A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

Revised June 2022

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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). Editorial revisions in July 2026 correct typographical errors.

Update to A Guide to the Small Business Reorganization Act of 2019 (July 2026) supplements the *Guide.*

The *SBRA Guide* is available at:

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Table of Contents

I. Introduction 1

II. Overview of Subchapter V 7

A. Changes in Confirmation Requirements 8

B. Subchapter V Trustee and the Debtor in Possession 9

C. Case Administration and Procedures 9

D. Discharge and Property of the Estate 10

1. Discharge – consensual plan 10

2. Discharge – cramdown plan 10

3. Property of the estate 11

III. Debtor's Election of Subchapter V and Revised Definition of "Small Business Debtor" 11

A. Debtor's Election of Subchapter V 11

B. Eligibility for Subchapter V; Revised Definitions of "Small Business Debtor" and "Small Business Case" 17

1. Statutory provisions governing application of subchapter V and the debt limit 17

2. Overview of eligibility for subchapter V 19

3. Revisions to the definition of "small business debtor" and requirements for eligibility for subchapter V in general 21

C. Debtor Must Be "Engaged in Commercial or Business Activities" 24

1. Whether debtor must be engaged in commercial or business activities on the petition date 25

2. What activities are sufficient to establish that the debtor is "engaged in commercial or business activities" when the business is no longer operating 28

D. What Debts Arise From Debtor's Commercial or Business Activities 37

E. Whether Debts Must Arise From Current Commercial or Business Activities 44

F. What Debts Are Included in Determination of Debt Limit 46

G. Ineligibility of Corporation Subject to SEC Reporting Requirements and of Affiliate of Issuer 49

IV. The Subchapter V Trustee 51

A. Appointment of Subchapter V Trustee 51

B. Role and Duties of the Subchapter V Trustee 53

1. Trustee's duties to supervise and monitor the case and to facilitate confirmation of a consensual plan 53

2. Other duties of the trustee 57

3. Trustee's duties upon removal of debtor as debtor in possession 58
C. Trustee's Disbursement of Payments to Creditors 59
1. Disbursement of preconfirmation payments and funds received by the trustee 59
2. Disbursement of plan payments by the trustee 61
D. Termination of Service of the Trustee and Reappointment 62
1. Termination of service of the trustee 62
2. Reappointment of trustee 63
E. Compensation of Subchapter V Trustee 64
1. Compensation of standing subchapter V trustee 64
2. Compensation of non-standing subchapter V trustee 65
3. Deferral of non-standing subchapter V trustee's compensation 70
F. Trustee's Employment of Attorneys and Other Professionals 70
V. Debtor as Debtor in Possession and Duties of Debtor 76
A. Debtor as Debtor in Possession 76
B. Duties of Debtor in Possession 77
C. Removal of Debtor in Possession 81
VI. Administrative and Procedural Features of Subchapter V 89
A. Elimination of Committee of Unsecured Creditors 90
B. Elimination of Requirement of Disclosure Statement 91
C. Required Status Conference and Debtor Report 92
D. Time for Filing of Plan 96
E. No U.S. Trustee Fees 100
F. Modification of Disinterestedness Requirement for Debtor's Professionals 100
G. Time For Secured Creditor to Make § 1111(b) Election 101
H. Times For Voting on Plan, Determination of Record Date for Holders of Equity Securities, Hearing on Confirmation, Transmission of Plan, and Related Notices 102
I. Filing of Proof of Claim; Bar Date 103
J. Extension of deadlines for status conference and debtor report and for filing of plan 105
K. Debtor's postpetition performance of obligations under lease of nonresidential real property – § 365(d) 111
VII. Contents of Subchapter V Plan 113
A. Inapplicability of §§ 1123(a)(8) and 1123(c) 113
B. Requirements of §1190 for Contents of Subchapter V Plan; Modification of Residential Mortgage 114

C. Payment of Administrative Expenses Under the Plan 119

VIII. Confirmation of the Plan 121

A. Consensual and Cramdown Confirmation in General 121

1. Review of confirmation requirements in traditional chapter 11 cases and summary of changes for subchapter V confirmation 121

2. Differences in requirements for and consequences of consensual and cramdown confirmation 124

3. Benefits to debtor of consensual or cramdown confirmation 128

4. Whether balloting on plan is necessary 133

5. Final decree and closing of case 135

B. Cramdown Confirmation Under §1191(b) 137

1. Changes in the cramdown rules and the "fair and equitable" test 137

2. Cramdown requirements for secured claims 139

3. Components of the "fair and equitable" requirement in subchapter V cases; no absolute priority rule 140

4. The projected disposable income (or "best efforts") test 141

i. Determination of projected disposable income 143

ii. Determination of period for commitment of projected disposable income for more than three years 150

5. Requirements for feasibility and remedies for default 156

6. Payment of administrative expenses under the plan 161

C. Postconfirmation Modification of Plan 161

1. Postconfirmation modification of consensual plan confirmed under §1191(a) 161

2. Postconfirmation modification of cramdown plan confirmed under §1191(b) 164

D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases 165

1. Classification of claims; unfair discrimination 165

2. Acceptance by all classes and effect of failure to vote 167

3. Classification and voting issues relating to priority tax claims 168

4. Timely assumption of lease of nonresidential real estate 169

5. The "best interests" or "liquidation" test of § 1129(a)(7) 170

6. Voting by holder of disputed claim 170

7. Individual must be current on postpetition domestic support obligations 171

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 171

E. § 1129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases 176

1. The § 1111(b)(2) election 177

2. Realization of the "indubitable equivalent" of a secured claim -- § 1129(b)(2)(A)(iii) 187

IX. Payments Under Confirmed Plan; Role of Trustee After Confirmation 190

A. Debtor Makes Plan Payments and Trustee's Service Is Terminated Upon Substantial Consummation When Confirmation of Consensual Plan Occurs Under §1191(a) 190

B. Trustee Makes Plan Payments and Continues to Serve After Confirmation of Plan Confirmed Under Cramdown Provisions of §1191(b) 191

C. Unclaimed Funds 195

X. Discharge 197

A. Discharge Upon Confirmation of Consensual Plan Under §1191(a) 197

B. Discharge Upon Confirmation of a Cramdown Plan Under § 1191(b) 199

C. Exceptions to Discharge in Subchapter V Cases 200

1. Exceptions to discharge after consensual confirmation 201

2. Exceptions to discharge after cramdown confirmation 202

3. Procedure for determination of exceptions to discharge under § 523(a)(2), (4), or (6) 203

D. Whether § 523(a) Exceptions Apply to Cramdown Discharge of Entity 203

1. Statutory language and background 203

2. Judicial debate over application of § 523(a) exceptions to cramdown discharge of an entity 207

XI. Changes to Property of the Estate in Subchapter V Cases 239

A. Property Acquired Postpetition and Earnings from Services Performed Postpetition as Property of the Estate in Traditional Chapter 11 Cases 239

B. Postpetition Property and Earnings in Subchapter V Cases 241

1. Property of the estate in subchapter V cases of an entity 242

2. Property of the estate in subchapter V cases of an individual 244

XII. Default and Remedies After Confirmation 247

A. Remedies for Default in the Confirmed Plan 247

B. Removal of Debtor in Possession for Default Under Confirmed Plan 249

C. Postconfirmation Dismissal or Conversion to Chapter 7 251

1. Postconfirmation dismissal 251

2. Postconfirmation conversion 255

XIII. Effective Dates and Retroactive Application of Subchapter V 257

APPENDIX A **Lists of Sections of Bankruptcy Code and Title 28 Affected or Amended By The Small Business Reorganization Act of 2019 (as amended by the Coronavirus, Aid, Relief, and Economic Security Act)**

APPENDIX B **Summary of SBRA Interim Amendments to The Federal Rules of Bankruptcy Procedure To Implement SBRA**

APPENDIX C **Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13 (Prepared by Bankruptcy Judge Mary Jo Heston's Chambers)**

APPENDIX D **Key Events in the Timeline of Subchapter V Cases (Prepared by Bankruptcy Judge Benjamin A. Kahn and Law Clerk Samantha M. Ruben)**

APPENDIX E **Comparison of Subchapter V With Chapter 13 and Chapter 11**

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

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[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

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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 12[12] and chapter 13[13] 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

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[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 chapter12 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.

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[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

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[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

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[32] NetJets Aviation, Inc. v. RS Air, LLC (*In re* RS Air, LLC), 638 B.R. 403, 413-14 (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),* 638 B.R. 403 (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 408 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 conference[38] and for filing a plan[39] 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

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[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 is 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 2021[47] 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

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[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 person[56] (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 debts[57] 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.

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[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").
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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]

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[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), 638 B.R. 403, 411-13 (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 413.

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)*, 638 B.R. 403 (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 410. 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]

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[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)*, 638 B.R. 403, 410-12 (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 410-11.

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.

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[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 owned 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]

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[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

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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 11[85] 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]

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[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 12[89] 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.

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§ 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]

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[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,

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[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.

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[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

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[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 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, 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.").

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."

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[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*,* 639 B.R. 365, 383 (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]

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[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]

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[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.

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[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 consummation[143] 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

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[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 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, although § 349(b)(3) ordinarily revests the property of the estate in the debtor, but that, as the Supreme Court recognized in *Czyzewski v. Jevic Holding Corp.,* 580 U.S. 451, 456 (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]

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[154] *See In re* Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 (Bankr. 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 estate[158] 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 professionals[159] 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 courts[161] 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

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[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.

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[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 professionals[172] and their compensation.[173] The debtor cannot use cash collateral[174] or use, sell, or lease property outside the ordinary course of business[175] 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

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[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, 639 B.R. 365 (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

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[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 circumstances[185]); (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]

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[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

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[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]

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[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

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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,* 638 B.R. 255, 258-59 (Bankr. 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

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[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, 639 B.R. 365, 383 (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 258-59.[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 258. 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 258.

The court reasoned, *id.* at 259:

> 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. 638 B.R. at 257-58.
[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 debtor[208] 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,* 642 B.R. 345 (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 chapter

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[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., 580 U.S. 451 (2017). The Supreme Court observed in *Jevic Holding Corp., id. at* 456-57:

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

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 V[212] 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.

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[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 plan[223] and its proponent[224] 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).

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[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.

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[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

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[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]

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[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]

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[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]

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[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 that 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]

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[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]

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[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 1123[285] (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 plans[288] 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

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[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.

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[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 things[294]) "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

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[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 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]

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[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" (§11903(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]

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[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]

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[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]

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[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, 2022[316] 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."

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[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.

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[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]

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[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 COVD-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

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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]

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[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 consummation[349] 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.

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[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 fees[355] and because its duty to file reports under § 308[356] 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]

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[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]

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[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.), 638 B.R. 137 (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 owner[374] or the postpetition liquidation of an asset[375] in an amount not less than the value of the debtor's disposable income.

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[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 12[378] 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. Section 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* 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]

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[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.

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[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 income[393] 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 12[396] and 13[397] 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

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[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]

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[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.

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[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.)*, 638 B.R. 137 (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 146. 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 146, 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 146-47.[406]

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[406] The opinion 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), states that the liquidation proceeds were about $ 433,000, *id.* at 144, 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 145. 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 144. 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.*

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]

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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.), 638 B.R. 137, 144-45 (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 146.

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 146.

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. 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.* at 147 (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.

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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 accountant[412] or credible testimony from the debtor's principal[413] 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 COVD-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

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[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.

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[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) election[428] 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 WL 10111637 at *2 (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.

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[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).

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[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 claims[440] 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.

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[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 (a)	Payment On $30,000 (b)	Interest Paid at 6% (c)	Total of Payments ($ 30,000 + Interest payments) (d)	Remaining Balance ($ 100,000 – (d)) (e)	Monthly Payment on Remaining Balance ((e)/months) (f)	Total Monthly Payment (b) + (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.

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[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."
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> 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

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[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]

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[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.,

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[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

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[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

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[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 asses 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]

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[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

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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 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).

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[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 entity[503] 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).

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[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.

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[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.

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[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*.

Commentators[523] 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 entity[524]) 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.*

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[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).

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[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 plan 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]

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[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 entity[547] 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 arisen 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 provision[550] 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

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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.

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[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 Beechraft, 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 that 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.

[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.

Fourth Circuit's consideration of purposes of subchapter V

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] Section1141(d)(5) makes three other distinctions between the discharge of individual and entity debts. Section 11141(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 discharges 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.

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

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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 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).

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[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.

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[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).

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[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 confirmation[582] 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 statues 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 consummation[592] 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 §1186[594]) 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.

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[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.

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[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 F3d 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, revests 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) revests 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 revest 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

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[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 revested 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

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& 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, Incl (*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 conference[612] and the filing of a plan[613] 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, 2024, 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]

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[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 others[625] 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.

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[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 clause[633] "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]

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[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]

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[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 party of the property for her

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[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.

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[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

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[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 2021[670] 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.

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[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 *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)

§ 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)

	§ 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)

§ 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)

§ 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)

	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)

	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.

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 who 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.

	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.

	debtor's small business status. The UST appoints any such committee. *Id.* 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.

	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. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 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.

	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."

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 **Estate Property Post-confirmation**	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. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	Section 1186 augments § 541 and parallels § 1115 in ch. 11. No separate rule.	Section 1207 augments § 541 and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Section 1306 augments § 541, and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).

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.

	§ 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.

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). None required.	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.
Commencement of Plan Payments	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.		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).
Plan Content	Plans *must*: 1) designate classes of	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2)	Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all

	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 *may*: 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 *may*: 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 *may* 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 *may* 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 *debtors in possession* 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 *and* trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which	Ch. 13 *debtors* 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

	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 *trustees* 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.	

			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 *pro rata*) distribution amongst unsecured claimants.	

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. *In re Rogers*, 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).

	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, *and* 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), *and* 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

				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. *Id.* 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. *Id.* 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. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 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. *Id.* 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

	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

	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 Cases[1]

Benjamin A. Kahn[2]
Samantha M. Ruben[3]

- 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.

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[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 Hearing[6]

  - 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 Deadlines[11]

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	Deadline	Act to Be Performed	Code or Rule[12]
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).

		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).

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 § 1188(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 if 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

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. See note 17, infra.	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. See note 17, infra.	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.

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).

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).

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)

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 mortgage[4] 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 lien[7] 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.

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[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" debtor[16] 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

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[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.

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[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.

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[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.

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[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.