plan is nonconsensual only because of a silent, nonparticipating class); *In re Creason*, Case No. 22-00988-swd, 2023 WL 2190623 at *1 (Bankr. W.D. Mich. Feb. 23, 2023) (Debtor placed the creditor in its own class and the creditor did not return its ballot, so the class did not formally accept the plan).

³³⁰ See, e.g., *In re Creason*, 2023 WL 2190623, at *2 n.3.

shown which would require the trustee to do so. This proposed change would make the debtor the default disbursing agent.

The Task Force determined, however, that the existing statutory language is sufficiently flexible to permit the debtor to function as the disbursing agent instead of the Subchapter V trustee. As currently written, the Bankruptcy Code permits charging the debtor rather than the trustee with the duty to make plan payments so long as that responsibility is allocated either in the plan or the order confirming the plan.³³¹ This language allows for flexibility that the Task Force thinks should be exercised where appropriate.

C. Postconfirmation Modification Standards

Recommendation and Supporting Principles:

Recommendation

The Task Force does not recommend any statutory changes to Subchapter V's existing standards for postconfirmation modification of plans.

Supporting Principles

- Subchapter V has different standards for postconfirmation modification of consensual and nonconsensual plans.
- The key difference between sections 1193(b) and 1193(c) is one of timing. A consensual plan may only be modified before the plan is substantially consummated, whereas a non-consensual plan may be modified at any time during the three-to-five-year period for the payment of projected disposable income.
- In the consensual plan context, the Code treats the plan as one having creditor support, meaning that creditors have relied on the terms proposed in the plan itself. Limiting the time within which a debtor may seek a postconfirmation modification respects the creditors vote (and any agreements reached among parties to achieve that vote) and provides certainty and finality for debtors and creditors, encouraging consensual plans.
- In the nonconsensual plan context, however, the plan lacks consensus and may contemplate payments over a longer period of time. The court in the first instance must evaluate whether the plan meets the cramdown requirements of Subchapter V and is capable of re-assessing that determination at the time of proposed modification, as well as determining whether the

³³¹ *Id.*

circumstances warrant the modification. The debtor also does not receive a discharge until all payments have been made

- The limitation of the right to modify a plan to only the debtor departs from the postconfirmation modification standards in other chapters of the Bankruptcy Code that permit the U.S. Trustee and parties in interest to seek to modify plans after confirmation. This difference is consistent with the policy goals of Subchapter V to provide a more feasible path to reorganization. By limiting the ability to seek postconfirmation modifications to the plan to the debtor, Subchapter V minimizes potential disruptions to the debtor's rehabilitation process.

Subchapter V has different standards for postconfirmation modification of consensual plans and nonconsensual, or cramdown, plans.

The debtor may modify a consensual plan confirmed under section 1191(a) before the plan is substantially consummated.³³² Substantial consummation typically occurs once plan distributions have commenced.³³³ The modified plan becomes the plan only if the court finds that circumstances warrant the modification, and the plan is confirmable under section 1191(a).³³⁴ Notice and hearing to confirm the modified plan under section 1191(a) are required.³³⁵ Holders of claims or interests that have accepted or rejected a consensually confirmed plan are deemed to have similarly accepted or rejected the plan as modified unless, within the time fixed by the court, the holder changes its previous acceptance or rejection.³³⁶

This standard is similar to the postconfirmation modification standard applicable in a standard Chapter 11 business case under section 1127(b), which also permits postconfirmation plan modifications only before substantial consummation.³³⁷ Case law about substantial consummation in the Subchapter V context is developing.³³⁸ Considerable case law exists discussing substantial consummation in the Chapter 11 context, and, generally, the inquiry turns on the specific facts of the case. The case law in

332 *Id.* § 1193(b). *See id.* § 1101(2) (Substantial consummation means “transfer of all or substantially all of the property proposed by the plan to be transferred; 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 commencement of distribution under the plan.”); *In re National Tractor Parts, Inc.*, 640 B.R. 916, 922 (Bankr. N.D. Ill. 2022) (finding that Subchapter V plan could not be modified after substantial consummation of the plan as defined in section 1101(2)).

333 *In re National Tractor Parts, Inc.*, 640 B.R. at 922 (ruling that “under the applicable canons of statutory construction, the correct reading of 11 U.S.C. § 1101(2)(C) is that . . . a plan is substantially consummated once any payment to any creditor is made”).

334 11 U.S.C. § 1193(b).

335 *Id.*

336 *Id.* § 1193(d).

337 *See id.* § 1127(b) (allowing postconfirmation modification before substantial consummation of the plan but only if the modified plan meets the requirements of sections 1122 and 1123, circumstances warrant the modification, and the court confirms the modified plan after notice and a hearing).

338 *See, e.g., In re National Tractor Parts, Inc.*, 640 B.R. at 922 (finding that Subchapter V plan could not be modified after substantial consummation of the plan as defined in section 1101(2)).

the standard Chapter 11 context is clear that application of the “substantial consummation” standard reinforces the principle of finality of the plan.³³⁹

A plan is substantially consummated if three requirements are met: (1) transfer of all or substantially all of the property proposed by the plan to be transferred; (2) 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 (3) commencement of distribution under the plan.³⁴⁰ The party seeking to modify the plan has the burden of proving that the plan has not been substantially consummated. The majority view of courts is that the first requirement refers not to distributions under the plan, which are addressed by the third requirement for substantial consummation, but rather to transfers necessary to achieve reorganization and to “shape the new financial structure of the debtor.”³⁴¹ Most courts have ruled that the third requirement—referring to payments to creditors to satisfy the debtor’s debts—is satisfied once distributions have begun.³⁴² Thus far, court decisions in the Subchapter V context agree.³⁴³

Under section 1193(c), nonconsensual plans may be modified at any time postconfirmation during the plan commitment period.³⁴⁴ Notice and a hearing are required to confirm the modified plan.³⁴⁵ The modified plan becomes the plan only if the court finds that circumstances warrant the modification, and the plan is confirmable under section 1191(b).³⁴⁶ Case law is still developing about what kinds of circumstances warrant modification.³⁴⁷

The postconfirmation modification standard in section 1193(c) for nonconsensual Subchapter V plans combines features from section 1127(b), which governs postconfirmation plan modifications in standard Chapter 11 business cases, with features from the applicable standards in Chapters 12 and 13, which have plan commitment periods like a nonconsensual Subchapter V plan. For both a standard Chapter 11 business case and a cramdown Subchapter V plan, the modified plan becomes the plan only if the court determines “circumstances warrant” the modification and approves it.³⁴⁸ And as in Chapters 12 and 13, postconfirmation modification is permitted at any time before completion of plan payments, on condition that the modified plan meet confirmation requirements.³⁴⁹

339 *Id.* at 920 (quoting *Matter of UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994)) (holding that Subchapter V plan was substantially consummated, and therefore it could not be modified).

340 11 U.S.C. § 1101(2).

341 7 Collier on Bankruptcy ¶ 1101.02 (16th ed. 2023) (citation omitted).

342 *Id.*

343 *In re Nat’l Tractor Parts, Inc.*, 640 B.R. at 922 (stating that section 1101(2)(C) is satisfied once any payment to any creditor is made).

344 11 U.S.C. § 1193(c).

345 *Id.*

346 *Id.*

347 See, e.g., *In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 681 (Bankr. S.D. Tex. 2022) (finding that to determine whether a postconfirmation modification under section 1193(c) is warranted, “the debtor must show that the circumstances which gave rise to the modification were the result of an unforeseen circumstance that rendered the confirmed plan to be unworkable”).

348 11 U.S.C. § 1127(b), § 1193(c).

349 *Id.* §§ 1193 (c), 1229, 1329.

The Task Force considered some testimony suggesting that perhaps two postconfirmation modification standards were unnecessary. After deliberation, however, the Task Force finds that the policy justifications for different postconfirmation modification standards for consensual and nonconsensual plans are persuasive.

The key difference between sections 1193(b) and 1193(c) is one of timing.³⁵⁰ A consensual plan may only be modified before the plan is substantially consummated, whereas a nonconsensual plan may be modified at any time during the three-to-five-year period for the payment of projected disposable income.³⁵¹

This difference makes sense. A more flexible standard for consensual plans could significantly alter the preconfirmation deal reached with creditors. Limiting the ability to seek a postconfirmation modification to the short time period between confirmation, when the Subchapter V debtor receives its discharge,³⁵² and substantial consummation provides certainty and finality for debtors and creditors and in that sense, the restrictive standard encourages consensual plans.

Cramdown plans, in contrast, lack the unanimity of consensual plans and may contemplate payments over a longer period of time. A court must consider all the relevant statutory requirements for cramdown confirmation under section 1191 before the plan can be confirmed. The court is capable of reassessing those requirements at the time of proposed modification along with determining whether the circumstances warrant the modification. The debtor also does not receive a discharge until all payments have been made.

The Task Force also considered whether to recommend statutory changes that would permit the Subchapter V trustee or a creditor to seek to modify a plan postconfirmation. In particular, the Task Force heard testimony suggesting statutory changes that would allow the Subchapter V trustee and nonpriority unsecured creditors to file a motion to modify the plan postconfirmation.³⁵³ The proposal would allow the Subchapter V trustee to seek the modification if in the trustee's reasonable judgment, such motion is warranted.³⁵⁴ The creditors could file such a motion to benefit from actual disposable income that materially exceeds the disposable income payable to unsecured creditors under the plan.³⁵⁵ Related to this change was the proposed addition of a requirement for the debtor file and serve an annual cash flow report over the life of the plan.³⁵⁶

350 Hon. Paul W. Bonapfel, *SBRA Guide: Subchapter V Update*, § IV (2023), https://www.flmb.uscourts.gov/judges/tampa/mcewen/SubchapterV_Update_Judge_Bonapfel_072023.pdf.

351 Compare 11 U.S.C. §§ 1193(b) and 1193(c).

352 Under section 1191(a), the Subchapter V debtor with a consensual confirmed plan receives a discharge under section 1141(d) which provides that “the confirmation of a plan . . . discharges the debtor.”

353 *Oral Testimony of Hon. Robert H. Jacobitz*, U.S. Bankruptcy Court for the District of New Mexico, ABI Subchapter V Task Force Hearing (Final Hearing) (Oct. 12, 2023), <https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing>.

354 *Id.*

355 *Id.*

356 *Id.*

The Task Force declines to recommend such a change. The limitation of the right to modify a plan to only the debtor departs from the postconfirmation modification standards in other chapters of the Bankruptcy Code that permit the U.S. Trustee and parties in interest to seek to modify plans after confirmation.³⁵⁷ This difference, however, is consistent with the policy goals of Subchapter V. The SBRA legislative history does not expressly state why only the debtor may seek to modify the plan after confirmation in a Subchapter V case. It does, however, emphasize the imperative for a streamlined reorganization process for smaller business debtors. By limiting the ability to seek postconfirmation modifications to the plan to the debtor, Subchapter V minimizes potential disruptions to the debtor's rehabilitation process.

Based on the foregoing, The Task Force does not recommend any statutory changes to Subchapter V's existing standards for postconfirmation modification of plans.

VIII. Conclusion

The Task Force's investigation and analysis underscores Subchapter V's nascent status. In undertaking to study the implementation and operation of the subchapter during its first few years, the Task Force observed, based on the various perspectives of judges, trustees, practitioners, commentators, and other stakeholders, that the aspects of Subchapter V clearly in need of reform or guidance are limited in scope. The Task Force examined those issues (shared through surveys, witness testimony, academic literature, and case law) that it believed warranted recommendations in the form of legislative reform or practical guidance and best practices. Overall, the Task Force concluded that its recommendations would improve the operation of Subchapter V.

The Task Force also noted that there are yet other aspects of the subchapter which require additional study, data collection, and potentially reform. Issues continue to emerge, some unanticipated, revealing themselves in local practice and case law. The Task Force concluded that such matters were not sufficiently developed to allow for an appropriate examination.

The Task Force hopes that the Report informs the discussion about the implementation and operation of the subchapter, provides some guidance about how some aspects of the subchapter should function, and facilitates serious consideration and adoption by policymakers some of the recommendations for legislative reform.

³⁵⁷ 11 U.S.C. §§ 1229, 1329 (permitting the debtor, the trustee, or an unsecured creditor to seek postconfirmation modification of the plan); § 1127(e) (permitting the debtor, the U.S. Trustee, the trustee, or an unsecured creditor to seek postconfirmation modification of the plan in an individual Chapter 11 case).

APPENDIX A: AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE MEMBERS

Hon. Michelle M. Harner

*U.S. Bankruptcy Court, District of Maryland
Baltimore, MD*

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

Megan W. Murray

*Shareholder, Underwood Murray, PA
Tampa, FL*

Ms. Murray, a founding shareholder of Underwood Murray, has nearly twenty years of reorganization and workout experience advising business owners, debtors, trustees, creditors' committees, secured and unsecured creditors, and asset purchasers and sellers. She has experience both on the legal side and on the business side in a global financial institution. She counsels businesses and owners in a wide variety of industries including but not limited to real estate, healthcare, hospitality, pharmaceutical, medical

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services, construction, insurance, transportation, logistics, aviation, and financial services. Ms. Murray also has extensive experience representing a variety of fiduciaries, from chapter 7 and 11 trustees, assignees in assignments for the benefit of creditors and receivers in proceedings across the state. She brings this knowledge to her fiduciary clients, which also adds value to her non-fiduciary clients and representations. In addition to her broad range of representations in core bankruptcy matters, Ms. Murray counsels her clients in making critical business decisions, while prosecuting and defending complex business disputes. She has extensive experience in director and officer liability litigation, bondholder disputes, shareholder and partnership disputes, court-appointed receiverships, healthcare receiverships, assignment proceedings, recovery of large and small business assets, and lien priority disputes related to a variety of collateral including real property, equipment, medical equipment, aircraft and logistics-related assets. Ms. Murray has been recognized by her peers and clients as a leading bankruptcy lawyer in Florida. Those honors include recognition by *Chambers USA*, selection for inclusion by *Florida Super Lawyers* and *Best Lawyers* and named to *Florida Trend Magazine* Legal Elite. She has also garnered an AV® Preeminent distinction, the highest available mark for professional excellence from Martindale-Hubbell's Peer Review Ratings. In 2018 the American Bankruptcy Institute recognized Ms. Murray as a top "40 under 40," one of the highest honors in the industry for young professionals. Ms. Murray is a contributing author to *Creditors' and Debtors' Practice in Florida*, is a frequent speaker and author on bankruptcy and insolvency topics and is active in local and national bankruptcy bar associations. In 2023 Ms. Murray was selected to co-chair the American Bankruptcy Institute's task force on Subchapter V with the Hon. Michelle Harner, United States Bankruptcy Court for the District of Maryland. Ms. Murray is also president of the Tampa Bay Bankruptcy Bar Association (2023).

Hon. Paul W. Bonapfel

*U.S. Bankruptcy Court, Northern District of Georgia
Atlanta, GA*

Hon. Paul W. Bonapfel is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta and Rome, Ga., appointed in 2002. Prior to his appointment, he practiced law in Atlanta with Lamberth, Bonapfel, Cifelli & Stokes, P.A., now known as Lamberth, Cifelli, Ellis & Nason, P.A. As an attorney, Judge Bonapfel represented all types of parties in bankruptcy cases, including consumer and business debtors in liquidation cases, business debtors in reorganization cases, chapter 7 and 11 bankruptcy trustees, creditors' committees, and creditors in both consumer and business cases. Judge Bonapfel is a co-author of Chapter 13 Practice and Procedure (Thomson Reuters). A Fellow in the American College of Bankruptcy, he has served as chairperson of the Bankruptcy Sections of the State Bar of Georgia and the Atlanta Bar Association and was a director and president of the Southeastern Bankruptcy Law Institute, which presents an annual seminar on bankruptcy law and procedure. In addition, he teaches a course at Mercer Law School in Macon, Ga., on consumer bankruptcy practice. Judge Bonapfel received his B.A. *cum laude* from Florida State University in 1972 and his J.D. *magna cum laude* from the University of Georgia School of Law in 1975, where he was a notes editor of the *Georgia Law Review*. Following law school, he clerked for U.S. District Judge Wilbur D. Owens, Jr., in Macon.

Soneet Kapila

ABI President

Partner, KapilaMukamal, LLP

Fort Lauderdale, FL

Soneet R. Kapila, CPA, CFF, CFE, CIRA is a founding partner of KapilaMukamal, LLP in Fort Lauderdale, Fla., and ABI's President. For more than 25 years, he has concentrated his efforts in the areas of consulting in insolvency, fiduciary and creditors' rights matters. Mr. Kapila is a federal bankruptcy trustee and serves as an examiner, CRO, chapter 7 and 11 trustee, subchapter V trustee, liquidating trustee, corporate monitor (SEC appointments), and as a state and federal court-appointed receiver. He has been appointed in numerous matters in the Southern and Middle Districts of Florida. As a trustee plaintiff, Mr. Kapila has managed complex litigation in significant cases. He advises and represents debtors, secured creditors and creditors' committees in formulating, analyzing and negotiating plans of reorganization. As a recognized expert in fraudulent conveyance, Ponzi schemes and insolvency issues, Mr. Kapila has provided expert testimony and litigation-support services to law firms involving complex insolvency issues and commercial damages. He has worked in conjunction with the SEC, FBI and U.S. Attorney's Office, and he has served both as a consultant and expert witness for litigation matters in state and federal courts. Mr. Kapila has spoken to various groups, including ABI, New York Law School, St. Thomas University Law School, and the National Conference of Bankruptcy Judges, Southeastern Bankruptcy Law Institute, National Association of Bankruptcy Trustees (NABT), Receiver's Forum, Association of Insolvency and Restructuring Advisors, Florida Institute of Certified Public Accountants, Turnaround Management Association, University of Miami School of Law, Florida International University School of Law, American Bar Association and the National Business Institute on topics related to insolvency, underperforming businesses and insolvency taxation. He is a Fellow of the American College of Bankruptcy and a past-president and past-chairman of the Association of Insolvency & Restructuring Advisors, for which he serves on its board of directors. Mr. Kapila has served on the advisory boards of ABI's Southeast Bankruptcy Workshop and Caribbean Insolvency Symposium. He also co-authored ABI's *Fraud and Forensics: Piercing Through the Deception in a Commercial Fraud Case* (2015). Mr. Kapila received his M.B.A. in 1978 from Cranfield School of Management.

Robert J. Keach

Shareholder, Bernstein Shur

Portland, ME

Robert J. Keach is co-chair of Bernstein Shur's Business Restructuring and Insolvency Practice Group. He is a Member of the Board of Directors and Fellow of the American College of Bankruptcy and served as Past President, President, and Chairman of the American Bankruptcy Institute (ABI). A national leader in Chapter 11 Reform and Subchapter V, Bob is a member of ABI's Subchapter V Task Force and former co-chair of their Commission to Study the Reform of Chapter 11. Mr. Keach focuses on the representation of various parties in workouts and bankruptcy cases, including debtors, creditors,

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creditors' committees, lessors and third parties acquiring troubled companies and/or their assets. He has appeared as a panelist on national bankruptcy, lender liability and creditors rights programs, and is the author of several articles on bankruptcy and creditors' rights appearing in the *ABI Law Review*, *Commercial Law Journal*, and *ABI Journal*, among other publications. Mr. Keach is a contributing author to *Collier Guide to Chapter 11: Key Topics and Selected Industries* (2011 Ed.). Bob is recognized as a "Star Individual" in Corporate Mergers & Acquisitions/Bankruptcy in *Chambers USA*, *Best Lawyers in America* (Twenty-Year Certificate), *Lawdragon 2023 500 Leading U.S. Bankruptcy and Restructuring Lawyers*, *New England Super Lawyers* (Bankruptcy and Top 100 Lawyers in New England regardless of specialty) and is rated AV® Preeminent by Martindale-Hubbell. For his dedication to the field, in 2021 Bob received the prestigious American Bankruptcy Institute's Lifetime Achievement Award. Mr. Keach is also certified in business bankruptcy by the American Board of Certification. Currently, Bob serves as the chapter 11 trustee in the railroad reorganization case of Montreal Maine & Atlantic Railway, Ltd., a cross-border restructuring case. Mr. Keach is also the fee examiner in the Exide Technologies case in Delaware; he was also the fee examiner in *In re AMR Corporation* (the chapter 11 cases of American Airlines and its parent and certain affiliates). Mr. Keach has also, *inter alia*, represented ad hoc committees in the Homebanc Mortgage, New Century TRS Holdings, and Nortel Networks cases in Delaware, as well as a public utilities commission in the FairPoint Communications case in the Southern District of New York.

Jolene Wee

*Managing Director and Founder
JW Infinity Consulting, LLC
New York, NY*

Jolene Wee is the Managing Director and Founder of JW Infinity Consulting, LLC. She has almost 20 years of finance and accounting experience and more than 15 years of restructuring experience. She has served in the role of Trustee, Expert Witness, Financial Advisor, Valuation Consultant and Forensic Consultant. Ms. Wee is a trusted advisor to fiduciaries, legal counsel, corporations, high net worth individuals, and public agencies on cross-border, restructuring, bankruptcy, litigation, fraud, financing, merger, and buyout matters. Her case experience included companies in the banking, e-commerce, healthcare, insurance, manufacturing, real estate, retail, and technology industries with revenues of up to \$15B. She is a Chapter 11 (Subchapter V) bankruptcy trustee in Region 2 covering the Eastern and Southern Districts of New York and Region 4 covering Maryland, the District of Columbia and the Eastern District of Virginia.

Donald L. Swanson

*Shareholder, Koley Jessen
Omaha, NE*

Donald L. Swanson is a shareholder in the law firm of Koley Jessen P.C., L.L.O., in Omaha, Nebraska. He serves as a Subchapter V Trustee in the District of Nebraska. He has practiced business bankrupt-

cy law for more than three decades and represents all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers in both bankruptcy and non-bankruptcy courts. He also has extensive experience resolving multi-party disputes while representing committees and trustees. Mr. Swanson serves as Chair of the Nebraska Bankruptcy Court Mediation Committee and is a Certified Specialist in Business Bankruptcy Law by the American Board of Certification. He is also active in the American Bankruptcy Institute (currently serving on its Subchapter V Task Force) and holds a Peer Review Rating of “AV® Preeminent™” by Martindale. He also serves as Commissioner representing Nebraska on the Uniform Law Commission (ULC), where he is a member of ULC’s Drafting Committee on assignments for benefit of creditors and a ULC Legislative Council Fellow.

Elizabeth M. Lally

*Partner, Koley Jessen LLP
Omaha, NE*

Elizabeth Lally is a Partner as Spencer Fane LLP where she solves complex banking and bankruptcy matters for businesses and financial institutions through proactive counsel, litigation, and alternative dispute resolution methods, providing consistently beneficial resolutions to protect her clients’ interests. She provides a thorough understanding of how to navigate the difficult world of corporate insolvency and restructuring, having worked with some of the nation’s top lending institutions. Ms. Lally’s experience includes representing borrowers and lenders in complex financing transactions, debt restructuring, and out-of-court workouts as well as Chapter 7, Chapter 12, and Chapter 11 reorganizations and liquidations. She regularly represents debtors-in-possession and unsecured creditor committees in complex Chapter 11 reorganizations and liquidations, and is a Subchapter V Trustee for Region 12 covering Iowa and South Dakota. In addition to traditional financial services and bankruptcy matters, Ms. Lally represents bankruptcy trustees and other creditors in suspected bankruptcy fraud investigations and all resulting litigation. She has also worked with the FBI and the U.S. Trustee Program’s Bankruptcy Fraud Program to recover funds for the victims of bankruptcy and wire fraud.

Alexandra Everhart Sickler

*Archie Unterseher Endowed Professor of Law
University of North Dakota Law
Grand Forks, ND*

Alex Sickler is the Archie Unterseher Endowed Professor of Law at the University of North Dakota School of Law, where she teaches contracts, bankruptcy, and commercial law courses. Before joining UND, Professor Sickler was a trial attorney with the U.S. Trustee Program in Washington, D.C. While there, she litigated civil enforcement matters arising in consumer bankruptcy cases. Before that, she practiced bankruptcy and complex commercial litigation in the Washington, D.C. office of Weil, Gotshal & Manges, LLP and clerked for the Honorable S. Martin Teel, Jr., U.S. Bankruptcy Judge for the District of Columbia. Professor Sickler earned her B.A. from the College of William and Mary and her

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J.D. with high honors from The George Washington University Law School, where she was named to the Order of the Coif and was an Articles Editor for *The George Washington International Law Review*.

Lisa A. Tracy

Deputy General Counsel & Senior Counsel to the Director
Executive Office for U.S. Trustees
U.S. Trustee Program
Washington, DC

Lisa A. Tracy is the Deputy General Counsel for the Executive Office for United States Trustees. She also serves as Senior Counsel to the Director. Previously, Ms. Tracy served for two and a half years as a Trial Attorney in the U.S. Trustee Program's Brooklyn field office. She joined the Department of Justice in 2002 through the Attorney General's Honors Program. Ms. Tracy was recognized with the Attorney General's Award for Distinguished Service in 2011, 2013 and 2018. Prior to working for the Department, Ms. Tracy was a law clerk for the Hon. Lee M. Jackwig, Chief Bankruptcy Judge for the Southern District of Iowa. She is a graduate of American University's Washington College of Law (2001).

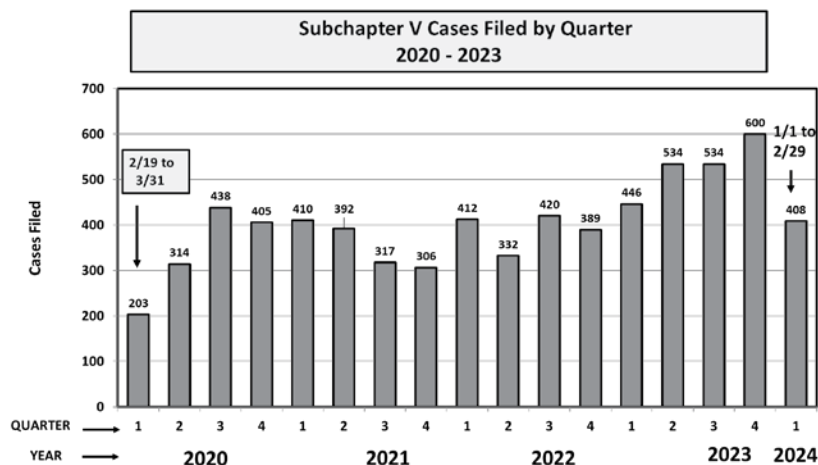
APPENDIX B: SUBCHAPTER V STATISTICAL SUMMARY

Data Notes: As with any empirical analysis, the data below offer only limited information and should be used as just one factor in the overall analysis of Subchapter V.³⁵⁸ For example, the ABI data only account for closed cases and do not capture any information about open cases still pending in the courts. The data also do not reflect the particular circumstances of any given case that might qualify the case as an outlier or strengthen any given data point. In addition, as noted in the footnote, there is no one comprehensive database collecting all potentially relevant data on Subchapter V cases.

Subchapter V Filings:

The EOUST reports more cases filed than the ABI. However, without a case-by-case listing there is no way to verify the data, or to determine other case characteristics. Therefore, most of the data in this report is based on ABI data.

Between February 19, 2020, and February 29, 2024, there were 6,860 Chapter 11 cases filed under Subchapter V. They accounted for more than one quarter of all Chapter 11 case filings (25,741) during this period. As the following chart shows, Subchapter V filings were at record levels in 2023.



³⁵⁸ Sources of Data: There are two main sources of data on Subchapter V cases. The first source is the Executive Office for the United States Trustees (EOUST), which has posted summary Subchapter V data on its website since early 2023. Some of these data come from the Administrative Office of the United States Courts (AO) and are subject to an agreement between the two agencies that limits the disclosure of certain information. The EOUST data do not include cases filed in North Carolina and Alabama, because those two states are not administered by the US Trustee Program.

The second database was compiled by the American Bankruptcy Institute. It combines data from PACER with data from the Integrated DataBase (IDB) which is published by the Federal Judicial Center.

The EOUST data on case outcomes are more complete than the ABI data, because the data are based on the actual date of confirmation, dismissal, or conversion while the data used by the ABI only become available after a case has been statistically closed. Case closing may occur years after a case is confirmed, dismissed, or converted.

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Subchapter V Filings by State:

Subchapter V cases have been filed in every state. Four states (Florida, California, Texas, and New York) have accounted for about 42 percent of all cases. The 22 states with more than 100 cases are as follows:

Subchapter V Cases Filed

2/19/2020 – 2/29/2023

Florida	948
Texas	761
California	705
New York	482
Georgia	282
Illinois	271
New Jersey	248
Tennessee	200
Arizona	189
Colorado	176
Pennsylvania	166
North Carolina	165
Nevada	148
Michigan	143
Louisiana	133
Maryland	121
Delaware	111
Ohio	110
Indiana	110
Washington	108
Virginia	106
Alabama	103

EOUST Summary Data Through February 29, 2024³⁵⁹

Subchapter V Filing Summary from EOUST: (The Government Fiscal Year is the 12-month period ending September 30 of each year.)

Time Period	Subchapter V Cases
Fiscal Year 2020	1,118
Fiscal Year 2021	1,716
Fiscal Year 2022	1,592
Fiscal Year 2023	1,987
Fiscal Year 2024	1,029

Chapter 11 Outcomes Through February 29, 2024 from EOUST:

Disposition	Chapter 11 Small Business (Non-Subchapter V)		Subchapter V
	FY 2017 – FY 2019	FY 2020 – FY 2023	FY 2020 – FY 2023
Pending Without Confirmed Plan	1%	8%	10%
Plan Confirmed	31%	20%	50%
Converted	15%	21%	11%
Dismissed	54%	51%	29%
Total	100%	100%	100%
Median Months to Confirmation	10.8	10.3	6.4
Median Months to Dismissal	6.0	3.8	4.5

Conclusions from EOUST Report:

- “Compared to other (non-subchapter V) chapter 11 small business cases, subchapter V cases have had approximately double the percentage of confirmed plans and half the percentage of dismissals, as well as a shorter time to confirmation.”
- *“Of subchapter V cases with confirmed plans, 69 percent of the confirmed plans have been consensual plans.”³⁶⁰*

³⁵⁹ Source: <https://www.justice.gov/ust/page/file/1499276/download>.

³⁶⁰ Emphasis added. The ABI understands the use of the term “consensual” to represent plans that the courts confirm under section 1191(a) of the Bankruptcy Code based on the requisite classes of creditors voting to accept the plan. Thus, this data point may not capture plans confirmed under the section 1191(b) cramdown provisions of the Bankruptcy Code when no creditors vote against the plan, and potentially all active creditors affirmatively support the plan, but certain classes of creditors have not voted at all.

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ABI Summary Data³⁶¹

ABI Data on Outcomes:

Small Business and Subchapter V Cases Filed 2/19/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Cases Filed	6,410	1,495
Cases Still Open	3,273	602
Total Closed or Converted	3,137	893
Confirmed	1,205	137
Dismissed	1,450	665
Converted and Closed	143	31
Converted and Still Open	277	45
Other Outcomes	62	15

The ABI data do show that Subchapter V cases have a much higher confirmation rate than cases in which the debtor does not elect to proceed under Subchapter V. Moreover, as of December 31, only 99 of the 6,410 Subchapter V cases included in the ABI database involved a debtor that needed to file a subsequent bankruptcy case.

Small Business and Subchapter V Cases Filed 2/19/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Total Closed or Converted	3,137	893
Confirmed	38.4%	15.3%
Dismissed	46.2%	74.5%
Converted and Closed	4.6%	3.5%
Converted and Still Open	8.8%	5.0%
Other Outcomes	2.0%	1.7%

³⁶¹ The following information in this summary is from the ABI database, as of the dates noted. The ABI database was compiled by combining information from PACER with information in the IDB. The ABI data on case outcomes are less complete because the IDB does not show the outcome unless the case has been converted to another chapter or statistically closed by the court. Also, 'Other Outcomes' includes intra-district and inter-district transfers and cases filed or closed in error.

Debt Amounts:

The Subchapter V debt limit was increased from \$2,725,625 to \$7,500,000 on March 27, 2020 (about six weeks after Subchapter V became available). The debt limits also reverted to their original amounts for several months during 2022. The following chart includes only cases filed during the periods when the Subchapter V debt ceiling was \$7.5 million.³⁶²

About 26.2% of Subchapter V cases have been between the old and new debt limits.

Subchapter V Cases by Debt Amount Filed 2/19/2020 to 12/31/2023				
	Under \$2,725,625	Up to \$7,500,000	Over \$7,500,000	Not Reported
Cases Filed	3,125	1,184	209	1,324
Cases Still Open	1,638	689	129	678
Total Closed or Converted	1,487	495	80	646
Confirmed	571	209	44	171
Dismissed	674	196	20	402
Converted and Closed	86	26	5	9
Converted and Still Open	133	59	11	40

The confirmation rate has been higher for cases with debts above the original limit. This gap is expected to rise slightly as more cases are closed by the courts.

Subchapter V Cases by Debt Amount Filed 2/19/2020 to 12/31/2023				
	Under \$2,725,625	Up to \$7,500,000	Over \$7,500,000	Not Reported
Cases Filed	3,125	1,184	209	1,324
Total Closed or Converted	1,487	495	80	646
Percent Closed or Converted	47.6%	41.8%	38.3%	48.8%
Confirmed	38.4%	42.2%	55.0%	26.5%
Dismissed	45.3%	39.6%	25.0%	62.2%
Converted and Closed	5.8%	5.3%	6.3%	1.4%
Converted and Still Open	8.9%	11.9%	13.8%	6.2%
Other Outcomes	1.5%	1.0%	0.0%	3.7%

³⁶² These data are based on raw numbers, with no independent investigation concerning whether the court or the parties subsequently determined the debt amounts to be higher or lower in the particular case. Thus, for example, a case showing on the docket as initially reporting debt above \$7,500,000, may not in fact have noncontingent and liquidated debt above that amount.

2024 MID-ATLANTIC BANKRUPTCY WORKSHOP

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Filings By Individuals:

About 21 percent of the Subchapter V cases were filed by individuals, who reported that a majority of their debt was business debt. The debt limits for Chapter 13 debtors were increased on June 21, 2022. Prior to this date 24.6% of Subchapter V cases were filed by individuals. Since this date only 16.4 percent of Subchapter V cases have been filed by individuals.

Confirmation rates have been much higher for the individuals who chose to proceed under Subchapter V.

Cases Filed by Individuals 2/19/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Total Filed	1,325	105
Total Closed or Converted	687	63
Confirmed	42.2%	12.7%
Dismissed	38.1%	74.6%
Converted and Closed	6.6%	3.2%
Converted and Still Open	10.5%	6.3%
Other Outcomes	2.6%	3.2%

Pro Se Cases:

About 3.6 percent of Subchapter V debtors and 18.1 percent of other small business debtors file without an attorney. Nearly all of these cases are dismissed by the court. These results are similar to Chapters 12 and 13 *pro se* debtors.

Pro Se Cases Filed 2/29/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Total Filed	230	270
Total Closed or Converted	187	168
Confirmed	1.1%	0.6%
Dismissed	89.8%	95.8%
Converted and Closed	5.3%	1.2%
Converted and Still Open	2.1%	1.8%
Other Outcomes	1.6%	0.6%

APPENDIX C: AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE SUBCHAPTER V SURVEY (2023)

Key Insights and Feedback About Subchapter V

I. Introduction

The American Bankruptcy Institute Subchapter V Task Force (Task Force) emailed a survey to ABI members and other insolvency professionals in late April 2023. The survey closed on July 31, 2023. The survey sought qualitative feedback from bankruptcy judges and bankruptcy professionals about their experiences with Subchapter V cases. The survey is attached to this summary of the key insights and feedback the Task Force received. In particular, the survey invited respondents to share:

- Whether they had a more positive or negative sentiment about Subchapter V by indicating a numerical score between five and one for this sentiment, five being the most positive and one being the most negative;
- Some aspects of Subchapter V that have worked well in their cases;
- Some aspects of Subchapter V that have not worked well in their cases;
- A desired change to Subchapter V; and
- Any other information they wanted to share about their experience with Subchapter V cases.

Below are key insights from the data on frequently reported positive and negative aspects of Subchapter V, along with frequently indicated suggestions for change to the subchapter.

II. Summary of Key Insights and Feedback

Role and background of respondents. Respondents from all federal circuits responded to the survey, with most having experience in the Fourth, Ninth, Tenth, and Eleventh Circuits. The majority of the 370 survey respondents were attorneys, with some bankruptcy judges, financial advisors, Subchapter V trustees, and government entities also represented. Most respondents had worked on 4 or more Subchapter V cases in the previous 12 months. Respondent attorneys indicated they typically

represent debtors, secured creditors, or unsecured creditors, and Subchapter V trustees, and government entities reported they represented themselves.

Average sentiment score. On average respondents had an overall positive view of Subchapter V. The average sentiment score about Subchapter V was 3.4 on a numerical scale of one to five, with five being the most positive and one being the most negative.

Amount of debt involved in the cases. The survey asked respondents to indicate how much noncontingent liquidated secured and unsecured debt is involved in the respondents' cases, according to three options: less than \$2,500,000; \$2,500,000 to \$5,000,000; and more than \$5,000,000. The survey asked respondents to indicate more than one of the three options, if appropriate. The frequency with which each option was indicated did not substantially vary:

- Less than \$2,500,000 (selected 190 times)
- \$2,500,000 to \$5,000,000 (selected 255 times)
- More than \$5,000,000 (selected 176 times).

Positive and negative aspects of Subchapter V and suggested changes.

- Frequently reported positive aspects of Subchapter V were its streamlined process, lower costs, Subchapter V trustee involvement, flexibility in plan confirmation, and equity retention.
- Frequently reported negative aspects of Subchapter V were uncertainty about Subchapter V trustee compensation and fees, strict deadlines, protection for unsecured creditors, lack of clarity about the role of the Subchapter V trustee, challenges determining contingent and unliquidated debt, challenges monitoring plan compliance, and nonparticipation by creditors.
- Frequently suggested changes to Subchapter V related to maintaining or raising the debt caps, clarification about the powers and duties of the Subchapter V trustee, use of interim compensation procedures to ensure payment of trustee fees, the ability of the Subchapter V trustee to file a plan, implementation of a deadline for plan confirmation, creditor protections, and expanded ability to modify confirmed consensual plans.

III. Positive Aspects of Subchapter V

Frequently reported positive aspects of Subchapter V according to survey responses include:

1. **Speed and efficiency of the process.** Many respondents mentioned the expedited timelines and deadlines helped move cases along more quickly compared to standard Chapter 11 cases, which saved time and costs.

2. **Role of the Subchapter V Trustee.** The presence of the Subchapter V trustee to facilitate negotiations, mediate disputes, and advise both debtors and creditors was described as beneficial by many respondents.
3. **Reduced costs.** The lack of quarterly fees, no required creditors' committee, streamlined reporting, and a simpler plan process helping to reduce professional fees and costs as compared to standard Chapter 11 cases were cited as positive aspects of Subchapter V.
4. **Confirmation standard.** The absence of the absolute priority rule, no need for an impaired accepting class, and the focus on projected disposable income made it easier for debtors to confirm plans over creditor objections.
5. **Nonconsensual confirmation.** The ability to achieve nonconsensual confirmation helped debtors in plan negotiations.
6. **Maintaining ownership.** Many debtor attorneys cited the ability of equity holders to retain ownership as a positive factor.

In summary, a streamlined process, lower costs, Subchapter V trustee involvement, flexibility in plan confirmation, and equity retention were frequently cited positive features of Subchapter V.

IV. Negative Aspects of Subchapter V

Frequently reported negative aspects of Subchapter V according to survey responses include:

1. **Subchapter Trustee Compensation.** Many respondents expressed concerns about Subchapter V trustees not getting paid fully in cases that are dismissed or converted before confirmation and indicated this could discourage qualified trustees from serving over time.
2. **Tight deadlines.** The expedited timeline of 90 days to file a plan was described as challenging in some cases, especially when extra time was needed to negotiate with creditors.
3. **High Subchapter V trustee fees.** Some respondents indicated that Subchapter V trustee fees were excessive in simpler cases.
4. **Inadequate creditor protections.** Some respondents stated that the subchapter favors debtors over creditors due to limited unsecured creditor rights and no committee representation.
5. **Uncertainty about the role of the Subchapter V Trustee.** Some respondents expressed concern that lack of clarity about the Subchapter V trustee's role caused confusion in the cases.
6. **Identifying contingent, unliquidated Debt.** Some respondents indicated guidance about identifying whether debt was contingent or unliquidated for calculating the debt cap would be helpful.

7. **Plan implementation and compliance.** Some respondents viewed monitoring plan compliance as a challenge, especially with no quarterly post-confirmation reports or trustee disbursements.
8. **Nonvoting creditors.** Some respondents reported that cases stayed open longer than necessary because creditors failed to return ballots.

In summary, Subchapter V trustee compensation and fees, strict deadlines, protection for unsecured creditors, lack of clarity about the role of the Subchapter V trustee, determining contingent and unliquidated debt, plan compliance, and nonparticipation by creditors were common areas of concern cited by survey respondents.

V. Suggested Changes or Improvements to Subchapter V

Frequently suggested changes or improvements to subchapter V include:

1. **Maintain the Current Debt Cap.** Many respondents called for making the existing \$7,500,000 debt cap permanent. Some also called for permanently increasing the debt cap to \$10 million or higher.
2. **Clarification about the Role of the Subchapter V Trustee.** Many respondents asked for additional guidance on the Subchapter V trustee's powers and duties, especially after the debtor has been removed from possession.
3. **Interim Compensation for Subchapter V Trustees.** Numerous respondents proposed requiring debtors to deposit or escrow funds at the outset of the case to ensure compensation for Subchapter V trustees.
4. **Allow Subchapter V Trustees to File Plans.** Many suggested giving the Subchapter V trustee the ability to file a plan if the debtor has been removed from possession or failed to timely file a plan.
5. **Deadline for Confirmation.** Some respondents proposed setting a hard deadline for plan confirmation to prevent cases from languishing.
6. **Increased Creditor Protections.** Some respondents recommended increased protections for creditors, such as application of the absolute priority rule, the requirement of a creditors' committee, or charging the Subchapter V trustee with duties to protect the interest of unsecured creditors.
7. **Plan Modifications.** Some responses requested the ability to modify confirmed consensual plans in instances of debtor default or debtor noncompliance.

In summary, frequently suggested changes to Subchapter V related to maintaining or raising the debt caps, clarification about the powers and duties of the Subchapter V trustee, use of interim compensation procedures to ensure payment of trustee fees, the ability of the Subchapter V trustee to file a plan, a deadline for plan confirmation, creditor protections, and expanded ability to modify confirmed consensual plans.

VI. Conclusion

The qualitative feedback from the survey indicates Subchapter V is generally achieving its goals of streamlining the reorganization process for smaller businesses. Respondents report an overall positive sentiment concerning the subchapter. The feedback also indicates that some aspect of the subchapter could benefit from reform or guidance.

Subchapter V Task Force Survey

The ABI Subchapter V Task Force needs your help. The Task Force is studying the operation of Subchapter V in practice, and it needs real-time input from the professionals working with the subchapter. Please take five minutes to answer the survey questions and add your experiences to the study. If you so choose, your survey responses may remain anonymous, however, understanding the survey respondents' professional demographics will aid in the Task Force's research and recommendations.

1. How many subchapter V cases have you worked on in the past 12 months?

None of the Above

1-4

5-9

10+

2. What role(s) do you typically serve in subchapter V cases? (Please check all that apply).

Judge

Attorney

Subchapter V Trustee

U.S. Trustee Program

Financial Advisor

Consultant

None of the Above

Other (please specify)

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3. Which parties do you typically represent in subchapter V cases? (Please check all that apply)
- Debtors
 - Secured creditors
 - Unsecured creditors
 - Government entity or agency
 - Subchapter V trustee (attorney or advisor to trustee)
 - None of the Above
4. Please identify the federal circuit(s) where you participate in subchapter V cases (check all that apply).
- First Circuit
 - Second Circuit
 - Third Circuit
 - Fourth Circuit
 - Fifth Circuit
 - Sixth Circuit
 - Seventh Circuit
 - Eighth Circuit
 - Ninth Circuit
 - Tenth Circuit
 - Eleventh Circuit
 - D.C. Circuit
5. How much noncontingent liquidated secured and unsecured debt is involved in these cases? (Please check all that apply)
- Less than \$2.5 million
 - \$2.5 million to \$5 million
 - More than \$5 million
6. Overall, do you have a more positive or negative sentiment about subchapter V as it relates to your practice? Please answer this question based on a number scale below, with 5 being the most positive and 1 being the most negative.
7. What are some aspects of subchapter V that have worked well in your cases?
8. What are some aspects of subchapter V that have not worked well?
9. If you could make one change to subchapter V (statutory or procedural), what would it be?
10. Is there anything else you would like to share about your experiences with subchapter V cases? (optional)

APPENDIX D: ABI SUBCHAPTER V TASK FORCE SUBCHAPTER V TRUSTEE SURVEY RESULTS

Introduction

The American Bankruptcy Institute Subchapter V Task Force (Task Force) surveyed 265 Subchapter V trustees across all judicial districts.³⁶³ The survey was emailed to the trustees on November 27, 2023, for online completion and closed December 15, 2023. Eighty-four Subchapter V trustees responded to the Task Force survey, a 32% response rate, although not all respondents answered all questions.³⁶⁴

Survey questions were designed to glean some insights about implementation of Subchapter V generally and the role of the Subchapter V trustee in particular. The responses are qualitative and provide a snapshot of the experiences about Subchapter V trustees who have a critical role in Subchapter V cases.

The survey asked Subchapter V trustees to respond to questions about compensation, expansion of their duties and powers, and the confirmation and postconfirmation success of the debtors in the cases in which they have been appointed. This summary includes information about Subchapter V trustee compensation relating to their hourly fees, how much they are awarded, how much they are paid, and whether an interim compensation procedure exists to secure payment of their fees. The summary also includes descriptions of how bankruptcy courts have expanded their duties and powers pursuant to court order. Finally, the results include some information about confirmation rates and postconfirmation business operations.

Although the survey results do not provide a comprehensive assessment, the results here do inform the larger discussion about how the subchapter is working and provide some insight about whether small businesses can effectively reorganize under the subchapter.

³⁶³ This includes Subchapter V trustees serving in North Carolina and Alabama.

³⁶⁴ No uniform minimum response rate exists, but commentary suggests that this is a good response rate for a qualitative survey administered online. *See, e.g.,* Diane Lourdes Dick, *Equitable Powers and Judicial Discretion: A Survey of U.S. Bankruptcy Judges*, 94 Am. Bankr. L. J. 265, 267 (2020) (reporting a 14% response rate for a survey administered online and noting that paper surveys tend to have higher response rates than online surveys); Ralph Peebles, *The Uses of Mediation in Chapter 11 Cases*, 17 Am. Bankr. Inst. L. Rev. 401, 416 (2009) (reporting a 44% response rate for survey deployed in paper and online); Tse-Hua Shih & Xitao Fan, *Comparing Response Rates from Web and Mail Surveys: A Meta-Analysis*, 20 Field Methods 249, 257 (2008) (finding the average response rate for web surveys is 34%); Robert J. Niemic & Shannon Wheatman, *Survey of Bankruptcy Judges Regarding Use of Rule 7026 Mandatory Disclosure in Adversary Proceedings* (2004) (reporting a 36-38% response rate for an online survey by the Federal Judicial Center), https://www.uscourts.gov/sites/default/files/rule7026_2.pdf.

Part I: Background Questions

The first part of the survey asked Subchapter V trustees to identify the circuit(s) in which they were appointed, and to indicate the number of cases in which they have been appointed a Subchapter V trustee.³⁶⁵ Almost all the Subchapter V trustees who responded to the survey serve in one federal circuit. Only two trustees who completed the survey serve in more than one federal circuit.

Eighty-four responses reported a total of 2,202 cases.³⁶⁶ Notably, this number represents about a third of all Subchapter V cases filed at the time the survey was deployed. The lowest number of cases reported in the survey by a Subchapter V trustee was two while the highest number of cases reported was 100.

Federal Circuits in which Respondents Serve as Subchapter V Trustees (84 Responses)

Federal Circuit	Responses (Percentage)	Responses (Number)
First Circuit	4.76%	4
Second Circuit	7.14%	6
Third Circuit	10.71%	9
Fourth Circuit	11.90%	10
Fifth Circuit	10.71%	9
Sixth Circuit	10.71%	9
Seventh Circuit	7.14%	6
Eighth Circuit	7.14%	6
Ninth Circuit	16.67%	14
Tenth Circuit	3.57%	3
Eleventh Circuit	14%	12
D.C. Circuit	1.19%	1

Part II: Subchapter V Fees & Compensation

The survey next asked Subchapter V trustees to respond to a series of questions about their fees and compensation.³⁶⁷ The Task Force was interested in the range of hourly fees charged by Subchapter V

³⁶⁵ Question 1: Identify the federal circuit(s) in which you have been appointed as Subchapter V trustee. [Please check all that apply.]

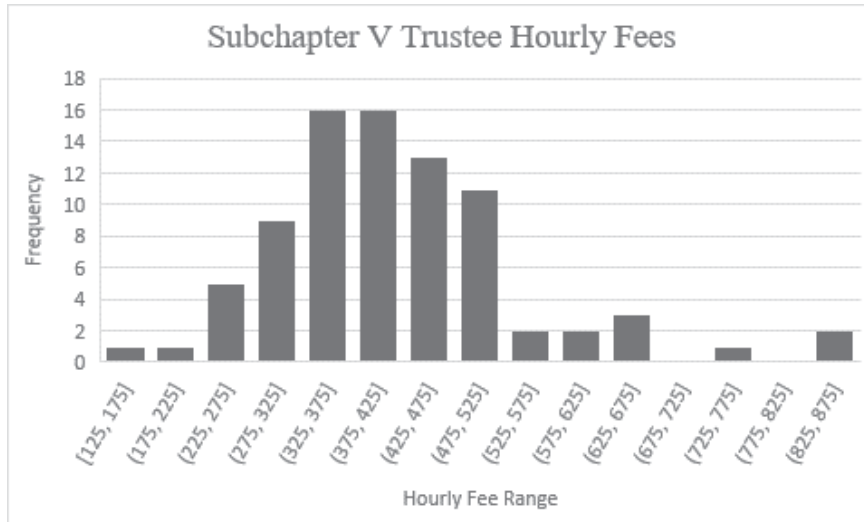
³⁶⁶ Question 2: In how many cases have you been appointed as Subchapter V trustee?

³⁶⁷ Question 3: What is your hourly fee? (85 responses)

trustees. The survey also asked Subchapter V trustees to report the range of fees typically awarded in a case and whether and how often Subchapter V trustees are paid less than their awarded fees.

A. Subchapter V Trustee Fees

Subchapter V trustees were asked to report their hourly fee rates. Thirty-nine percent of the Subchapter V trustees responding to the survey report fees between \$325–\$425 per hour. Twenty-nine percent report an hourly fee between \$425–\$525 per hour.



The Task Force also asked Subchapter V trustees a series of questions about their professional fees to collect some information about their hourly fees, the range of fees they are typically awarded in a case, whether they collect amounts less than their fee awards, and whether their districts have interim compensation procedures.

The Task Force invited Subchapter V trustees to indicate the range within which the professional fees they are awarded most often fall.³⁶⁸ Fifty-five percent of Subchapter V trustees who responded to this question indicated that they are typically awarded \$5,000 to \$10,000 in fees in a Subchapter V case. Twenty-eight percent of Subchapter V trustees report that they are typically awarded fees in the range of \$11,000 to \$15,000.

Eighty-six percent of the survey respondents (or 70 out of 81) report having been paid less than the amount of professional fees they were awarded.³⁶⁹ Subchapter V Trustees were asked, as a follow-up question, to indicate the number of cases in which they had been paid less than the full amount of fees

³⁶⁸ Question 4: Please indicate the range within which the professional fees you are awarded in a Subchapter V case most often fall. (82 responses)

³⁶⁹ Question 5 (81 responses): Have you ever been paid less than the amount of professional fees you have been awarded? Yes or no.

they were awarded. The respondents indicated that they were not paid the full amount of fees they were awarded in a total of 379 cases.³⁷⁰ This represents about 17% of the 2,202 cases reported in the survey.³⁷¹

B. Interim Compensation Procedures

The Task Force asked Subchapter V trustees to report whether the district where they serve has an interim compensation procedure, and if so to describe that procedure.³⁷² About 44% of Subchapter V trustees responding to the question (27 out of 62) indicated they have an interim compensation or fee escrow procedure for Subchapter V trustees in the district(s) where they serve. Fifty-six percent (35 out of 62) reported that no such procedure exists where they serve.

The responses described both informal interim compensation procedures and formal ones, meaning those required by local rule or standing order. Some trustees reported the use of an informal escrow procedure. Money is escrowed for fees if the trustee files a motion requesting it. A few trustees noted that often the escrow does not get funded.

Some trustees indicated that their districts have a formal procedure that requires escrow of a specified amount per month (\$1,000). Many others said they file an interim fee application. Some Subchapter V trustees indicated that their fees are included as a line item in the debtor's budget in cash collateral orders.

Part III: Expansion of Powers and Duties of the Subchapter V Trustee

Part III of the survey asked some questions about the expansion of the Subchapter V trustee's duties and powers pursuant to court order.³⁷³

A. Expansion of Duties

Here, 42 Subchapter V trustees responding to the survey report that their duties have never been expanded pursuant to court order under section 1183(b)(2). The remaining responses indicated that their duties had been expanded under section 1183(b)(2) in 59 total cases:

- 23 Subchapter V trustees in one case each, representing 23 cases;
- Seven Subchapter V trustees in two cases each, representing 14 cases;

³⁷⁰ Question 6: In how many cases have you been paid less than the full amount you were awarded?

³⁷¹ Some survey respondents did not enter a numerical answer for Question 6 and instead responded "several," "unknown," "most," etc. These were not counted.

³⁷² Question 7: Is there an interim compensation or fee escrow procedure for subchapter V trustees in the district(s) where you serve? (62 responses); Question 8: Describe the interim compensation procedures. ([#] responses).

³⁷³ Question 9: In how many cases in which you have been appointed as a Subchapter V trustee have your duties been expanded pursuant to court order under section 1183(b)(2)? (80 responses); Question 10: In how many cases in which you have been appointed as a Subchapter V trustee have your powers been expanded pursuant to court order under section 1185? (77 responses)

- Three Subchapter V trustees in three cases each, representing nine cases;
- Two Subchapter V trustees in four cases each, representing eight cases; and
- One Subchapter V trustee in five cases, representing five cases.

When asked to describe how their duties have been expanded,³⁷⁴ Subchapter V trustees described their expanded duties as follows.

- Investigate the debtor's finances (many answers stated this phrase generally). Specific examples include:
 - Review and report on the debtor's finances;
 - Review and report on whether debtor followed the sales process;
 - Investigate insider loans for cash collateral purposes;
 - Investigate avoidance actions.
- Operate the business (several answers stated this phrase generally). More specific examples include:
 - Control over sales proceeds pending plan approval;
 - Control debtor's bank accounts while business operations continued postconfirmation;
 - Control cash.
- Other ways trustees reported their duties have been expanded pursuant court order include:
 - Report on the debtor's operations;
 - Prepare the monthly financials;
 - Take control of the sale of the debtor assets;
 - Determine whether creditors' claims were noncontingent for eligibility purposes;
 - Liquidate assets, analyze and prosecute causes of action and objections to claims, and make distributions to creditors after confirmation;
 - Serve as settlement conference facilitator on a myriad of contested matters and adversary proceedings.

B. Expansion of Powers.

Here, 55 Subchapter V trustees responding to the survey report that their powers have never been expanded pursuant to court order under section 1185. The remaining responses indicated that their powers had been expanded under section 1185 in 32 total cases:

³⁷⁴ Question 9a: If your duties have expanded, please describe how they have been expanded under section 1183(b)(2). (24 responses)

- 13 Subchapter V trustees in one case each, representing 13 cases;
- Four Subchapter V trustees in two cases each, representing eight total cases;
- Two Subchapter V trustees in four cases each, representing eight total cases;
- One Subchapter trustee in three cases, representing three cases.

When asked to describe how their powers have been expanded,³⁷⁵ Subchapter V trustees described their expanded powers as follows:

- Upon removal of the debtor in possession, powers were expanded to operate the debtor's business and to encompass the same rights, powers, and duties as a Chapter 11 trustee would have in a traditional Chapter 11 case (except the ability to file a plan);
- Appointed on an interim basis to manage day-to-day affairs of the business while reviewing other shareholders as replacement for the removed debtor;
- Conduct a sale of debtor's assets under section 363 of the Bankruptcy Code;
- Carry out liquidating plan;
- Review potential avoidance actions for Chapter 7 liquidation analysis purpose;
- Negotiate in mass tort scenarios to reduce claims against the estate.

Part IV: Plan Confirmation and Postconfirmation Results

The fourth and final part of the Task Force survey asked Subchapter V trustees to indicate how many cases in which they have been appointed have had consensual and nonconsensual confirmed plans, respectively³⁷⁶, and asked the trustees to report whether those debtors' businesses are still operating.³⁷⁷ Survey responses declined for this set of questions, so the total number of cases represented in the responses declined overall. As a result, the data for these questions address only 1,608 of those 2,202 previously reported cases.³⁷⁸

³⁷⁵ Question 10a: If your powers have expanded, please describe how they have been expanded pursuant to court order under section 1185. (17 responses)

³⁷⁶ Question 11: How many of the cases in which you have been appointed as the subchapter V trustee have had consensual confirmed plans? (70 responses); Question 13: How many of the cases in which you have been appointed as the subchapter V trustee have had nonconsensual confirmed plans? (69 responses).

³⁷⁷ Question 12: How many debtors with consensual confirmed plans have businesses that are still operating? (67 responses); Question 14: How many debtors with nonconsensual confirmed plans have businesses that are still operating? (63 responses).

³⁷⁸ Some respondents did not respond to the last four survey questions, which asked about plan confirmation and postbankruptcy operation, so there is no confirmation data for 532 of the 2,202 cases reported in the aggregate in response to Question 2.

The responding Subchapter V trustees indicated that 908 total plans (632 consensual and 276 nonconsensual) were confirmed out of the 1,608 cases represented in the responses to this set of questions. Those numbers reflect a 56% confirmation rate, which is not far from the 50% plan confirmation rate reported by the U.S. Trustee Program.³⁷⁹ That means that the remaining cases reported by the Subchapter V trustees responding to the questions in this part of the survey were either pending or resolved other than through a confirmed plan at the time they responded to the survey.

According to the responses, 89% percent of the businesses with consensual confirmed plans are still operating (514 of 579 cases), while 79% of those debtors with nonconsensual confirmed plans have businesses that are still operating (213 of 270 cases).³⁸⁰

379 See U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at <https://www.justice.gov/ust/page/file/1499276/dl>. According to the survey responses, 39% of these confirmed plans were consensual (632 out of 1,608 cases) and 17% were nonconsensual (276 out of 1,608 cases). This number is low as compared with the U.S. Trustee Program's 69% rate for consensual confirmed plans, *see supra id.*, and likely reflects, in part, the drop in number of survey responses to this question.

380 Again, the responses to Questions 12 and 14, asking how many business with consensual confirmed and nonconsensual confirmed plans were still operating, declined, so the overall number of cases represented in the calculation dropped.

APPENDIX E: AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE HEARING WITNESS LIST

General Experiences with Subchapter V (June 9, 2023)

- Hon. Hannah L. Blumenstiel, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Northern District of California
- Hon. Lori V. Vaughan, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Middle District of Florida
- Katharine Clark, Partner, Thompson Coburn LLP
- John-Patrick M. Fritz, Levene, Neale, Bender, Yoo & Golubchik L.L.P.
- Richardo I. Kilpatrick, President, Kilpatrick & Associates, P.C.
- David Mawhinney, Hart Advisory PLLC
- Brian L. Shaw, Member, Cozen O'Connor
- Michael St. James, St. James Law P.C.

Eligibility Issues (June 23, 2023)

- Hon. Paul M. Black, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Western District of Virginia
- Hon. Kesha L. Tanabe, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of Minnesota
- Hon. Benjamin A. Kahn, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Middle District of North Carolina
- Sumner A. Bourne, Partner, Rafool & Bourne, PC
- Karen Cordry, Bankruptcy & State Defensive Litigation Chief Counsel, National Association of Attorneys General (*in memoriam*)
- Robert J. Gonzales, Emerge Law, PLC
- Adam R. Prescott, Shareholder, Bernstein, Shur, Sawyer & Nelson, P.A.
- Daniel A. Velasquez, Partner, Latham, Luna, Eden & Beaudine, LLP

Role of the Subchapter V Trustee (July 14, 2023)

- Hon. Craig T. Goldblatt, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of Delaware
- Hon. Meredith S. Grabill, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Eastern District of Louisiana
- Hon. Deborah L. Thorne, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Northern District of Illinois
- Marc E. Albert, Partner, Stinson LLP
- Amy Denton Mayer, Shareholder, Stichter, Riedel, Blain & Postler, P.A.
- Mark D. Hildreth, Partner, Shumaker, Loop & Kendrick, LLP
- Susan K. Seflin, Partner, BG Law

Operation of the Case (July 28, 2023)

- Hon. Scott M. Grossman, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Southern District of Florida
- Hon. Michael E. Romero, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of Colorado
- Hon. Elizabeth S. Stong, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Eastern District of New York
- Craig M. Geno, Law Offices of Craig M. Geno, PLLC
- Geoff Groshong, Groshong Law PLLC
- Nancy Isaacson, Partner, Greenbaum Rowe Smith & Davis LLP
- Benjamin Zaslav, Director, Hilco Real Estate

Confirmation Issues (September 8, 2023)

- Hon. Martin R. Barash, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Central District of California
- Hon. Craig A. Gargotta, Chief U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Western District of Texas
- Jeffrey S. Ainsworth, Branson Law PLLC

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- Daniel E. Etlinger, Underwood Murray PA
- Rebecca F. Redwine, Hendren, Redwine, & Malone, PLLC

Postconfirmation Issues (September 22, 2023)

- Hon. Andrew B. Altenburg Jr., U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of New Jersey
- Hon. Mary Jo Heston, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Western District of Washington
- Hon. Catherine Peek McEwen, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Middle District of Florida
- Eyal Berger, Partner, Akerman, LLP
- Keri L. Riley, Partner, Kutner, Brinen, Dickey, Riley, P.C.
- Ciara L. Rogers, Partner, Waldrep Wall Babcock & Bailey, PLLC
- Dennis J. Shaffer, Senior Counsel, Whiteford, Taylor & Preston LLP

Final Wrap-up Hearing/General Experiences with Subchapter V (October 12, 2023)

- Hon. Laurel M. Isicoff, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Southern District of Florida
- Hon. Robert H. Jacobvitz, Chief U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of New Mexico
- Hon. Stacey G.C. Jernigan, Chief U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Northern District of Texas
- H. David Cox, Cox Law Group, PLLC
- Professor Brook E. Gotberg, Brigham Young University J. Reuben Clark Law School
- Brad W. Odell, Partner, Mullin, Hoard, Brown, LLP
- Heidi J. Sorvino, Co-Chair, Financial Restructuring and Bankruptcy Practice and Managing Partner, White & Williams, LLP

APPENDIX F – SUBCHAPTER V LBRs BY STATE AND DISTRICT / DIVISION

Appendix – Subchapter V LBRs by State and District / Division

State	Division	Comments, LBR Links, and Court Website Links
Alabama	M.D. Ala.	No specific LBRs on SubV readily apparent https://www.almb.uscourts.gov/sites/almb/files/local_rules/ALMBLocalRuleeffectiveJuly1%2C2019.pdf https://www.almb.uscourts.gov
Alabama	N.D. Ala.	No specific LBRs on SubV readily apparent https://www.alnb.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.alnb.uscourts.gov
Alabama	S.D. Ala.	No specific LBRs on SubV readily apparent https://www.alsb.uscourts.gov/local-rules-0 https://www.alsb.uscourts.gov
Alaska	Alaska	LBR 3003-1 Proofs of Claim in Chapter 9 and 11 Cases, Including Small Business Debtors Filing Under Subchapter V of Chapter 11 (a) Deadline for Filing. (2) <i>Chapter 11- Subchapter V Small Business Debtor.</i> The deadline for filing proofs of claim in a chapter 11 case filed as a small business debtor under subchapter V is seventy (70) days from the date of the order for relief. https://www.akb.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.akb.uscourts.gov/
Arizona	D. Ariz.	No specific LBRs on SubV readily apparent https://www.azb.uscourts.gov/local-rules https://www.azb.uscourts.gov
Arkansas	E.D. Ark. W.D. Ark	No specific LBRs on SubV readily apparent https://www.areb.uscourts.gov/local-rules https://www.areb.uscourts.gov
California	C.D. Cal.	<u>LBR 2015-3. PRECONFIRMATION REQUIREMENTS FOR SUBCHAPTER V DEBTORS, DEBTORS IN POSSESSION, AND TRUSTEES</u> (a) <u>Applicability.</u> This LBR only applies to cases proceeding under subchapter V of chapter 11 of the Bankruptcy Code. (b) <u>Subchapter V Status Report.</u> Unless otherwise ordered by the Court, not later than 14 days before the date of the first-scheduled status conference, the debtor must: (1) file a completed Subchapter V Status Report, local form F 2015-3.1.SUBV.STATUS.RPT , executed by both the debtor and the debtor's counsel, if any; and

		(2) serve a copy of the Subchapter V Status Report on the trustee, the United States trustee, and all parties in interest. (c) <u>Monthly Operating Reports.</u> The debtor must file with the Court timely subchapter V monthly operating reports (“MORs”) on the appropriate Official Form (Official Form B 425C) required by section 308 of the Bankruptcy Code and in accordance with the timing requirements of FRBP 2015(a)(6). If the debtor is removed as debtor in possession, the obligation to file MORs shall be the obligation of the subchapter V trustee in possession, unless the Court orders otherwise. LBR 2090-1. (d) <u>Complete Inventory.</u> Upon written motion pursuant to LBR 9013-1, filed by a party in interest, including the subchapter V trustee, the Court may direct the debtor to file a complete physical inventory of the debtor’s property as of the date (1) the petition was filed, or (2) the case was converted to chapter 11, subchapter V. (e) <u>Subchapter V Trustee’s Estimate of Fees and Expenses.</u> Unless otherwise ordered by the Court, not later than 14 days before the deadline to file any proposed plan, the Subchapter V Trustee must: (1) file a completed Notice of Subchapter V Trustee’s Estimated Fees and Expenses for Purposes of Plan Confirmation, local form F 2015- 3.2.SUBV.TRUSTEE.FEE.EST; and (2) serve a copy of the Subchapter V Trustee’s Estimated Fees and Expenses on the debtor, counsel for the debtor, and the United States trustee. LBR 3003-1. <u>BAR DATE IN CHAPTER 11 CASES</u> (a) <u>Claims Bar Date.</u> (1) <u>General.</u> In chapter 11 cases, except for subchapter V cases, the claims bar date will be set by the Court either on its own motion or upon a motion filed pursuant to LBR 9013-1(q). (2) <u>Subchapter V Cases.</u> In subchapter V cases, unless otherwise ordered, the claims bar date will be 70 days after, and for claims by governmental units 180 days after, the latest of: (1) the date of entry of the order for relief, (2) the date of conversion of the case to chapter 11, subchapter V, or (3) the date of the amendment of the petition to designate the case as a subchapter V case. In the case of conversion or re-designation of a case to subchapter V, any previously- set bar date will govern, unless otherwise ordered. (b) <u>Timing of Bar Date Notice.</u> (1) <u>General.</u> Unless otherwise ordered, in chapter 11 cases, except for subchapter V cases, the debtor in possession or chapter 11 trustee, as applicable, must file and serve the bar date notice on all parties entitled to notice within 7 days of the entry of the order setting the bar date.

		(2) <u>Subchapter V Cases.</u> Unless otherwise ordered, in subchapter V cases, the debtor in possession or subchapter V trustee in possession, as applicable, must file and serve the bar date notice within 7 days of (1) the date of entry of the order for relief, (2) the date of conversion of the case to chapter 11, subchapter V, or (3) the date of the amendment of the petition to designate the case as a subchapter V case. (c) <u>Mandatory Form Notice of Bar Date.</u> Any entity providing notice of the claims bar date must use the mandatory Court-approved form F 3003-1.NOTICE.BARDATE. <u>LBR 3014-1. ELECTION UNDER 11 U.S.C. § 1111(b) BY SECURED CREDITOR IN SUBCHAPTER V CASES</u> (f) <u>Election Deadline.</u> (1) <u>Section 1125 Does Not Apply.</u> In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, the election under 11 U.S.C. § 1111(b) must be made not later than the date set for filing objections to the plan or another date that the Court may fix. (2) <u>Section 1125 Applies.</u> In a subchapter V case in which the Court has ordered that a combined disclosure statement and plan be filed or that 11 U.S.C. § 1125(f)(3) applies, the election under 11 U.S.C. § 1111(b) must be made not later than the date fixed for objections pursuant to FRBP 3017.1(a)(2) or another date that the Court may fix. <u>LBR 3017-2. CHAPTER 11 DISCLOSURE STATEMENT – APPROVAL IN SMALL BUSINESS CASES AND WHEN REQUIRED IN SUBCHAPTER V CASES</u> (g) <u>Applicability.</u> This LBR applies in a small business case or in a case under subchapter V of chapter 11 in which the Court has ordered that 11 U.S.C. § 1125 applies. (h) <u>Conditional Approval of Disclosure Statement.</u> The court may, on application of the plan proponent or without an application, conditionally grant a motion for approval of a disclosure statement filed in accordance with 11 U.S.C. § 1125(f) and FRBP 3016. (i) <u>Procedure for Requesting Conditional Approval of Disclosure Statement.</u> The plan proponent may file a motion, without complying with LBR 9013-1(d) or LBR 9013- 1(o), for conditional approval of the disclosure statement, asking that the hearing on the adequacy of the disclosure statement be combined with the hearing on plan confirmation. The motion must be supported by a declaration establishing grounds for conditional approval and accompanied by a proposed order consistent with FRBP 2002(b) that conditionally approves the disclosure statement and establishes: (1) A date by which the holders of claims and interests may accept or reject the plan; (2) A date for filing objections to the disclosure statement; (3) A date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and (4) A date for the hearing on confirmation of the plan.

		(j) <u>Objections and Hearing on Final Approval.</u> (1) The debtor must file and serve a notice of the dates set forth above, together with a copy of the disclosure statement and plan, on all creditors and the United States trustee. <u>LBR 3020-2. POSTCONFIRMATION REQUIREMENTS IN A SUBCHAPTER V CASE</u> (a) <u>Applicability.</u> This LBR only applies to cases proceeding under subchapter V of chapter 11 of the Bankruptcy Code. (b) <u>Consensual Plan.</u> Upon confirmation of a consensual plan, unless the confirmation order provides otherwise, the following rules and procedures apply: (1) <u>Postconfirmation Reporting.</u> Upon confirmation of a consensual plan, the debtor must file and serve postconfirmation quarterly reports in accordance with LBR 3020-1(b) and (c). If the debtor is removed as debtor in possession, the subchapter V trustee in possession must file and serve postconfirmation quarterly reports, unless the Court orders otherwise. (k) <u>Substantial Consummation Report.</u> Not later than 14 days after the date of the entry of the order confirming the plan, the debtor must file a report stating whether the plan has been substantially consummated and, if not, providing a projected date when substantial consummation is expected to occur and the steps necessary for substantial consummation to occur. (l) <u>Extensions of Projected Date of Substantial Consummation.</u> If the projected date for substantial consummation must be extended, the debtor must file a supplemental report specifying the new projected date, the progress made toward consummation of the plan, the steps necessary for substantial consummation to occur, and the reasons for the delay. The supplemental report must be filed and served as soon as possible, but at least not later than 14 days after the previously projected date of substantial consummation. (m) <u>Notice of Substantial Consummation.</u> Not later than 14 days after the debtor's consensual plan has been substantially consummated, the debtor must file a notice of substantial consummation and serve this notice on the subchapter V trustee, the United States trustee, and the 20 largest unsecured creditors. (n) <u>Termination of the Subchapter V Trustee's Services.</u> Upon substantial consummation of a consensual plan, the subchapter V trustee's services will terminate automatically, unless otherwise provided in the plan or ordered by the Court. (c) <u>Nonconsensual Plan.</u> Upon confirmation of a nonconsensual plan, unless the confirmation order provides otherwise, the following rules and procedures apply:

		(1) <u>Distributions</u>. The subchapter V trustee must collect plan payments and make distributions to creditors, unless otherwise provided for in the plan or confirmation order. (2) <u>Postconfirmation Reporting</u>. Upon confirmation of a nonconsensual plan, the subchapter V trustee must file and serve postconfirmation quarterly reports in accordance with LBR 3020-1(b) and (c). LBR 3022-1. FINAL DECREE AND CLOSING A CHAPTER 11 CASE (o) <u>Motion for Final Decree</u>. After an estate is fully administered in a chapter 11 reorganization case, a reorganized debtor, chapter 11 trustee, or subchapter V trustee in possession may file a motion for a final decree using the procedure of LBR 9013-1(d) or (o). Notice of the motion must be served upon all parties upon whom the plan was served. (p) <u>Motion for Order Closing Case on Interim Basis</u>. If a chapter 11 estate is substantially consummated, but not fully administered, the reorganized debtor, chapter 11 trustee, or subchapter V trustee in possession, may file a motion for an order closing case on an interim basis using the procedure of LBR 9013-1(d) or (o). LBR 3022-2. FULL ADMINISTRATION IN A SUBCHAPTER V CASE (a) <u>Applicability</u>. This LBR only applies to cases proceeding under subchapter V of chapter 11 of the Bankruptcy Code. (b) <u>Consensual Plan</u>. (1) <u>Subchapter V Final Report and Account</u>. Within 60 days after the final distribution to creditors under a consensual plan, the debtor must file with the Court, and serve upon all parties upon whom the plan was served, a subchapter V final report and account of administration of the estate (UST Form 101-11(V)-FR (“Subchapter V Final Report and Account”), whereupon the debtor must seek entry of a final decree closing the case. (2) <u>Final Decree</u>. After the debtor has filed its Subchapter V Final Report and Account, the debtor must file a motion for final decree pursuant to LBR 3022- 1(a) supported by a declaration under penalty of perjury showing that: (A) the services of the subchapter V trustee have terminated, (B) the estate has been fully administered, (C) all adversary proceedings, contested matters and other disputes, including appeals, have been resolved by a final, non-appealable order or dismissed, and (D) there are no remaining matters for which the Court must continue to exercise jurisdiction. The debtor must also lodge a proposed final decree. Nothing herein is intended to prevent the debtor from seeking interim or early closure of the case. (c) <u>Nonconsensual Plan</u>. (1) <u>Subchapter V Final Report and Account</u>. Within 60 days after the final distribution to creditors under a nonconsensual plan, the subchapter V trustee must file with the Court,

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		and serve upon all parties upon whom the plan was served, a Subchapter V Final Report and Account of administration of the estate, whereupon the subchapter V trustee must seek entry of a final decree closing the case. (2) <u>Final Decree</u>. Upon the subchapter V trustee's filing of a Subchapter V Final Report and Account in a case in which the plan is a confirmed nonconsensual plan, the subchapter V trustee must file a motion for final decree pursuant to LBR 3022-1(a) supported by a declaration under penalty of perjury showing that: (A) the estate has been fully administered, (B) all adversary proceedings, contested matters, and other disputes, including appeals, have been resolved by a final, non-appealable order or dismissed, and (C) there are no remaining matters for which the Court must continue to exercise jurisdiction. The subchapter V trustee must also lodge a proposed final decree. (3) <u>Termination of the Subchapter V Trustee's Services</u>. Upon entry of the final decree, the subchapter V trustee's services will terminate. https://www.cacb.uscourts.gov/local-rules <u>Local Forms:</u> Subchapter V Status Report MANDATORY https://www.cacb.uscourts.gov/sites/cacb/files/documents/forms/F2015-3.1.SUBV_STATUS.RPT_.pdf Subchapter V Trustee's Estimated Fees and Expenses for Purposes of Plan Confirmation https://www.cacb.uscourts.gov/sites/cacb/files/documents/forms/F2015-3.2.SUBV_TRUSTEE.FEE_EST_.pdf https://www.cacb.uscourts.gov
California	E.D. Cal.	LBR 3003-2 Filing Proofs of Claim in Subchapter V Chapter 11 Small Business Debtor Reorganization Cases Unless otherwise ordered by the Court, and except as provided in Fed. R. Bankr. P. 3003(c)(3), a proof of claim or interest in a case filed under Subchapter V of Chapter 11 must be filed within 70 days after the date of the order for relief in the case, unless the claimant is a governmental unit, in which case a proof of claim shall be filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide for filing a proof of claim or interest in a Subchapter V case. https://www.cacb.uscourts.gov/LocalRules https://www.cacb.uscourts.gov

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California	N.D. Cal.	No specific LBRs on SubV readily apparent https://www.canb.uscourts.gov/procedures/local-rules https://www.canb.uscourts.gov
California	S.D. Cal.	No specific LBRs on SubV readily apparent https://www.casb.uscourts.gov/rules-procedures https://www.casb.uscourts.gov
Colorado	D. Col.	No specific LBRs on SubV readily apparent https://www.cob.uscourts.gov/local-rules https://www.cob.uscourts.gov
Connecticut	D. Conn.	LBR 3014-1 Time For Secured Creditor to Exercise Election under Bankruptcy Code Section 1111(b) in Subchapter V Case. Unless the Court rules that Section 1125 applies, an election of the application of Section 1111(b) of the Code by a class of secured creditors in a Chapter 11 subchapter V case may be made at any time on or before seven (7) days after the filing of the Debtor's Initial Plan of Reorganization, or such later time as the Court may establish. https://www.ctb.uscourts.gov/local-rules-effective-august-2-2021 https://www.ctb.uscourts.gov
Delaware	D. Del.	LBR 3016-1 Plan and Disclosure Statement Documents and Required Forms in Subchapter V Cases. (a) Redline or Blackline of Plan and Disclosure Statement Documents. Parties filing an amended disclosure statement or plan (or any related document thereto that is amended post filing) shall include in the filing a document showing all changes made to the last version of the document on file. (b) Required Forms in Subchapter V Cases. A Subchapter V debtor must file Local Forms 136 Subchapter V Status Report and Local Form 137 Subchapter V Small Business Plan. https://www.deb.uscourts.gov/local-rules-and-orders LF 136 Subchapter V Status Report https://www.deb.uscourts.gov/sites/default/files/LF%20136%20DE%20Subchapter%20V%20Status%20Report.pdf Local Form 137 (Subchapter V Small Business Plan) https://www.deb.uscourts.gov/sites/default/files/LF%20137%20DE%20Subchapter%20V%20Small%20Business%20Debtor%27s%20Plan%20of%20Reorganization%20or%20Liquidation_0.pdf https://www.deb.uscourts.gov
Florida	M.D. Fla.	LBR 2081-1 (11)(d) Monthly Operating Reports in Small Business Cases. Each month, Small Business Debtors as defined in 11 U.S.C. § 101(51D) and Subchapter V Debtors as defined in 11 U.S.C. § 1182 shall complete and file the Schedule of Receipts and Disbursements (also required of Chapter 11 Business Debtors), following as Appendix A. The Schedule may be filed without the referenced

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		attachments. In addition to filing the Schedule included herein as Appendix A, Small Business Debtors and Subchapter V Debtors shall also file a Check Register in the form following as Appendix B, which shall identify all checks issued by the debtor during the reporting month and all outstanding checks issued before the commencement of the debtor's bankruptcy case which were permitted to clear during the applicable reporting period. Small Business Debtors and Subchapter V Debtors shall complete and file a separate Check Register for each bank account from which checks are drawn. These requirements are in addition to the completion and filing of the Small Business Monthly Operating Report prescribed or promulgated by the Judicial Conference. LBR 3022-1 FINAL REPORT/DECREE (CHAPTER 11) (a) Chapter 11 Subchapter V Proceedings. Unless extended by the Court, on or before the later of 30 days after the granting of a discharge in a case under Chapter 11 Subchapter V (Small Business Debtor Reorganization), or 30 days after the disposition of all adversary proceedings or contested matters, whichever is later, the debtor's attorney shall file a motion for final decree. This deadline shall apply in both individual and non-individual debtors under Subchapter V. https://www.flmb.uscourts.gov/localrules/ https://www.flmb.uscourts.gov
Florida	N.D. Fla.	No specific LBRs on SubV readily apparent https://www.flmb.uscourts.gov/local-rules https://www.flmb.uscourts.gov
Florida	S.D. Fla.	No specific LBRs on SubV readily apparent https://www.flsb.uscourts.gov/general-orders Administrative Order: AO 2022-09 Status of Interim SBRA Bankruptcy Rules Adopted by Administrative Orders 2020-02 and 2022-06 upon the effective date of the Amended Federal Rules of Bankruptcy Procedure on December 1, 2022: On June 20, 2022, this Court entered Administrative Order 2022-06 "Adoption of Amended SBRA Interim Bankruptcy Rule 1020 to Reflect BTATC Act Implementation", adopting the recommendation of the Advisory Committee on Bankruptcy Rules that this revised Interim Rule be adopted as a SBRA Local Interim Rule while the BTATC Act Subchapter V limit is in effect. Accordingly, it is ORDERED as follows: 1. Interim SBRA Bankruptcy Rule 1020 adopted by this Court under Administrative Order 2022-06 shall remain in effect while the BTATC Act Subchapter V limit is in effect unless otherwise ordered by this Court. 2. The other Interim SBRA Bankruptcy Rules adopted by Administrative Order 2020-02 are replaced by the amended Federal Rules of Bankruptcy Procedures effective December 1, 2022, and Administrative Order 2020-02 is abrogated. Amendments can be viewed on the Pending Rules and Forms Amendments page of the United States Courts website. 3. The Clerk is directed to provide notice on the Court website of entry of this Order and to update affected Local Rules, Local Forms, and procedures to reflect the provisions of this Order.

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		https://www.flsb.uscourts.gov/local-rules https://www.flsb.uscourts.gov
Georgia	M.D. Ga.	LBR 3001-1. PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS Claims and Equity Security Interests (amended February 24, 2020) (e) Bar Date for Filing Claims in Subchapter V Chapter 11 Reorganization Cases. For all bankruptcy petitions filed under Subchapter V of Chapter 11, the bar date for filing proofs of claim or interest shall be 70 days after docketing of the order for relief of the Subchapter V Chapter 11 case. For cause shown, the Court shall consider extending the time to file proofs of claim upon the filing of an appropriate motion or request within the 70-day period. LBR 3022-2. Final Report/Decree in Subchapter V Cases (Chapter 11) (added February 24, 2020) (a) If the confirmed plan is subject to 11 U.S.C. § 1191(a) (a “consensual plan”) the Subchapter V small business debtor will conform to the following provisions: (1) Projected Dates for Substantial Consummation. Chapter 11 Subchapter V small business debtors shall file with the Clerk of Court within 14 days of the date of the entry of the order confirming the plan of reorganization, a report specifying the projected date for substantial consummation as defined in 11 U.S.C. § 1101(2). The report shall describe the action that is to be taken to reach substantial consummation. If the projected date for substantial consummation must be extended, the debtor shall file a supplemental report specifying the new projected date, the progress made toward consummation of the plan, the action remaining to be taken toward substantial consummation, and the reasons for the delay. (2) Application for Final Decree. Upon substantial consummation as defined in 11 U.S.C. § 1101(2), the Subchapter V Chapter 11 debtor shall comply with the procedures contained in the Clerk’s Instructions, file a final report and final account in compliance with 11 U.S.C. § 704(a)(9), file an application for final decree, and submit a proposed final decree. (b) If the confirmed plan is subject to 11 U.S.C. § 1191(b) (a “non-consensual plan”), upon completion of all payments under the confirmed plan, the debtor shall comply with the procedures contained in the Clerk’s Instructions, file a final report and final account in compliance with 11 U.S.C. § 704(a)(9), and file a Certificate of Plan Completion and Request for Discharge. https://www.gamb.uscourts.gov/USCourts/local-rules-and-clerks-instructions https://www.gamb.uscourts.gov
Georgia	N.D. Ga.	No specific LBRs on SubV readily apparent https://www.ganb.uscourts.gov/local-rules Amended and Restated General Order No. 30-2020 DateSigned: 12/10/2020

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		This Order provides for the application of Interim Bankruptcy Rules in cases filed under Subchapter V of Title 11 of the United States Code and for the modification of Official Forms 309E2 and 309F2 to add a new paragraph 10 which sets a deadline for a secured party to make an election under 11 U.S.C. §1111(b). https://www.ganb.uscourts.gov/content/amended-and-restated-general-order-no-30-2020 https://www.ganb.uscourts.gov
Georgia	S.D. Ga.	No specific LBRs on SubV readily apparent https://www.gasb.uscourts.gov/local-rules https://www.gasb.uscourts.gov
Hawaii	D. Haw.	LBR 2015-2. Appointment of Subchapter V Trustee Unless the court orders otherwise, the debtor must tender to the Subchapter V Trustee the sum of \$1,000 no later than 14 days after the filing of the Notice of Appointment of Subchapter V Trustee. Any party in interest may file a motion to adjust the amount of the deposit. The debtor shall include the deposit in any cash collateral budget. The Subchapter V Trustee must hold these funds in escrow for the purpose of compensation for services rendered and reimbursement for expenses. Payment of compensation and reimbursement to the Subchapter V Trustee from the escrowed funds is subject to allowance and approval by the court under sections 503(b), 330, 331 and 1194 of the Bankruptcy Code, Bankruptcy Rule 2016 and LBR 2016-1. Failure of the debtor to tender the required amount within 14 days after the filing of the Notice of Appointment is cause for dismissal of the case. LBR 3003-1. Chapter 11 Claims Bar Date Unless the court orders otherwise, proofs of claim or interest required to be filed in a chapter 11 case under Bankruptcy Rule 3003 must be filed within 90 days after the first date set for the meeting of creditors called under § 341. In a chapter 11 case under subchapter V, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under subchapter V of chapter 11. https://www.hib.uscourts.gov/local-rules-and-general-orders https://www.hib.uscourts.gov
Idaho	D. Idaho	LBR 3014.1 SECTION 1111(b) ELECTIONS Pursuant to Fed. R. Bankr. P. 3014, if (1) the court has entered an order conditionally approving a disclosure statement, (2) the disclosure statement and the plan are combined and no hearing on the disclosure statement is held, or (3) the court has not ordered application of § 1125 in a case under chapter 11 subchapter V, then the election under § 1111(b) shall be made no later than fourteen (14) days before the first scheduled confirmation hearing date. LBR 3020.1 CHAPTER 11 PRECONFIRMATION MEMORANDUM b. In a chapter 11 subchapter V case, the plan proponent shall, not less than five (5) days prior to the confirmation hearing, file a memorandum containing the proponent's response to any objections to plan confirmation, and a statement as to how each requirement of 11 U.S.C. § 1191 is satisfied. https://www.id.uscourts.gov/clerks/rules_orders/Bankruptcy_Local_Rules.cfm https://www.id.uscourts.gov

Illinois	C. D. Ill.	No specific LBRs on SubV readily apparent https://www.ilcb.uscourts.gov/local-rules-procedures-and-standing-orders https://www.ilcb.uscourts.gov
Illinois	N.D. Ill.	No specific LBRs on SubV readily apparent https://www.ilnb.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.ilnb.uscourts.gov
Illinois	S.D. Ill.	No specific LBRs on SubV readily apparent https://www.ilsb.uscourts.gov/local-rules https://www.ilsb.uscourts.gov
Indiana	N.D. Ind.	No specific LBRs on SubV readily apparent https://www.innb.uscourts.gov/court-info/local-rules-and-orders https://www.innb.uscourts.gov
Indiana	S.D. Ind.	LBR B-4004-2. DISCHARGE IN SUB V CHAPTER 11 CASE (a) <u>Discharge in Case Confirmed Under §1191(a)</u> If the case has been confirmed under 11 U.S.C. §1191(a) and the Debtor is an individual, the Court shall enter the discharge immediately after entry of the confirmation order. (b) <u>Discharge in Case Confirmed Under §1191(b)</u> (1) <u>Notice of Completion of §1192 Payments</u> The entity administering the confirmed plan shall file a Notice of Completion of § 1192 Payments after the Debtor has made the number of payments required to be eligible for a discharge. A sample form is available on the Court's website. (2) <u>The Debtor's Required Pleadings</u> Within 30 days after the filing of the Notice of Completion of § 1192 Payments, the Debtor shall file a Motion for Entry of Discharge and a Certification of Eligibility for Discharge. Each Debtor in a joint case shall file a separate Certification. Sample forms are available on the Court's website. (3) <u>Service and Notice</u> The Debtor shall serve a copy of the Motion for Entry of Discharge and a Certification of Eligibility for Discharge on the trustee. The trustee shall have 21 days from the date of filing to object to the Motion or the Certification. (4) <u>Closing and Reopening</u> If no Motion for Entry of Discharge is filed, the case may be closed without entry of a discharge after filing of the trustee's final report. If the case has been closed and the Debtor seeks entry of the discharge, the Debtor must first file a motion to reopen the case. (5) <u>Request for Hardship Discharge</u> If the Debtor seeks a discharge under 11 U.S.C. §1141(d)(5), the Debtor shall file a Motion for Hardship Discharge and a Certification of Eligibility for Discharge. The requirement to file a Certification of Eligibility for Discharge is waived if the Debtor seeking the hardship discharge is

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		deceased and a verified statement of the Debtor's death has been filed as required by S.D.Ind. B-1016-1. A sample Certification is available on the Court's website. https://www.insb.uscourts.gov/content/local-rules https://www.insb.uscourts.gov
Iowa	N.D. Iowa	LBR 3011-1 Deposit and Distribution of Unclaimed Funds (b) Deposit by Chapter 11 Subchapter V, 12, or 13 Trustee If any funds remain unclaimed after the final distribution of funds is made in a Chapter 11 Subchapter V, 12, or 13 case as required by 11 U.S.C. § 347(a), the trustee shall file a 19 Motion to Pay Into the Court Registry any remaining funds. Upon entry of a final order granting such motion, the trustee shall pay the remaining funds into the Court Registry and shall provide the Court's finance officer a list of the last known names and address of the unpaid claimants and the amounts they are entitled to receive, as required by the Federal Rule of Bankruptcy Procedure 3011. https://www.ianb.uscourts.gov/local-rules
Iowa	S.D. Iowa	No specific LBRs on SubV readily apparent
Kansas	D. Kan.	INTERIM LBR 1020.1 CHAPTER 11 REORGANIZATION CASE FOR SMALL BUSINESS DEBTORS OR DEBTORS UNDER SUBCHAPTER V Federal Rule of Bankruptcy Procedure 1020 applies in the Bankruptcy Court for the District of Kansas but, effective April 25, 2020, is amended on an interim basis to state: (a) DEBTOR DESIGNATION. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the Code and, if the latter, whether the debtor elects to have subchapter V of chapter 11 apply. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the Code and, if the latter, whether the debtor elects to have subchapter V of chapter 11 apply. The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect. (b) OBJECTING TO DESIGNATION. The United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later. (c) PROCEDURE FOR OBJECTION OR DETERMINATION. Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; the creditors included on the list filed under Rule 1007(d) or, if a committee has been appointed under § 1102(a)(3), the committee or its authorized agent; and any other entity as the court directs.

		LBR 3003.1 AUTOMATIC CLAIMS BAR DATE IN CHAPTER 11, SUBCHAPTER V, CASES WHEN FILED (a) Subchapter V Cases. In a Chapter 11, Subchapter V, case, unless otherwise ordered, the claims bar date will be 70 days after, and for claims by governmental units 180 days after, the latest of: (1) the date of entry of the order for relief, (2) the date of conversion of the case to Chapter 11, Subchapter V, or (3) the date of the amendment of the petition to designate the case as a Subchapter V case. In the case of conversion or re-designation of a case to Subchapter V, any previously set bar date will govern, unless otherwise ordered. (b) Non-Subchapter V Cases. This rule does not apply to Chapter 11 cases not designated as Subchapter V. https://www.ksb.uscourts.gov/local-rules https://www.ksb.uscourts.gov
Kentucky	E.D. Ky.	No specific LBRs on SubV readily apparent https://www.kyeb.uscourts.gov/court-info/local-rules-and-orders https://www.kyeb.uscourts.gov
Kentucky	W.D. Ky.	No specific LBRs on SubV readily apparent https://www.kywb.uscourts.gov/local-rules https://www.kywb.uscourts.gov
Louisiana	E.D. La.	No specific LBRs on SubV readily apparent https://www.laeb.uscourts.gov/court-info/local-rules-and-orders https://www.laeb.uscourts.gov
Louisiana	M.D. La.	No specific LBRs on SubV readily apparent https://www.lamb.uscourts.gov/rules-and-forms https://www.lamb.uscourts.gov
Louisiana	W.D. La.	No specific LBRs on SubV readily apparent https://www.lawb.uscourts.gov/court-info/local-rules-and-orders https://www.lawb.uscourts.gov
Maine	D. Me.	No specific LBRs on SubV readily apparent https://www.meb.uscourts.gov/local-rules https://www.meb.uscourts.gov
Maryland	D. Md.	LBR 1002-2 ELECTION TO PROCEED UNDER SUBCHAPTER V OF CHAPTER 11 (a) Election on Petition. A debtor who qualifies under 11 U.S.C. § 1182 may elect to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code by selecting that option on the debtor's bankruptcy petition.

		(b) Election After Petition. If a debtor who qualifies under 11 U.S.C. § 1182 elects to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code <i>after</i> the debtor files a bankruptcy petition under Chapter 11, the Court grants a motion filed by the debtor to convert a pending case to one under Chapter 11, or the Court grants (or the debtor consents to) an involuntary petition against the debtor, the debtor must file an amended bankruptcy petition selecting the option to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code. LBR 1009-1 NOTICES TO CREDITORS (I) OMITTED FROM OR INCORRECTLY LISTED ON MASTER MAILING MATRIX OR (II) AFFECTED BY AMENDMENT TO SCHEDULE (d) Notice of Amendment of Schedules in Chapter 9 and Chapter 11 Cases. Whenever the debtor or the trustee in a Chapter 9 or a Chapter 11 case amends the debtor's schedules to change the amount, nature, classification, or characterization of a debt owing to a creditor, the debtor or the trustee must, within fourteen (14) days of filing, transmit notice of the amendment to the creditor, which notice must conspicuously identify the claims being amended, and provide notice of the creditor's right to file a proof of claim by the later of: (1) the bar date (if any); or (2) either (A) thirty (30) days from the date of notice in a case proceeding under Subchapter V or (B) sixty (60) days from the date of the notice in all other cases in Chapter 9 and Chapter 11. The debtor or the trustee must file a certificate of service of the notice within seven (7) days after service. LBR 2016-1 COMPENSATION OF PROFESSIONALS (a) Applications for Compensation by Professionals. Unless the Court orders otherwise, all professionals seeking compensation pursuant to 11 U.S.C. §§ 327, 328, 330, and 331, including attorneys, accountants, examiners, investment bankers, financial advisors, real estate advisors, and Subchapter V trustees, must prepare and submit their applications for compensation in accordance with the Guidelines attached as Appendix D to these Rules. LBR 2072-1 ACCESS TO INFORMATION IN CHAPTER 11 CASES Unless otherwise ordered by the Court, a committee appointed under 11 U.S.C. § 1102 or a trustee appointed in a Subchapter V case is not required to provide access to information to the extent that such information has been reasonably designated by the party providing such information as non-public, proprietary, privileged, work product, or otherwise confidential. LBR 3003-1 TIME FOR FILING PROOFS OF CLAIM IN CHAPTER 11 CASES Except as provided in 11 U.S.C. § 502(b)(9), in a Chapter 11 case, other than a case under Subchapter V, a proof of claim is timely filed if it is filed not later than ninety (90) days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a), unless a different date is fixed by the Court. Except as provided in 11 U.S.C. § 502(b)(9), in a case under Subchapter V, a proof of claim is timely filed if it is filed not later than seventy (70) days after entry of the order for relief, unless a different date is fixed by the Court. LBR 3022-1 ADMINISTRATION OF CONFIRMED CHAPTER 11 PLANS

		(a) Subchapter V Cases. In a Chapter 11 case proceeding under Subsection V, the debtor or other party administering the confirmed plan must comply with the following requirements: (1) Notice of Substantial Consummation. Within fourteen (14) days after a confirmed Chapter 11, Subchapter V plan is substantially consummated (as defined in 11 U.S.C. § 1101(2)), the debtor or plan administrator must file with the Court and serve on the trustee, the United States Trustee, and all parties in interest notice of such substantial consummation pursuant to 11 U.S.C. § 1183(c)(2). The notice must include a certification that includes a summary report of the disbursements, distributions, and transfers that have been made pursuant to the plan; a description of other acts taken to consummate the plan; and a description of any matters involving consummation of the confirmed plan that have not been fully resolved. (2) Post-Confirmation Progress Reports. The debtor or plan administrator must file with the Court and serve on the United States Trustee reports of progress towards full administration of the plan until the Court enters a final decree. The first report must be filed no later than six (6) months after entry of the order of confirmation. Subsequent reports must be filed every six (6) months thereafter. (3) Discharge Order. In a case involving a consensual plan confirmed under 11 U.S.C. § 1191(a), the Court will issue a discharge order as appropriate under 11 U.S.C. § 1141(d) upon confirmation of the plan. In a case involving a non-consensual plan confirmed under 11 U.S.C. § 1191(b), the Court will issue a discharge order as appropriate under 11 U.S.C. § 1192 after completion of all plan payments. (4) Motion for Final Decree. Upon full administration of the plan as defined in paragraph (c) of this Rule, the debtor or plan administrator must file with the Court and serve on the trustee, United States Trustee, and all parties in interest a motion for a final decree and to close the case. The motion must be substantially in the form of Local Bankruptcy Form N-1 (for non-individuals) or Local Bankruptcy Form N-2 which includes a request for entry of a discharge (for individuals) and must be accompanied by a certification of full administration. The certification must include a final summary report of the disbursements, distributions, and transfers that have been made pursuant to the plan. (5) Final Decree. The Court may enter a final decree and close the case at any time after the plan has been fully administered. LBR 9001-1 DEFINITIONS AND RULES Unless otherwise ordered by the Court, the definitions of words and phrases in Federal Bankruptcy Rule 9001 and the definitions adopted by reference therein apply in these Local Bankruptcy Rules and orders entered by the Court. In addition, the following words and phrases used in these Rules have the meanings stated: (l) “Subchapter V” means subchapter V of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1181, <i>et seq.</i> debtor, and a co-owner of property of the estate. (l) “Subchapter V” means subchapter V of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1181, <i>et seq.</i> debtor, and a co-owner of property of the estate.

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		(l) “Subchapter V” means subchapter V of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1181, <i>et seq.</i> LBR 9029-2 INTERIM SUBCHAPTER V BANKRUPTCY RULE To implement the provisions of the Small Business Reorganization Act of 2019, a national interim Federal Bankruptcy Rule 1020 has been promulgated and is adopted and incorporated as Appendix I of the Local Bankruptcy Rules. The interim Federal Bankruptcy Rule 1020 is effective in this district until such time as the regular rule making process is concluded and the interim Federal Bankruptcy Rule is implemented as a final rule. https://www.mdb.uscourts.gov/files/localrules_07.pdf https://www.mdb.uscourts.gov
Massachusetts	D. Mass.	No specific LBRs on SubV readily apparent https://www.mab.uscourts.gov/massachusetts-local-bankruptcy-rules
Michigan	E.D. Mich.	No specific LBRs on SubV readily apparent https://www.mieb.uscourts.gov/sites/mieb/files/Local%20Bankruptcy%20Rules.pdf
Michigan	W.D. Mich.	No specific LBRs on SubV readily apparent – No website readily apparent
Minnesota	D. Minn.	No specific LBRs on SubV readily apparent https://www.mnb.uscourts.gov/content/local-rules https://www.mnb.uscourts.gov
Mississippi	N.D. Miss.	LBR 3003-1. Filing of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases. (c) Filing proof of claim. (3) Time for filing. (i) Unless otherwise ordered by the court, all persons and entities that assert a claim, as defined in section 101(5) against the debtor which arose on or prior to the filing of the Chapter 11 petition shall file a proof of such claim on or before the date that is 120 days (or 70 days in a case filed under Subchapter V of Chapter 11) after the date of the order for relief, except that proofs of claim filed by governmental units must be filed on or before the date that is 180 days after the date of the order for relief. https://www.msnb.uscourts.gov/rules-and-fees https://www.msnb.uscourts.gov
Mississippi	S.D. Miss.	LBR 3003-1. Filing of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases. (c) Filing proof of claim. (3) Time for filing. (i) Unless otherwise ordered by the court, all persons and entities that assert a claim, as defined in section 101(5) against the debtor which arose on or prior to the filing of the Chapter 11 petition shall file a proof of such claim on or before the date that is 120 days (or 70 days in a case filed under Subchapter V of Chapter 11) after the date of the order for relief, except that proofs of claim

		filed by governmental units must be filed on or before the date that is 180 days after the date of the order for relief. https://www.mssb.uscourts.gov/local-rules https://www.mssb.uscourts.gov
Missouri	E.D. Mo.	LBR 2015-3 - Duty of Debtor in Chapter 11 Case C. Subchapter V Specific Duties No later than seven (7) days after the filing of the Notice of Appointment of Trustee, the debtor must tender to the Subchapter V Trustee the sum of \$1,000.00. The Subchapter V Trustee will hold these funds in escrow for the purpose of compensation for services rendered and reimbursement for out-of-pocket expenses. The dollar amount for deposit is subject to adjustment by the Court upon the request of any interested party. Payment of compensation and reimbursement to the Subchapter V Trustee from the escrowed funds is subject to allowance and approval by further order of the Court under Sections 503(b), 330, 331 and 1194 of the Bankruptcy Code, Federal Rule of Bankruptcy Procedure 2016 and Local Rule 2016-1. Failure of the debtor to tender the required amount within seven (7) days after notification of the appointment of the Subchapter V Trustee is cause for dismissal of the case. LBR 3003 - Additional Proof of Claim Filing Provisions for Chapter 11 Cases. A. Claims Bar Date. 2. In Subchapter V cases, unless otherwise ordered, the claims bar date will be seventy (70) days after the petition date, and for claims by governmental units 180 days after the petition date, unless the Bankruptcy Code or order of the court provide a later date. https://www.moeb.uscourts.gov/sites/moeb/files/USBC%20EDMO%20Local%20Rules%20Rev%20120123.pdf https://www.moeb.uscourts.gov
Missouri	W.D. Mo.	No specific LBRs on SubV readily apparent – No website readily apparent
Montana	D. Mont.	LBR 1020-1. Chapter 11 Reorganization Case for Small Business Debtor or Debtor Under Subchapter V. (a) Debtor Designation. In a voluntary Chapter 11 case, debtor shall state in the petition whether debtor is a small business debtor or debtor as defined under 11 U.S.C. § 1182(1) and, if the latter, whether debtor elects to have subchapter V of Chapter 11 apply. In an involuntary Chapter 11 case, debtor shall file a statement as to whether debtor is a small business debtor or debtor as defined under 11 U.S.C. § 1182(1) within 14 days after entry of the order for relief and, if the latter, whether debtor elects to have subchapter V of Chapter 11 apply. The status of the case as a small business case or a case under subchapter V of Chapter 11 shall be in accordance with debtor's statement under this subdivision unless and until the Court enters an order finding that debtor's statement is incorrect. (b) Objecting to Designation. The United States trustee or a party in interest may file an objection to debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of

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		creditors held pursuant to 11 U.S.C. § 341(a) or within 30 days after any amendment to the statement, whichever is later. (c) Procedure for Objection or Determination. Any objection or request for a determination under this Local Rule shall be governed by Fed. R. Bankr. P. 9014 and served on debtor, debtor's attorney, United States Trustee, trustee, creditors included on the list filed under Fed. R. Bankr. P. 1007(d), or if a committee has been appointed under 11 U.S.C. § 1102, the committee or its authorized agent and any other entity as the Court directs. https://www.mtb.uscourts.gov/rules-statutes https://www.mtb.uscourts.gov
Nebraska	D. Neb.	LBR 2015-1. Subchapter V Status Report In cases under Subchapter V of Chapter 11, the debtor must timely file a status report under 11 U.S.C. § 1188(c), using the form in Appendix D. Appendix D Subchapter V Status Report The debtor submits this status conference report pursuant to 11 U.S.C. § 1188(c). 1. Background. Briefly describe the nature of the debtor's business or occupation, the reasons for filing bankruptcy and the desired goals of a reorganization plan. 2. Plan. Identify whether the debtor intends to propose a consensual or non-consensual plan and the reason for the type of plan to be proposed. 3. Parties. Identify key parties, by name and category (secured, priority, unsecured, equity, trustee, other), with whom the debtor must communicate to confirm a plan. For each party, identify any important discussions that have occurred, or any reasons discussions have not occurred. 4. Efforts. Describe efforts the debtor has undertaken to develop a plan of reorganization and any actions contemplated to formulate the plan. Also, if the debtor intends to propose a consensual plan, explain the steps being taken to achieve support for the plan. 5. Obstacles. Identify what the debtor believes to be significant obstacles or challenges to the confirmation of a plan, such as valuation disputes, claim adjudication, adversary proceeding litigation, or significant motions that may be filed. 6. Collateral. Identify who creditors should contact to inspect any collateral. Also, if the debtor anticipates a need to use cash collateral, identify the cash collateral and the secured parties with an interest in such collateral. 7. Other. Identify any additional information the debtor believes would be helpful to the court or parties in interest (e.g., executory contracts or unexpired leases, sale or surrender of real or personal property, any unusual circumstances, or any reason the debtor cannot file a plan within the 90-day deadline of 11 U.S.C. § 1189(b). [SIGNATURE BLOCK]

		LBR 3015-3. Plans, Objection to Confirmation, and Amendments D. Plan Amendments. In cases under Subchapter V of Chapter 11, Chapter 12, or Chapter 13, an amended plan filed before a plan is confirmed supersedes any previously filed plan. No resistance deadline may be set for an amended plan for a date earlier than 14 days after the meeting of creditors is concluded. If an amended plan is filed while objections to a previously filed plan are pending, the debtor must notify the objecting parties an amended plan was filed, and the court will not act on the previously filed plan or objections. E. Redline Version. In cases under Subchapter V of Chapter 11 and under Chapter 12, if a debtor files an amended plan, the debtor must file, under the event Notice of Modified / Amended Plan, a version of the amended plan with all changes clearly and conspicuously indicated (such as track changes, redline, or similar method). The debtor does not have to serve this version of the amended plan. LBR 3015-4. Dismissal on Payment Default A. Notice of Default. If the debtor defaults on a plan payment to the trustee, the trustee may file and serve the debtor a notice of payment default in a case under Subchapter V of Chapter 11, Chapter 12, or Chapter 13. The notice must state the amount of the default and the date on which the next scheduled payment is due. The notice must also state that under this Local Rule, the court may dismiss the debtor's bankruptcy case unless, within 21 days after the notice, the debtor either cures the default and makes all payments due or makes other arrangements acceptable to the trustee. The notice must state the specific calendar date by which the payment default must be cured. LBR 3020-1. Deposit; Confirmation of Plan – Chapters 9, 11, and 12 A. Deposit. The debtor in a case under Subchapter V of Chapter 11 must pay the trustee an advance fee and expense deposit within five days after the petition is filed and each month thereafter until a Subchapter V plan is confirmed. The amount to be paid is stated in Appendix H. The trustee must keep the advance deposit in a segregated account. The trustee may apply the advance deposit to any trustee compensation approved by the court. The trustee must return any excess amount to the debtor within ten business days after the court approves the trustee's final application for compensation. The debtor must include the amounts paid under this Local Rule in the debtor's proposed cash collateral budget. Appendix H Trustee Fees in Subchapter V of Chapter 11 and in Chapter 12 cases Subchapter V of Chapter 11 The advance deposit the debtor must pay the trustee in a case under Subchapter V of Chapter 11 is: Due Date Amount Within 5 days of the Petition Date \$1,000.00 Each Month \$500.00 on the same day of the month as the petition date until a Subchapter V plan is confirmed or until the total amount held by the trustee is \$3,000. If the advance deposit drops below \$3,000 because the trustee was paid authorized compensation from the deposit, the debtor must restart payments until the advance deposit again reaches \$3,000. https://www.neb.uscourts.gov/local-rules

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		https://www.neb.uscourts.gov
Nevada	D. Nev.	LBR 3003. FILING PROOF OF CLAIM IN CHAPTER 11 REORGANIZATION CASE. (b) In a case under subchapter V of chapter 11, a proof of claim must be filed not later than seventy (70) days after the order of relief. LBR 3022.2. INDIVIDUAL SUBCHAPTER V OF CHAPTER 11 DISCHARGES. (a) An individual debtor under subchapter V of chapter 11 seeking entry of discharge must complete and file the local certificate of compliance form, and serve a copy of the certificate of compliance on all creditors. (b) If the debtor fails to file the certificate of compliance, the case may be closed without entry of a discharge. (c) Upon entry of a discharge, and in the absence of any unresolved administrative issues, a final decree closing the case will be entered by the clerk. https://www.nvb.uscourts.gov/rules-forms/rules/local-rules/ https://www.nvb.uscourts.gov
New Hampshire	D. N.H.	No specific LBRs on SubV readily apparent – No website readily apparent
New Jersey	D.N.J.	LBR 1020-1. Subchapter V Designation (a) Designation within 14 days after filing. A debtor that did not elect in the original petition to have subchapter V of chapter 11 apply, may make the election by filing an amended petition within 14 days of the date of filing, or in an involuntary petition, file a statement within 14 days of the order for relief. All subchapter V deadlines will run from the date of the filing of the original petition or the order for relief. (b) Designation after 14 days. After the initial 14-day period, a debtor must file a motion seeking permission to have subchapter V of chapter 11 apply. Any request for an extension of the subchapter V deadlines must be part of the motion and the motion must be served on the parties designated in Bankruptcy Rule 1020 (c). 2023 Comment This Rule is new. It addresses the procedures for opting for subchapter V after the petition has been filed or an order for relief has been entered. The debtor must promptly email chambers to inform the assigned judge of either (i) the amended petition, or (ii) in an involuntary case, a statement consistent with Federal Rule of Bankruptcy Procedure 1020(a), so that the correct deadlines may be set in the case. Failure of the debtor to ensure that the deadlines are updated on the court’s docket does not excuse compliance with the deadlines in subchapter V. LBR 3011-1. Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, or Chapter 13 (a) Deposit. A trustee must file Local Form Notice Depositing Unclaimed Funds Pursuant to D.N.J. LBR 3011-1 to deposit unclaimed funds into the court’s registry without court order. (b) Payment of unclaimed funds. (1) All claimants must use Local Form Application for Payment of Unclaimed Funds. (2) A claimant must be: (A) the Owner of Record (original payee) or its legal successor; or

		(B) the Owner of Record's assignee or its legal successor. (3) The application must include the supporting documentation identified in the Instructions for Filing an Application for Payment of Unclaimed Funds. (4) The application must be served on the United States Attorney for the District of New Jersey and Local Form Certification of Service must be filed. (5) The application must include Local Form Order Granting Application for Payment of Unclaimed Funds. (c) Objection. Unless a party in interest files an objection within 21 days of the filing of the application, the request will be considered by the court without a hearing. 2020 Comment The title of this Rule is amended to include Subchapter V of Chapter 11 due to the enactment of the Small Business Reorganization Act of 2019. This Rule is amended to conform with the adoption of Director's Form 1340 (to be effective December 1, 2019) by the Judicial Conference of the United States. If an objection is timely filed in accordance with subsection (c) the court will schedule a hearing. In a closed case, no motion to reopen is required and no reopening fee will be charged. https://www.njb.uscourts.gov/local-rules-and-orders https://www.njb.uscourts.gov
New Mexico	D. N.M.	No specific LBRs on SubV readily apparent https://www.nmb.uscourts.gov/court-info/local-rules-and-orders https://www.nmb.uscourts.gov
New York	E.D.N.Y.	No specific LBRs on SubV readily apparent https://www.nyeb.uscourts.gov/local-bankruptcy-rules-united-states-bankruptcy-court-eastern-district-new-york https://www.nyeb.uscourts.gov
New York	N.D. N.Y.	No specific LBRs on SubV readily apparent https://www.nyeb.uscourts.gov/local-bankruptcy-rules-united-states-bankruptcy-court-eastern-district-new-york https://www.nyeb.uscourts.gov
New York	S.D.N.Y.	No specific LBRs on SubV readily apparent https://www.nysb.uscourts.gov/content/local-rules https://www.nysb.uscourts.gov
New York	W.D. N.Y.	No website found
North Carolina	E.D.N.C.	LBR 3014-1 ELECTION UNDER § 1111(b) BY SECURED CREDITOR IN SUBCHAPTER V CASE In a case under subchapter V of chapter 11 in which § 1125 of the Bankruptcy Code does not apply, an election of application of § 1111(b)(2) of the Bankruptcy Code by a class of secured creditors may be made at any time within the time fixed by the court for filing written acceptances or rejections of the Debtor's plan or within such later time as the court may fix prior to expiration of the period provided herein. http://www.nceb.uscourts.gov/sites/ncsb/files/local%20rules%2012-1-23_0.pdf

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		http://www.nceb.uscourts.gov
North Carolina	M.D.N.C.	LBR 2007.1-1 TRUSTEES & EXAMINERS (CH. 11) (b) Appointment of Trustee in a Subchapter V Case. If the court has not appointed one or more standing trustees to serve in cases under subchapter V of chapter 11, the bankruptcy administrator must promptly file a notice identifying the disinterested individual who will serve as the trustee in a subchapter V case, including the individual's name and address. LBR 3003-1 CHAPTER 11 CLAIMS (b) Period for Filing Chapter 11 Claims in a Case under Subchapter V. In a chapter 11 case under subchapter V, non-governmental units must file proofs of claim (if required to be filed) within 70 days after the order for relief, unless the court orders otherwise prior to expiration of such period. LBR 3014-1 ELECTION UNDER 11 U.S.C. § 1111(b) Subchapter V Case. In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, a class of secured creditors may elect to apply 11 U.S.C. § 1111(b)(2) within 14 days after service of the first plan or within such later time as the court may fix prior to expiration of such period. http://www.ncmb.uscourts.gov/court-info/local-rules-and-orders/local-rules http://www.ncmb.uscourts.gov
(North Carolina)	W.D.N.C.	LBR 3001-1 Claims and Equity Security Interests (c) Time for Filing Proof of Claim or Interest in a Chapter 11 Case. Pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3) and unless otherwise ordered by the court, a proof of claim or interest shall be timely if filed: (1) In a case filed under Subchapter V of Chapter 11, within 70 days after the order for relief; https://www.ncwb.uscourts.gov/sites/ncwb/files/WDNC%20Bankruptcy%20Local%20Rules%20Sept%202021.pdf https://www.ncwb.uscourts.gov
North Dakota	D.C. N.D.	No specific LBRs on SubV readily apparent http://www.ndb.uscourts.gov/local-rules-and-orders http://www.ndb.uscourts.gov
Ohio	N.D. Ohio	No LBRs on Sub https://www.ohnb.uscourts.gov/file-list/local-bankruptcy-rules https://www.ohnb.uscourts.gov
Ohio	S.D. Ohio	No specific LBRs on SubV readily apparent https://www.ohsb.uscourts.gov/court-info/local-rules-and-orders https://www.ohsb.uscourts.gov
Oklahoma	E.D. Okla.	No website found
Oklahoma	N.D. Okla.	No specific LBRs on SubV readily apparent

		https://www.oknb.uscourts.gov/court-info/local-rules-and-orders https://www.oknb.uscourts.gov
Oklahoma	W.D. Okla.	No specific LBRs on SubV readily apparent https://www.okwb.uscourts.gov/local-rules-and-orders-0 https://www.okwb.uscourts.gov
Oregon	D. Or.	No specific LBRs on SubV readily apparent https://ord.uscourts.gov/index.php/rules-orders-and-notice/local-rules/bankruptcy-procedure https://ord.uscourts.gov
Pennsylvania	E.D. Pa.	No specific LBRs on SubV readily apparent https://www.pacb.uscourts.gov/court-info/local-rules-and-orders https://www.pacb.uscourts.gov
Pennsylvania	M.D.Pa.	No specific LBRs on SubV readily apparent https://www.pamb.uscourts.gov/court-info/local-rules-and-orders https://www.pamb.uscourts.gov
Pennsylvania	W.D.Pa.	No specific LBRs on SubV readily apparent https://www.pawb.uscourts.gov/court-info/local-rules-and-orders https://www.pawb.uscourts.gov
Rhode Island	D.R.I.	LBR 3020-1 CHAPTER 9 AND 11 CONFIRMATION (b) Documents Required Seven Days Prior to Confirmation Hearing in Subchapter V Cases. Not less than seven (7) days prior to the hearing on confirmation, the debtor shall provide the following to the Court, the local office of the United States trustee, and any other party specified by the Court: (1) A proposed order of confirmation of the plan in substantially the same form as <u>R.I. Local Form 3020-1.5</u> ; (2) A certification of compliance with the requirements of <u>11 U.S.C. § 1191</u> , or in the alternative, evidence of such compliance at the hearing; and (3) Any other documents necessary for plan confirmation. (c) Proof of Deposit Due Seven Days Prior to Confirmation Hearing, if Applicable. Proof of deposit shall be filed with the Clerk of Court at least seven (7) days prior to the hearing on confirmation, if applicable. A copy of the bank statement showing the amount on deposit in accordance with Fed. R. Bankr. P. 3020(a) is required. The amount of the deposit must be equal to the initial distribution for all classes on the effective date of the plan. Any party waiving payment from funds on deposit must file a written waiver within the time indicated herein. (d) Failure to timely file the documents set forth in subdivisions (a) and (b) of this LBR may result in the vacating of the hearing on confirmation, and it will be the responsibility of the plan proponent to notify all creditors and interested parties thereof. 2/19/20 This rule is reorganized to distinguish the documents to be filed prior to confirmation of regular Chapter 11 cases from those under subchapter V.

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		Subdivision (b)(1) of the rule incorporates in subchapter V cases the new local form of confirmation order, R.I. Local Form 3020-1.5 LBR 3016-1 CHAPTER 11 - PLAN [Amended 2/19/2020] (a) Subchapter V Cases. For subchapter V cases, the debtor may use Official Form 425A - <i>Plan of Reorganization for Small Business Under Chapter 11</i>, which may be altered to fit the circumstances of the case. https://www.rib.uscourts.gov/local-rules-0 https://www.rib.uscourts.gov
South Carolina	D.S.C.	LBR 2083-1: CHAPTER 11 SUBCHAPTER V CASES – GENERAL A debtor, who elects to proceed as a subchapter V case, shall file with the Court not later than 14 days before the date of the status conference a Subchapter V Status Report in substantial conformance with the Court’s local form. LBR 4004-2: SUBCHAPTER V DISCHARGE – NON-CONSENSUAL PLANS a. Discharge Following the Completion of Plan Payments. As soon as practicable following the completion by the debtor or trustee of all payments under a plan confirmed under 11 U.S.C. § 1191(b), the debtor shall file a Certification of Plan Completion and Request for Discharge in substantial conformance with the Court’s local form, and a hearing notice in conformance with the Court’s local form prescribed by Local Rule 9013-4. b. Objections. Any party objecting to the granting of a discharge pursuant to paragraph (a) shall, within twenty-one (21) days after service of the Certification of Plan Completion and Request for Discharge, serve an objection upon the debtor, debtor’s counsel, and the trustee and file the objection with the Court. https://www.scb.uscourts.gov/local-rules https://www.scb.uscourts.gov
South Dakota	D.S.D.	LBR 1007-1. Lists (other than mailing list of creditors), Schedules, Statements, and Payment Advices; Extension of Time to File. (g) Chapter 11 statement under 11 U.S.C. § 1116(1). A debtor in a small business chapter 11 case and a debtor who has elected to be a debtor under subchapter V of chapter 11 shall file a statement regarding certain business records using the form at Appendix 1D and attach thereto, when applicable, the business records required by 11 U.S.C. § 1116(1)(A). LBR 1017-1. Voluntary Conversion to Chapter 11. Any debtor voluntarily seeking conversion of the debtor’s case from chapter 7, 12, or 13 to chapter 11 shall state in the motion to convert whether the debtor qualifies as a small business debtor as defined by 11 U.S.C. § 101(51C) and (51D) and whether the debtor elects to proceed under subchapter V of chapter 11. LBR 2015-3. Filing Reports. (b) Unless otherwise ordered, a monthly operating report or a post-confirmation report by a debtor in possession or a trustee in a chapter 11 case, other than a chapter 11 small business case or a chapter 11

		case where the debtor has elected to be a debtor under subchapter V, shall be filed with the Court in compliance with the United States Trustee's "Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11." LBR 3016-1. Chapter 11 Plan Required Content. (a) Each chapter 11 plan shall: (1) be entitled "[insert name of proponent]'S PLAN DATED [insert the date the proponent signs the plan]," e.g., "DEBTOR'S PLAN DATED DECEMBER 19, 2024"; (2) set forth in a separate paragraph the plan term in months, the date of the first payment being made under the plan, the date of the last payment being made under the plan, and the names of the creditors holding nondischargeable claims and secured claims that will continue to receive payments after the plan term ends; (3) not include repetitive descriptions of claims or claim treatment or unnecessarily repeat information from any attendant disclosure statement; and (4) be signed and dated by the proponent and any attorney for the proponent. (c) In addition to the requirements set forth in paragraph (a) above, a plan by a debtor who has elected to be a debtor under subchapter V of chapter 11 shall conform either to: (1) Official Form 425A; or (2) Appendix 3A of these local bankruptcy rules, excluding Parts 1, 2.2, 7.2 (unless the debtor is an individual), and 8 and any references to chapter 13 and "nonstandard provisions," incorporating the relevant portions of Official Form 425A, including Articles 7 and 9, incorporating the relevant portions of Official Form 425B, including part II and paragraphs D and G of part III, and including the information required by 11 U.S.C. § 1190. LBR 3016-2. Disclosure Statement in a Small Business Case. Pursuant to 11 U.S.C. § 1125(f)(1) or 11 U.S.C. §§ 1181(b) and 1187(c) and unless otherwise ordered, a plan filed in a small business chapter 11 case or in a chapter 11 case in which the debtor has elected to be a debtor under subchapter V is deemed to contain adequate information and the proponent of the plan shall not prepare, file, and serve a disclosure statement with the plan. https://www.sdb.uscourts.gov/court-info/local-rules-and-orders https://www.sdb.uscourts.gov
Tennessee	E.D. Tenn.	No specific LBRs on SubV readily apparent https://www.tneb.uscourts.gov/court-info/local-rules-and-orders/local-rules
Tennessee	M.D. Tenn.	No specific LBRs on SubV readily apparent But there is a pdf of Step by Step Instructions: https://www.tnmb.uscourts.gov/sites/tnmb/files/tfr/SBRA_PP_for_public_website.pdf https://www.tnmb.uscourts.gov/court-info/local-rules-and-orders https://www.tnmb.uscourts.gov
Tennessee	W.D. Tenn.	No specific LBRs on SubV readily apparent https://www.tnwb.uscourts.gov/TNW/LBKRules.aspx

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		https://www.tnwb.uscourts.gov
Texas	E.D. Tex	No specific LBRs on SubV readily apparent https://www.txed.uscourts.gov/?q=rules-and-orders https://www.txed.uscourts.gov
Texas	N.D. Tex.	No specific LBRs on SubV readily apparent https://www.txnd.uscourts.gov/rules-and-orders https://www.txnd.uscourts.gov
Texas	S.D. Tex.	No specific LBRs on SubV readily apparent https://www.txs.uscourts.gov/sites/txs/files/Local_Rules_August_11_2023_FINAL.pdf https://www.txs.uscourts.gov
Texas	W.D. Tex.	No specific LBRs on SubV readily apparent - No website readily apparent
Utah	D. Utah	LBR 3003-1 CHAPTER 11 BAR DATE FOR FILING PROOF OF CLAIM OR INTEREST (a) Claims Bar Date in Chapter 11 Cases. (2) Subchapter V Cases. Unless otherwise ordered by the court, in subchapter V cases, the claims bar date will be 70 days after, and for claims by governmental units 180 days after, the later of: (i) the date of entry of the order for relief, (ii) the date of conversion of case to chapter 11, subchapter V, or (iii) the date of the amendment of the petition to designate the case as a subchapter V case. https://www.utb.uscourts.gov/local-rules-and-orders https://www.utb.uscourts.gov
Vermont	D. Vt.	LBR 3014-1. SECTION 1111(B) ELECTION IN SUBCHAPTER V CASE. s may make an election under § 1111(b) not later than 30 days after the debtor files a subchapter V plan, or such later or earlier date as the Court may order. https://www.vtb.uscourts.gov/local-rules https://www.vtb.uscourts.gov
Virginia	E.D. Va.	There appear to be interim procedures, but the rules that posted as of 1/31/2024 have many paragraphs stricken. https://www.vaeb.uscourts.gov/sites/vaeb/files/LBR%20changes%20effective%201-29-2024.pdf https://www.vaeb.uscourts.gov
Virginia	W.D. Va.	No specific LBRs on SubV readily apparent https://www.vawb.uscourts.gov/?q=court-info/local-rules-and-orders https://www.vawb.uscourts.gov
Washington	E.D. Was.	LBR 3017-1 Disclosure Statement and Plan - General (c) Disclosure Statement in Case of Small Business Debtor and in Subchapter V Small Business Debtor Reorganization Cases if §1125 is applicable. (1) A motion for an order determining that a separate disclosure statement is not necessary or for conditional approval of a disclosure statement shall be on seven (7) days notice and hearing to the United States trustee pursuant to LBR 2002-1.

		(2) The proposed disclosure statement and plan shall be filed as an attachment to the motion. (3) If either of the above motions is granted, then the proponent of the plan shall promptly file the approved combined plan or conditionally approved disclosure statement and plan, as appropriate, and comply with LBR 3018-1. LBR 3021-1 Post-Confirmation Reporting Requirements in Chapter 11 Small Business and Subchapter V Cases (a) In all chapter 11 small business and subchapter V cases, the reorganized debtor or any other party authorized to administer the confirmed plan must file quarterly post-confirmation reports using the appropriate mandatory form until a final decree is entered or the case is dismissed or converted to another Bankruptcy Code chapter. (b) Jointly Administered Cases. Each reorganized debtor and any other party authorized to administer the confirmed plan in jointly administered cases must file separate post-confirmation reports on a non-consolidated and non-consolidating basis consistent with any requirements set forth by the United States Trustee. (c) In the cases of small business debtors (as defined in 11 U.S.C. § 101(51D)) and subchapter V debtors (as defined in 11 U.S.C. § 1182), post-confirmation reports should continue to be filed in compliance with the form, timing, and service requirements established by 11 U.S.C. § 308, 11 U.S.C. § 1187, Fed. R. Bankr. P. 2015(a), and the Local Bankruptcy Form 3021-1. https://www.waeb.uscourts.gov/local-bankruptcy-rules https://www.waeb.uscourts.gov
Washington	W.D. Was.	LBR RULE 2015-1. DEBTOR IN POSSESSION DUTIES (a) Chapter 11 Monthly Financial Reports. A small business or subchapter V chapter 11 debtor in possession or trustee shall file with the court a monthly financial report using Official Form B 425C, available on the court's website (www.uscourts.gov) or such other form as the Court may direct established by the United States Trustee in accordance with 28 U.S.C. § 589b. https://www.wawb.uscourts.gov/local-bankruptcy-rules-landing https://www.wawb.uscourts.gov
West Virginia	N.D. W.Va.	No specific LBRs on SubV readily apparent https://www.wvnb.uscourts.gov/court-info/local-rules-and-orders/local-rules General Order 21-5 Establishing an Initial Deposit for Cases Filed Under Subchapter V of Chapter 11. Summary: Ordered that cases filed under Subchapter V of Chapter, Debtor's Attorney shall segregate and hold \$1000.00. Pro Se Debtor's must tender to Sub V Trustee \$1000.00 to be held in escrow for Trustee compensation with approval of Court. https://www.wvnb.uscourts.gov/court-info/local-rules-and-orders/general-orders https://www.wvnb.uscourts.gov

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West Virginia	S.D.W. Va.	No specific LBRs on SubV readily apparent https://www.wvbs.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.wvbs.uscourts.gov
Wisconsin	E.D. Wis.	No specific LBRs on SubV readily apparent https://www.wieb.uscourts.gov/local-rules https://www.wieb.uscourts.gov
Wisconsin	W.D. Wis.	No specific LBRs on SubV readily apparent https://www.wiwb.uscourts.gov/court-info/local-rules-and-orders https://www.wiwb.uscourts.gov
Wyoming	D. Wyo.	No specific LBRs on SubV readily apparent https://www.wyb.uscourts.gov/court-info/local-rules-and-orders https://www.wyb.uscourts.gov
District of Columbia	D.D.C.	LBR 3003-1 CLAIMS IN CHAPTER 11 CASES (a) Claims Bar Date. In a Chapter 11 case, the Clerk shall give notice of the bar date with the notice for the meeting of creditors. Unless a different date is subsequently ordered by the Court: (3) in a chapter 11 case under subchapter V of chapter 11, other than a claim of a governmental unit, a proof of claim is timely if filed no later than seventy (70) days after the date of the entry of the order for relief, unless a different date is fixed by the Court. LBR 3011-1 UNCLAIMED FUNDS (a) Deposits of Unclaimed Funds. Deposits of unclaimed distributions by chapter 7, 11, 12, 13, and subchapter V trustees may be made without leave of Court. LBR 3014-1 ELECTION UNDER 11 U.S.C. § 1111(b) BY SECURED CREDITOR IN SUBCHAPTER V CHAPTER 11 CASE In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, an election of 11 U.S.C. § 1111(b)(2) by a class of secured creditors shall be made no later than fourteen (14) days following the filing of the plan, or such other date as the Court may direct. LBR 3022-1 FINAL REPORT/DECREE (CHAPTER 11) (a) Chapter 11 Subchapter V Proceedings. Unless extended by the Court, on or before the later of thirty (30) days after the granting of a discharge in a case under chapter 11 Subchapter V (Small Business Debtor Reorganization), or thirty (30) days after the disposition of all adversary proceedings or contested matters, whichever is later, the debtor's attorney shall file a motion for final decree. This deadline shall apply to both individual and nonindividual debtors under Subchapter V. https://www.dcb.uscourts.gov/local-rules-orders https://www.dcb.uscourts.gov
Puerto Rico	D.P.R.	No specific LBRs on SubV readily apparent https://www.prb.uscourts.gov/?q=court-info/local-rules-and-orders https://www.prb.uscourts.gov/
U.S. Virgin Islands	D.V.I.	No website found

Faculty

Joseph C. Barsalona II is a partner in Pashman Stein Walder Hayden P.C. in Wilmington, Del., in its Bankruptcy, Restructuring & Creditors' Rights and Commercial Real Estate practice groups. He opened the firm's Delaware office in June 2022 and concentrates on the preparation and issuance of state and federal legal opinions in connection with real estate financings, including substantive non-consolidation, bankruptcy remote and fairness opinions, as well as Delaware state law opinions. Mr. Barsalona focuses his practice on in-court and out-of-court restructurings, distressed-asset sales and bankruptcy litigation. His diverse bankruptcy practice includes representation of debtors (specifically debtors under subchapter V of chapter 11), official committees, secured and unsecured creditors, distressed investors, independent directors, asset-purchasers and other parties in interest in all phases of chapter 11 proceedings and related trial and appellate litigation. Mr. Barsalona has experience representing debtors in subchapter V and with various state court insolvency proceedings in the Delaware Court of Chancery, the Chancery Division of the New Jersey Superior Court and the Supreme Court of the State of New York, including assignments for the benefit of creditors, receiverships and dissolutions. His experience spans a wide variety of industries, including direct-to-consumer e-commerce, legal services, hospitality, pharmaceuticals, oil and gas, food and beverage, entertainment, energy production, retail, manufacturing, publishing, finance, transportation and real estate. Mr. Barsalona is a member of ABI and previously co-chaired its Bankruptcy Litigation Committee. He is also a member of the Turnaround Management Association. Prior to joining Pashman Stein, Mr. Barsalona was an associate in Delaware at Richards, Layton & Finger, P.A. and Morris, Nichols, Arsht & Tunnell LLP. He received his B.A. *cum laude* and with honors from Middlebury College in 2007, and his J.D. *cum laude* in 2012 from Ohio State University Michael E. Moritz College of Law.

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

Institute. She previously was in private practice in the business restructuring, insolvency, bankruptcy and related transactional fields, most recently as a partner at the Chicago office of the international law firm Jones Day. Judge Harner received her B.A. *cum laude* from Boston College in 1992 and her J.D. *summa cum laude* from The Ohio State University College of Law in 1995.

Brad D. Jones is a partner with Stinson LLP in Washington, D.C. His bankruptcy litigation practice focuses on advising debtors, creditors and trustees of their rights and remedies. Mr. Jones's cases span a variety of industries and business sizes. An experienced trial attorney and an appointed chapter 11 trustee, he litigates fraudulent-transfer, preference and other recovery disputes in hearings before U.S. bankruptcy courts and defends appeals to district and appellate courts. He also represents parties in commercial disputes outside of bankruptcy. Prior to entering private practice, Mr. Jones was a trial attorney for the U.S. Trustee Program, serving as counsel of record in more than 650 bankruptcy cases representing the U.S. Trustee in cases involving health care, commercial real estate and internet technology matters. He also served as a Special Assistant U.S. Attorney, where he assisted with white-collar criminal prosecutions involving bankruptcy. Mr. Jones is a fixture in the bankruptcy bar in the Eastern District of Virginia and the District of Columbia, and he has served on the local rules committees in both districts. Due to his knowledge of local practice, he regularly serves as local counsel for landlords, liquidating professionals and convertible noteholders in nationally prominent bankruptcy cases. Mr. Jones serves on the amicus committee of the National Association of Bankruptcy Trustees, advising and filing briefs in support of trustees on nationally important bankruptcy issues. He also maintains an active *pro bono* practice. In 2024, Mr. Jones was recognized in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. He also has been listed in *Arlington Magazine* as a top attorney and in *Virginia Business* as a Legal Elite. Mr. Jones received his B.S.B. in 2008 from Indiana University and his J.D. in 2011 from the University of Virginia.

Denise Penn is a trial attorney in the Executive Office for U.S. Trustees in Washington, D.C., a position she has held since 2019. She began her career as an associate in the financial restructuring practice at Cadwalader, Wickersham & Taft LLP and was Of Counsel at Greenberg Traurig, LLP. Prior to working at the Executive Office, Ms. Penn was a supervisory attorney at the Congressional Research Service of the Library of Congress. She received her J.D. in 2004 from Boston College Law School.

Angela L. Shortall, CPA, CIRA is a director with 3Cubed Advisory Services, LLC in Baltimore and has more than 20 years of financial analysis and accounting experience. She is responsible for providing a wide range of consulting services, including corporate restructuring services and litigation support to her clients. Ms. Shortall supervises the staff of a chapter 7 Trustee, identifying assets and causes of actions, overseeing the liquidation of assets, supervising the preparation of reports to the U.S. Bankruptcy Court and the Office of the U.S. Trustee, and negotiating sale contracts, settlement agreements and claims issues for chapter 7 individual and business bankruptcies. She also provides bankruptcy and reorganization services on numerous engagements involving all phases of chapter 7 and chapter 11 proceedings, and her assignments have included litigation and bankruptcy consulting matters. Ms. Shortall is a member of the American Institute of Certified Public Accountants, Maryland Association of Certified Public Accountants, ABI, International Women's Insolvency & Restructuring Confederation, Bankruptcy Bar Association of Maryland and the Association of Insolvency & Restructuring Advisors for which she served as a past president. She received her B.A. from St. Mary's College of Maryland, and her M.B.A. and J.D. from the University of Pittsburgh.