



AMERICAN
BANKRUPTCY
INSTITUTE

Southeast Bankruptcy Workshop

Consumer Session

Individual Subchapter V Cases: Square Pegs in Round Holes?

Richard P. Cook

Richard P. Cook, PLLC | Wilmington, N.C.

H. David Cox

Cox Law Group, PLLC | Lynchburg, Va.

Hon. Caryl E. Delano

U.S. Bankruptcy Court (M.D. Fla.) | Tampa

Nicole Mariani Noel

Kass Shuler, P.A. | Tampa, Fla.



Individual Subchapter V Cases: Square Pegs in a Round Hole?

A Guide to Subchapter V for Consumer Debtors' Attorneys



Individual Subchapter V Cases: Square Pegs in a Round Hole?

Presented by:

Hon. Caryl E. Delano – Tampa, FL
Richard P. Cook, Esq. – Wilmington, NC
H. David Cox, Esq. – Lynchburg, VA
Nicole M. Noel, Esq. – Tampa, FL

3



Topics for Today's Panel

- Differences Between “Regular” Chapter 11s and Subchapter V Cases
- Eligibility Requirements for Subchapter V Debtors
- Pros and Cons to Filing a Subchapter V Case vs. a Chapter 7 or 13 Case
- Specific Considerations for Individuals: Subchapter V Compared to Chapter 13
- Available Tools for Creditors

4



Differences Between “Regular” Chapter 11 Cases and Subchapter V Cases

5



How Subchapter V Cases Differ from “Regular” Chapter 11 Cases

- Effective February 19, 2020
- Subchapter V Trustee Appointed
- No Unsecured Creditors’ Committee
- No U.S. Trustee Fees
- No Disclosure Statement
- Status Conference: 60 Days (Status Report due 14 days in advance)
- Only Debtor May File Plan
- Plan Must be Filed Within 90 Days
- Possible Modification on Debtor’s Principal Residence
- No Absolute Priority Rule
- Acceptance by an Impaired Class not Required
- For Consensual Plans, Discharge Entered upon Confirmation!

6



Eligibility Requirements for Subchapter V Debtors

7



Who Is Eligible to be a Sub V Debtor?

*The debt limit was extended to \$7.5 million under the CARES Act, which expired June 21, 2024

Efforts for further extensions have so far been unsuccessful.

- Under § 1182, a debtor under Sub V is a “person”:
 - engaged in commercial or business activities;
 - whose “aggregate noncontingent liquidated secured and unsecured debts” are not greater than \$3,024,725;* and
 - not less than 50% of debts must arise from the debtor’s business activities.

8



Is Debtor Engaged in Business? – Majority View

Business may be non-operational.

Nothing in the SBRA limits application to a debtor currently engaged in a business operation.

- *In re Wright*, 2020 WL 2193240, at *2 (Bankr. D.S.C. Apr. 27, 2020)
- *In re Blanchard*, 2020 WL 4032411, at *2 (Bankr. E.D. La. July 16, 2020)
- *In re Bonert*, 619 B.R. 248, 256 (Bankr. C.D. Cal. 2020).

9



Is Debtor Engaged in Business? – Minority View

Business must be active

- *In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. 2020)
- Debtors ceased operating their business and sold all business assets before filing and were retired – failed to qualify.
- *In re Johnson*, 2021 WL 825156, at *7 (Bankr. N.D. Tex. Mar. 1, 2021)
- Defunct companies ceased all business activities prior to the petition date.

10



Is Debtor Over Sub V Debt Limit?

Debt limit is
currently
\$3,024,725

- **Disputed Debt Counts!**
 - Simply claiming a debt is “disputed” does not remove it from the calculation of total aggregate debt for purposes of Sub V eligibility.

- **Aggregate Debt Counts!**
 - Affiliate debt is aggregated. If the entity filing bankruptcy is a member of a group of entities under common ownership who are also filing bankruptcy cases, the debt of all the affiliates will be counted toward the monetary cap.

In re 305 Petroleum, Inc., 622 B.R. 209 (N.D. Miss. 2020).

11



Is Debtor Over Sub V Debt Limit?

Recent Case Law
on Eligibility

- *In re Macedon Consulting Inc.*,
652 B.R. 480 (Bankr. E.D. Va. 2023)
 - Bankruptcy court found that the debtor was ineligible for Subchapter V because future amounts due under its unexpired leases exceeded the \$7.5 million debt limit (context: debtor sought to reject the leases).

contrast with

- *In re Zhang Medical P.C.*,
655 B.R. 403 (Bankr. S.D.N.Y. 2023)
 - Bankruptcy court held that future liabilities under unexpired leases and executory contracts should “rarely, if ever, be counted toward the subchapter V debt cap.” (But debtor otherwise ineligible.)

12



Is 50% of Debt Business Debt?

At least 50% of debts must arise from the debtor's business, which depends upon debtor's subjective intent in obtaining the loan.

- *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020)
 - Debtor purchased property as a residence before converting to B&B – qualified for Subchapter V.
 - The fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is consumer debt.
 - “The test for determining whether a debt should be classified as a business debt, rather than as a consumer debt, is whether it was incurred with an eye toward profit...[c]ourts 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.”

13



Pros & Cons of Filing a Subchapter V Case vs. a Chapter 7 or 13 Case

14



Pros of Filing an Individual Subchapter V Case

- Because Sub V debtors remain in possession and have control of all property of the estate, they can control when property is liquidated, when adversary proceedings are filed, and which professionals to employ. *See* § 1184 (debtor-in-possession has same rights of a trustee).
- Sub V debtors can pay modified secured claims over longer than 60 months (limited to 60 months in Chapter 13. *See* § 1322(d)).
- Section 1141(d)(5), which provides that individual debtors receive a discharge upon completion of plan payments, doesn't apply in Sub V cases. In Sub V cases, individual debtors receive their Chapter 11 discharge immediately upon confirmation of a "consensual" plan under § 1191(a).

15



Pros of Filing an Individual Subchapter V Case, *cont'd*

- Subject to court approval, debtors who would be "above-median" in a Chapter 13 case may confirm a Sub V plan with a three-year period under § 1191(c): three years of disposable monthly income vs. five years in Chapter 13.
- No means test. *See* 11 U.S.C. § 1181(a) (§§ 1129(a)(15) & 1325(b)(2) do not apply in Sub V cases).
- Projected disposable income fixed at confirmation?

16



Pros of Filing an Individual Subchapter V Case, *cont'd*

- Only Sub V debtor can amend plan post-confirmation (whereas trustee or unsecured creditors can amend a Chapter 13 plan post-confirmation. *See* § 11 U.S.C. 1329(a); 11 U.S.C. § 1193(b), (c).
- Trustee as a cheerleader: Sub V Trustee has a statutory duty to facilitate a consensual plan. 11 U.S.C. § 1183(b)(7).
- Plan payments begin upon confirmation in accordance with the confirmed plan. In a Chapter 13, plan payments begin within 30 days of the filing of petition or order for relief, whichever is earlier (see 11 U.S.C. § 1326(a)(1)).

17



Cons of Filing an Individual Subchapter V Case

- More Expensive:
 - attorney's fees are greater in a Sub V case than in a Chapter 13; and
 - the debtor must pay Sub V Trustee's fees.
- Unsophisticated debtors may not have the ability to complete monthly operating reports.
- Disruption involved in opening debtor-in-possession bank account.

18



Pros of Filing a Chapter 13 Case

- Debtor remains in possession and has control of property of the estate. § 1303.
- No monthly reports or related entity reports.
- Fewer documents to be provided to Chapter 13 trustee and UST.
- No initial debtor interview.
- No status conferences.
- Chapter 13 trustee is paid based on percentage of plan payments, not an hourly rate.

19



Pros of Filing a Chapter 13 Case, *cont'd*

- Court sets a confirmation hearing within 45 days of the meeting of creditors. § 1324(b).
- Claims bar date is 70 days from petition date (180 days for governmental entities). Fed. R. Bankr. P. 3002(c). In a Chapter 11 case, the court sets the claims bar date. Fed. R. Bankr. P. 3003(c)(3).
- Scheduled claims are not automatically allowed; creditors are still required to file proofs of claim. *Compare with* Fed. R. Bankr. P. 3003(b)(1): undisputed claims in Chapter 11 cases are automatically allowed.

20



Pros of Filing a Chapter 13 Case, *cont'd*

- Debtor may seek modification of plan payments (§ 1329) and may receive a hardship discharge (§ 1328(b)).
- Creditors do not vote on a Chapter 13 plan, but they may object to the plan to the extent it fails to satisfy §§ 1322 and 1325. Fed. R. Bankr. P. 3015(f).
- Debtors, especially those curing arrearages through the plan, may need payment structure provided by Chapter 13 and the Trustee's oversight.

21



Pros of Filing a Chapter 13 Case, *cont'd*

- Under § 1328(a)(2), some otherwise non-dischargeable debts under § 523 are discharged, including:
 - (a)(6) – debts for willful or malicious injury
 - (a)(7) – fines or forfeitures payable to governmental entity other than taxes,
 - (a)(10) – debts that were or could have been listed in a prior case to which debtor waived discharge or discharge was denied
 - (a)(15) – debts to spouse/former spouse/child that are not in the nature of domestic support
 - (a)(16) – obligations to HOAs and Condo Associations “for as long as debtor has an interest” in the unit.

22



Specific Considerations for Individuals:

Subchapter V Compared to Chapter 13

23



Deadline to File Plan & Status Conference/Report

Subchapter V Case

- Debtor must file a plan within 90 days of the order for relief, but this period may be extended if need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).
- Court must hold a status conference no later than 60 days after the order for relief. § 1188(a).
- At least 14 days before the conference, the debtor must file a report detailing efforts to attain a consensual plan. § 1188(c).

Chapter 13 Case

- Debtor must file a plan within 14 days after the petition is filed, unless the court orders otherwise for cause. Fed. R. Bankr. P. 3015(b).
- No status conference.
- No status conference report.

Only the debtor can file a plan under Subchapter V or Chapter 13

11 U.S.C. § § 1189(a) and 1321.

24



Sub V Plan

Requirements for Subchapter V plans are set forth in § 1190(1)

- **Subchapter V plan must include:**

- a brief history of debtor's business operations;
- a liquidation analysis; and
- projections that demonstrate the debtor's ability to make payments under the plan.

25



Modification of Claims Secured by Debtor's Principal Residence?

Court should "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."

In re Ventura, 615 B.R. 1, 24 (Bankr. E.D.N.Y. 2020)

- **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.

26



Sub V Plan Confirmation

Sub V plan may be “consensually” confirmed under § 1191(a) if each impaired class has accepted the plan and all requirements of § 1129(a) except (a)(15) are met

Courts differ on what constitutes “acceptance”

Compare

- *In re MVJ Auto World, Inc.*, 2024 WL 3153327 (Bankr. M.D. Fla. June 24, 2024)
 - When an impaired class of creditors fails to accept a Sub V plan, that plan cannot be consensually confirmed under § 1191(a).

with

- *In re Hot’z Power Wash*, 655 B.R. 107 (Bankr. S.D. Tex. 2023)
- *In re Franco’s Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023)
 - If no votes are cast for an impaired class in a Sub V plan, the class should not be counted for purposes of § 1129(a)(8).

27



Cramdown in Subchapter V

Requirements for cramdown are set forth in § 1191(b)

- Plan may be confirmed by cramdown under § 1191(b), and no consenting impaired class is required, if:
 - provisions of § 1129(a), other than (a)(8), (a)(10), and (a)(15) are met;
 - plan does not discriminate unfairly; and
 - plan is fair and equitable as to each impaired, nonconsenting class. §§ 1181(a), 1191(b).

28



Fair & Equitable Under § 1191(b) & (c)

Three

Requirements

- With respect to secured claims, the plan must satisfy § 1129(b)(2)(A):
 - (i) creditor retains its lien to the extent of its allowed claim and creditor receives payments totaling at least the amount of its claim valued as of the plan's effective date or at least the value of the creditor's secured claim;
 - (ii) for the sale of collateral free and clear with lien to attach to the proceeds; for the indubitable equivalent of its claim.
- Plan 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), or the value to be distributed is not less than that projected disposable income; and
- The debtor will be able to make all payments under the plan, or there is a reasonable likelihood that the debtor will be able to make the payments, and the plan provides for remedies to protect creditors if payments are not made.

29



Disposable Income in Subchapter V

Similar to the definition of disposable income in § 1225(b)(2).

- Under § 1191(d), disposable income is income that is received by the debtor and that is not "reasonably necessary to be expended" for:
 - the maintenance or support of the debtor or a dependent of the debtor;
 - a domestic support obligation that first becomes payable after the date of the filing of the petition; or
 - payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.

30



Plan Modification

Subchapter V

- Only the debtor may modify the plan.
- Post-confirmation, debtor may only modify a plan confirmed under § 1191(b)—debtor may not modify a consensual plan.

Chapter 13

- The debtor may modify the plan at any time before confirmation. § 1323.
- Post-confirmation, the plan may be modified by the debtor, the trustee, or holder of an allowed unsecured claim. § 1329.

31



Property of the Estate

Subchapter V

- If court confirms a plan under § 1191(b)'s cramdown provisions, property of the estate is expanded to include postpetition assets and earnings.
- If court confirms a plan under § 1191(a)'s consensual plan provisions, property of the estate is not expanded.

Chapter 13

- Section 1306 broadens property of the estate for Chapter 13.
- Property of the estate includes:
 - property acquired "after the commencement of the case but before the case is closed, dismissed, or converted"; and
 - "earnings from services performed by the debtor after the commencement of the case." § 1306(a).

Defined in 11 U.S.C. § 541 for both Chapter 11 and 13

32



Codebtor Stay

Subchapter V

- Unlike Chapters 12 and 13, Chapter 11 does not provide a statutory codebtor stay;
- Guarantors are protected only if the court grants relief under § 105.

Chapter 13

- Upon the filing of the case, the automatic stay extends only to codebtors on consumer debts (defined in § 101(8));
- Does not apply to debts incurred in the ordinary course of business. § 1301.

33



Dismissal

Subchapter V

- 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.” § 1112(b)(1).

Chapter 13

- The court, upon request of a party in interest or the trustee, may dismiss a Chapter 13 case or convert it to a case under Chapter 7 for “cause.” § 1307(c).

“Cause” for dismissal under both chapters includes “material default by the debtor with respect to a confirmed plan.” § 1112(b)(1)(N); § 1307(c)(6).

34



Effect of Post-Confirmation Dismissal

- If dismissal follows confirmation under § 1191 but before a discharge has been entered:
 - Dismissal before entry of a discharge will restore the parties to their pre-bankruptcy status.
- If dismissal follows confirmation under § 1191(a) and the debtor has received a discharge:
 - Post-confirmation dismissal, without further order of the Court, would not affect the discharge already received or the binding effect of the plan.

35



Discharge

Subchapter V Cases

- If a plan is consensually confirmed under § 1191(a), discharge occurs upon confirmation (except in a liquidating plan).
- If a plan is non-consensually confirmed, discharge entered after completion of all payments due (3-5 years). § 1192.
- Section 1141(d)(5) does not apply to a case under Subchapter V. So there is no hardship discharge in an individual case.
- Regardless of when the discharge occurs, in the case of an individual debtor, the discharge in a Subchapter V does not discharge debts excepted under § 523(a).

36



Discharge

Chapter 13 Cases

- Section 1328(a) incorporates most § 523(a) exceptions to discharge (full plan completion discharge). But...full plan completion will discharge:
 - § 523(a)(15) divorce or separation agreement debts that are not domestic support obligations.
 - § 523(a)(10) debts that were denied discharge in an earlier bankruptcy.
 - § 523(a)(14) debts incurred to pay an otherwise nondischargeable tax.
- Long-term debts under § 1322(b)(5) excluded from full-plan discharge under § 1328(a)(1).
- Section 1328(b) hardship discharge incorporates all § 523(a) exceptions to discharge.

37



Available Tools for Creditors

38



Tools for Creditors in Subchapter V

- Sub V debtors may not need your vote to confirm their plans, but you can still object to the debtor's attempt to confirm under § 1191(b) if the plan is not "fair and equitable" under § 1191(c)?
 - Is the plan feasible? Do debtor's projections comport with prepetition performance?
 - Does the plan provide for debtor's disposable income?
 - Does the plan provide "appropriate remedies" in the event of a default?
- You have leverage in negotiating plan treatment:
 - The right to appeal confirmation order.
 - The impact on the debtor of the delay in obtaining a discharge, additional time spent in the bankruptcy case, and the additional attorney's fees.
 - Sub V Trustee required to distribute funds under Plan.

Benefit to your client of a consensual plan: Debtor cannot modify the plan!

39



Subchapter V Resources

- Official Form B 425A – *Plan of Reorganization for Small Business Under Chapter 11*
- Official Form B 425C – *Monthly Operating Report for Small Business Under Chapter 11*

<https://www.uscourts.gov/forms/bankruptcy-forms#procedure>

40



Questions?

41

Faculty

Richard P. Cook is the owner and managing attorney of Cape Fear Debt Relief, a boutique bankruptcy firm in Wilmington, N.C., that represents individuals and small businesses in chapter 7, 11 and 13 cases before the U.S. Bankruptcy Courts in Eastern North Carolina. In February 2020, Mr. Cook was named a subchapter V trustee for the Eastern District of North Carolina. He is recognized by the North Carolina State Bar as a Board-Certified Specialist in both Business and Consumer Bankruptcy Law. Mr. Cook was selected as a “Rising Star” by *Super Lawyers* in 2017, 2018, 2019, 2020, 2021 and 2022, and in 2020 he was honored as one of ABI’s “40 Under 40.” He formerly served on the board of the North Carolina State Bar Association’s Bankruptcy Section Council from 2013-16 and as the Fourth Circuit Chair for the National Association of Consumer Bankruptcy Attorneys from 2019-21, and he is a regular speaker at state and national bankruptcy conferences. In 2017, 2019, 2020 and 2021, Mr. Cook was recognized as a *Pro Bono* Honor Society Inductee by the N.C. *Pro Bono* Resource Center for providing more than 50 hours of *pro bono* legal services each year. Prior to founding Cape Fear Debt Relief, he was an associate with Butler & Butler, LLP in Wilmington, N.C., and prior to that, he was an associate with Brock & Scott, PLLC in Winston-Salem, N.C. Mr. Cook received his undergraduate degree and J.D. from the University of North Carolina at Chapel Hill in 2003 and 2007, respectively.

H. David Cox is the founding member of Cox Law Group PLLC in Lynchburg, Va., and practices bankruptcy law throughout the Western District of Virginia. Prior to entering private practice, he clerked for the late Hon. William E. Anderson. He co-edits the treatise *Bankruptcy Practice in Virginia*, co-authored the fourth edition of ABI’s *Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code*, and has lectured at numerous regional and national CLE programs. Mr. Cox is a member of the National Bankruptcy Conference, a Fellow of the American College of Bankruptcy, chair of the Bankruptcy Law Section of the Virginia Bar Association and a faculty member of the mandatory Virginia State Bar Harry L. Carrico Professionalism Course, and he serves on ABI’s Board of Directors. He received his B.A. in 1992 from Virginia Tech and his J.D. in 1995 from the University of Richmond - TC Williams School of Law.

Hon. Caryl E. Delano is Chief Judge for the U.S. Bankruptcy Court for the Middle District of Florida in Tampa, initially appointed on June 25, 2008, and named Chief Judge on October 1, 2019. She also was appointed Presiding Judge of the Fort Myers Division in July 2012. In 2022, Judge Delano was appointed by the Eleventh Circuit to a second 14-year term as a bankruptcy judge. In 2022, she was appointed to the Bankruptcy Judges Advisory Committee to the Administrative Office of the U.S. Courts for a three-year term beginning in 2023. On July 6, 2023, the district court reappointed her as Chief Judge for another four-year term beginning on Oct. 1, 2023. Previously, Judge Delano practiced before the bankruptcy courts of the Central District of California for 14 years. In 1994, she returned to Tampa and most recently practiced law with the firm of Addison & Delano, P.A., where she concentrated her practice on bankruptcy and commercial litigation. Judge Delano has represented debtors and creditors in numerous chapter 11 cases and related adversary proceedings. She served as the liaison judge to the Middle District of Florida’s Local Rules Lawyers’ Advisory Committee from 2011-20 and is a member of the National Conference of Bankruptcy Judges Federal Rules Advisory Committee. In 2017, Judge Delano received the Southwest Florida Bankruptcy Professionals Asso-

ciation's Alexander L. Paskay Professionalism Award. In addition, she is a former executive director and past-president of the J. Clifford Cheatwood American Inn of Court. Judge Delano received her B.A. in English *cum laude* in 1976 from the University of South Florida and her J.D. in 1979 from Indiana University School of Law, having completed her final year of law school at Emory University School of Law.

Nicole Mariani Noel is a shareholder at Kass Shuler, P.A. in Tampa, Fla., where she has been practicing in the fields of bankruptcy, creditors' rights and insolvency, real estate, consumer and business litigation since 2009. She heads the Bankruptcy practice group for the firm and handles cases throughout the state of Florida in all districts, as well as District of Colorado, Eastern and Southern District of Texas, all three Districts in Tennessee, and the Northern and Southern Districts of Illinois. Ms. Noel is the president of the Tampa Bay Bankruptcy Bar Association (TBBBA) for the 2024-25 bar year. She formerly chaired the Bankruptcy Practice Group for the American Legal and Financial Network (ALFN) and the Case Law Update Subcommittee for the Real Property Finance and Lending Committee of the Real Property Probate and Trust Law Section of the Florida Bar. She also recently authored a chapter on bankruptcy in *Florida Foreclosure Law*, published by Fastcase. Ms. Noel is active in the community and is an adjunct professor at Stetson University College of Law, St. Petersburg College and Hillsborough Community College, teaching bankruptcy, real property finance, business law and civil litigation. She participated in the 2016 NextGeneration program, held during the National Conference of Bankruptcy Judges (NCBJ), and she was honored to become a Fellow for the Florida Bar Leadership Academy. In addition, she has been named one of ALFN's Junior Professionals and Executives Group (JPEG)'s standout young professionals to watch in 2016 and most recently received the 2023 Industry Achievement Award for the ALFN. Ms. Noel received her undergraduate degree from Florida State University and her M.B.A. and J.D. from Stetson University School of Business Administration and Stetson University College of Law, respectively.