

UPDATE TO A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

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This Update supplements *A Guide to the Small Business Reorganization Act of 2019* (June 2022 rev. ed.), which this Update cites as the “*SBRA Guide*.” The Update contains new material since publication of the *SBRA Guide* and includes material contained in previous updates.

The materials in the Update are organized with the same headings and subheadings as the *SBRA Guide*, together with additional subheadings. An asterisk following a heading or subheading indicates that the section is a new one or includes additional material to supplement the original text. The absence of text after a heading or subheading means that the Update does not supplement that section. References in this Update to “*Update*” indicate that the material is new and not covered in the *SBRA Guide*.

The *SBRA Guide* is available at:

<https://www.ganb.uscourts.gov/sbraguide>

The Update is available at:

<https://www.ganb.uscourts.gov/subvupdate>

**UPDATE TO A GUIDE TO THE SMALL
BUSINESS REORGANIZATION ACT OF 2019**

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New or updated sections are marked with an asterisk

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I. Introduction

Amendments to Bankruptcy Rules*

Effective December 1, 2022, provisions of the Interim Rules adopted after enactment of SBRA and summarized in Appendix B of the *SBRA Guide* were incorporated as amendments to the Federal Rules of Bankruptcy Procedure. A revised Appendix B that references the amendments is attached.

How is Subchapter V Working? ABI Subchapter V Task Force Final Report*

Available data indicates that subchapter V is working as intended and has helped smaller businesses to reorganize successfully.

The *SBRA Guide* noted an empirical study by Bankruptcy Judge (and former bankruptcy professor) Michelle Harner and her staff of 438 cases filed in 2020 that concluded:¹

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

The survey showed that confirmation occurred in more than half of all cases and in over 62 percent of those that were not dismissed.²

¹ Hon. Michelle Harner, Emily Lamasa, and Kimberly Goodwin, *Subchapter V Cases By The Numbers*, 40-Oct AM. BANKR. INST. J. 12, 59 (October 2021). Emily Lamasa is a career law clerk, and Kimberly Goodwin is Judge Harner's paralegal.

² The dataset included 438 randomly selected cases filed between February 19, 2020, and December 31, 2020, with data collection ending on December 31, 2021. The cases were randomly selected based on a list of 1,278 cases (excluding duplicate cases) filed during the period, representing approximately 36 percent of the cases filed. The data set included at least one case in each Circuit. Hon. Michelle Harner, Emily Lamasa, and Kimberly Goodwin, *Subchapter V Cases By The Numbers*, 40-Oct AM. BANKR. INST. J. 12 & nn. 6-8 (October 2021).

As of December 21, 2020, the court had confirmed a plan in 221 cases, the debtor had filed a plan that had not yet been confirmed in 105 cases, the debtor had not filed a plan in 30 cases, and the court had dismissed 82 cases. The debtor had not filed a plan at the time of dismissal in 55 of them. *Id.* at 12 n. 10. In the 30 cases with no plan, the court had converted 25 cases (24 to chapter 7, one to chapter 13) and extended the deadline for the filing of a plan in five. *Id.* at 12.

Consensual confirmation occurred in 130 cases, approximately 59 percent. When nonconsensual confirmation occurred in the other 91 cases, 40 had at least one class of impaired creditors voting against the plan

These early results are consistent with data compiled by the United States Trustee Program with regard to subchapter V cases, which shows confirmation in approximately 55 percent of the cases. The report notes that, compared to non-subchapter V small business cases historically, subchapter V cases “have had approximately double the confirmed plan percentage and a 20 percent lower dismissal percentage, as well as a shorter time to confirmation.”³

Anecdotal evidence indicates that most lawyers and judges agree that subchapter V is working well.⁴ As the court noted in *In re Corinthian Communications, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022), subchapter V has been “a remarkably successful addition to Chapter 11 of the Bankruptcy Code.”

The Subchapter V Task Force of the American Bankruptcy Institute, after a year of study of subchapter V, issued the *ABI Subchapter V Task Force Final Report* that concluded:⁵

After extensive study, the Task Force has concluded that the overwhelming consensus of bankruptcy professionals, bankruptcy judges, and academics is that Subchapter V is functioning as Congress intended. Many have commented that Subchapter V is the most effective and useful bankruptcy legislation passed since enactment of the Bankruptcy Code in 1978.

The data show that confirmation in Subchapter V cases occurs more often, more quickly, and at lower cost than in non-Subchapter V small business cases and standard Chapter 11 cases, and that creditors are receiving more money in Subchapter V.

The American Bankruptcy Institute established a Task Force to evaluate subchapter V and recommend improvements. In April 2024, the Task Force issued its Final Report after a comprehensive review.

The American Bankruptcy Institute is continuing its study of Subchapter V. ABI is particularly interested in learning more about the real-world impact of Subchapter V.

and 51 had impaired classes that did not vote. *Id.* at 59. The average time from filing of the case to confirmation was 184 days, and the median time was 168 days. *Id.* at 59.

³ United States Trustee Program, *Chapter 11 Subchapter V Statistical Summary Through December 31, 2024*, available at <https://www.justice.gov/ust/subchapter-v> (last visited Apr. 9, 2026). The data includes only cases filed in United States Trustee Program districts, which thus excludes Alabama and North Carolina.

For subchapter V cases through the end of fiscal year 2023, the report shows that confirmation occurred in 52 percent of them and that confirmation was consensual in 68 percent of them. Conversion occurred in 13 percent of the cases, and 32 percent were dismissed. The remaining three percent were pending without a confirmed plan. It reports the median months to confirmation as 6.6 and the median months to dismissal as 4.9.

⁴ The author has presented more than 40 continuing legal education programs on subchapter V since its enactment. Although some participants have expressed reservations or problems with subchapter V, most conclude that it is working as intended to expedite reorganization of smaller businesses that should be reorganized and to expedite dismissal or conversion of cases where reorganization is not feasible.

⁵ American Bankruptcy Institute, *Final Report of the American Bankruptcy Institute Subchapter V Task Force* at 5 (2024) [hereinafter “*ABI Subchapter V Task Force Final Report*”]. A free copy is available at <https://subvtaskforce.abi.org/>.

Accordingly, ABI is asking for bankruptcy professionals to submit stories about a distressed business or creditor who has used or benefited from the subchapter and comments about whether that case could still happen under the lower debt cap for Subchapter V debtors. The link for submissions is <https://www.abi.org/subvstories>.

II. Overview of Subchapter V

A. Changes in Confirmation Requirements

B. Subchapter V Trustee and the Debtor in Possession

C. Case Administration and Procedures

D. Discharge and Property of the Estate

1. Discharge – consensual plan

2. Discharge – cramdown plan

3. Property of the estate

III. Debtor’s Election of Subchapter V and Revised Definition of “Small Business Debtor”

A. Debtor’s Election of Subchapter V*

Shortly after entry of an order for relief on an involuntary petition, the debtor in *In re Zarifian Enterprises, LLC*, 2024 WL 5165920 (Bankr. N.D. Ill. 2024), moved to convert the chapter 7 case to subchapter V to “actively engage in liquidating its assets to pay its creditors” through a subchapter V liquidating plan. *Id.* at *1. The court held that the debtor was engaged in commercial and business activities because it maintained significant assets, a bank account, a commercial lease, and a claim against its landlord for wrongful lockout. *Id.* at 3. The court permitted conversion to allow the debtor to liquidate its assets.

Courts continue to conclude that the burden of proof on the issue of the debtor’s eligibility for subchapter V is on the debtor when an objection is filed. *E.g.*, *In re Joiner*, 2025 WL 281053 at * 8 (Bankr. W.D.N.C. 2025); *In re Evergreen Site Holdings, Inc.*, 652 B.R. 307, 316 (Bankr. S.D. Ohio 2023).

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

As *SBRA Guide* § III(B) explains, temporary legislation, effective until June 20, 2024, increased the debt limit for subchapter V eligibility to \$ 7.5 million and amended § 1182(1) to state the requirements for eligibility for subchapter V. The provisions for subchapter V eligibility in temporary § 1182(1) were the same as the provisions in § 101(51D) that define a “small business debtor” except that the debt limit in § 101(51D) is \$ 3,024,725 (as adjusted under § 104 on April 1, 2022).

Under the sunset provisions of the temporary legislation, § 1182(1) reverted to its previous language such that, effective on June 20, 2024, § 1182(1) now defines debtor as a

“small business debtor.” Section 103(j) provides that subchapter V applies in a chapter 11 case in which a debtor, as defined in § 1182(1), elects its application.

The effect of the sunset is that a debtor must be a “small business debtor” under § 101(51D) to be eligible for subchapter V. The only substantive effect is that the debt limit is \$ 3,024,725, but § 101(51D) now states all the requirements for subchapter V eligibility.

As adjusted on April 1, 2025, under § 104, the debt limit is \$ 3,424,000.

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

The Eleventh Circuit in *Guan v. Ellingsworth Residential Community Association, Inc.*, (*In re Ellingsworth Residential Community Association, Inc.*), 125 F.4th 1365 (11th Cir. 2025), held that a debtor need not have a profit motive to be “engaged in commercial or business activities.”

The debtor was a homeowner’s association that state law characterized as a not-for profit corporation. But that status, the court explained, did not preclude it from engaging in business-like activities. “To the contrary,” the court said, “HOAs can collect assessments, manage budgets, enforce rules, and maintain common areas. In practice, an HOA operates much like a small business – overseeing the maintenance of shared properties, contracting with service providers, and negotiating with third parties on behalf of its members.” *Id.* at 1379 (citations and footnote omitted). Accordingly, the court affirmed the bankruptcy court’s order determining that the debtor was eligible for subchapter V.⁶

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

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

As *SBRA Guide* § III(C)(2) discusses, a number of courts have broadly interpreted “commercial or business activities” to include “wind-down” activities for a business that has discontinued active business operations. More courts have taken this approach.

In *In re Hillman*, 2023 WL 3804195 (Bankr. N.D.N.Y. 2023), the debtor held a 50 percent equity interest in two entities. A creditor had filed a lawsuit against one of them and the debtor for defaults under a commercial lease agreement with the company and the debtor’s personal guaranty of its obligations. The creditor objected to subchapter V eligibility on the ground that neither of the debtor’s two companies was engaged in commercial or business activities at the time of the filing of the petition.

The court agreed that eligibility must be determined based on the existence of activities on the petition date but held that the debtor met the requirement under the “totality of circumstances” approach because both companies were currently engaged in commercial or business activities.

⁶ The court noted that the bankruptcy court had determined eligibility in a non-final order but that the interlocutory order had merged into her appeal from the Bankruptcy Court’s final order confirming the reorganization plan. 125 F.4th at 1378 n. 7 (11th Cir. 2025).

Although the defendant company had closed, the court ruled that the defense of the claim on the guaranty constituted sufficient winding down activity for the debtor to satisfy the “engaged in commercial or business activities” requirement. *Id.* at *4. The court found no “reason to distinguish between pursuing versus defending commercial litigation when determining subchapter V eligibility.” *Id.* at * 4 n. 8 (citing *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 237 (Bankr. S.D. Tex. 2021)).

The creditor alleged that the operations of the other entity were not enough to constitute being presently involved in business or commercial activity, characterizing it as a “hobby.” The court rejected the contention that “little or scarce business activity is insufficient for subchapter V eligibility,” noting that the company had completed a sale of goods for profit within 60 days of the bankruptcy filing. *Id.* at *4 n. 7.

In *In re Robinson*, 2023 WL 2975630 (Bankr. S.D. Miss. Apr. 17, 2023), the debtor filed the subchapter V case over a year after the closing of a poultry farming operation when its contract for chicken processing terminated. At the time of the filing, the debtor had a job as a loader operator at a lumberyard. The debtor filed the case to liquidate the farm’s assets after efforts to find another grower contract were unsuccessful.

The U.S. Trustee objected to the debtor’s eligibility, contending that the cessation of farming operations more than a year before the filing was so distant that his current activities could not be characterized as winding down.

The debtor was continuing to manage farm assets, was seeking to sell the farm or parts of it and maintained and inspected improvements on the farm. The court concluded that, under the “totality of circumstances” approach, the debtor’s activities were sufficient wind-down activities to satisfy the “engaged in” commercial or business activities requirement. The court reasoned, “[T]he totality of the circumstances standard does not dictate a quantum of activities or time engaged in them.” *Id.* at *4.

In *In re Free Speech Systems, LLC*, 649 B.R. 729, 733 n.14 (Bankr. S.D. Tex. 2023), the court noted that the requirement that the debtor be engaged in commercial or business activities is not a continuing one, such that the termination of business operations after filing does not render the debtor ineligible.

In two related cases, a bankruptcy court held that the individual debtors, siblings who each owned 25 percent of a construction and contracting company but had not had any involvement with the company for about seven years, were “engaged in commercial or business activities.” The debtors were appealing a judgment against them on a guaranty of a debt of the business and were pursuing an action against former business associates for taking excessive distributions from the company. *In re Fama-Chiarizia*, 655 B.R. 48 (Bankr. E.D.N.Y. 2023); *In re Fama*, 655 B.R. 648 (Bankr. E.D.N.Y. 2023). (In *Fama-Chiarizia*, the court also found that the debtor’s rental of an apartment in her residence satisfied the requirement.)

After an extensive review of the caselaw, the court agreed “with the substantial majority of courts that have found that a debtor may be eligible to reorganize under Subchapter V when it seeks to address residual business debt, and to marshal residual business assets. And here, the facts and circumstances show that [the debtors seek] to do exactly that with respect to the business debt and assets of [the company].” 655 B.R. at 69 and 2023 WL 6131466 at * 18.

The court further observed, 655 B.R. at 70 and 2023 WL 6131466 at * 18:

And, for better or worse, courts agree that where – as here – the “business and commercial activities” are, in large part, in the nature of evaluating, asserting, pursuing, and defending litigation claims, this can still amount to addressing the business’ debts and marshaling its assets, and can satisfy Section 1182(1)(A)’s requirement of “commercial or business activities.”

An individual’s involvement in the prosecution of an appeal from a judgment against him and his solely-owned limited liability company, whose debt he had personally guaranteed, was not sufficient engagement in commercial or business activities to establish subchapter V eligibility in *In re Bohman*, 663 B.R. 831 (Bankr. D Utah 2024). The court agreed that under some circumstances the prosecution of litigation might qualify as a commercial or business activity but concluded that the Debtor was not “presently or actively” involved in the appeal. *Id.* at 843.

The court rejected the debtor’s arguments that other activities established that he was engaged in commercial or business activities. The debtor, a retired anesthesiologist whose primary income was social security, was not directly engaged in any commercial or business activities, and his limited liability company was no longer operating. The court ruled that he was not engaged in any activities on behalf of the LLC, and that he had not established any intent to restart the business prior to the petition date. *Id.* at 841-43. The court ruled that his work for entities owned by his family, in which he had no ownership interest, on a volunteer basis was not business or commercial activity because it did not involve the buying and selling of commodities and was not a means of livelihood, employment, or gain for the debtor. *Id.* at 840.

An insurance producer working as a W-2 employee on a commission basis also owned a ten percent interest in the employer, was an officer, and had managerial responsibilities, including serving as a mentor to younger insurance producers. The court in *In re Wilson*, 666 B.R. 828 (Bankr. M.D. Ga. 2024), declined to follow the broad approach suggested in *In re Ikalowych*, 629 B.R. 261, 286 (Bankr. D. Colo. 2021),⁷ that a W-2 employee could be engaged in business. Nevertheless, the court concluded that all his duties and responsibilities established that he was engaged in commercial or business activities. 666 B.R. at 837-88 The court ruled, however, that the only debt that could qualify as debt arising from commercial or business activities had to be excluded in determining eligibility because it was unliquidated and, therefore, that the debtor did not meet the requirement that not less than 50% of his debts arise from commercial or business activities. Section III(F) *infra* discusses this aspect of the court’s ruling.

⁷ *SBRA Guide* § III(E) discusses this aspect of the *Ikalowych* decision.

In re Tombul, 2026 WL 1096475 (Bankr. E.D. Tenn. 2026), likewise rejected *Ikalowych*, concluding that W-2 employment alone was insufficient to render a debtor engaged in commercial or business activities.

A company is engaged in commercial or business activities when, although it has not yet generated any business, it has raised capital from investors, leases a facility, maintains bank accounts, employs attorneys to protect its intellectual property rights, is continuing its attempts to generate business, and is providing marketing materials to potential investors. *In re GCPS Holdings, LLC*, 2024 WL 4847831 (Bankr. S.D. Tex. 2024). The court rejected the argument of the creditors who had filed an involuntary petition against the debtor and wanted to propose their own chapter 11 plan that the debtor was not engaged in commercial or business activity because it had never generated any business or income.

Shortly after entry of an order for relief on an involuntary petition, the debtor in *In re Zarifian Enterprises, LLC*, 2024 WL 5165920 (Bankr. N.D. Ill. 2024), moved to convert the chapter 7 case to subchapter V to “actively engage in liquidating its assets to pay its creditors” through a subchapter V liquidating plan. *Id.* at *1. The court held that the debtor was engaged in commercial and business activities because it maintained significant assets, a bank account, a commercial lease, and a claim against its landlord for wrongful lockout. *Id.* at *3. The court permitted conversion to permit the debtor to liquidate its assets.

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

In *In re Bennion*, 2022 WL 3021675 (Bankr. D. Idaho 2022), the court ruled that medical debts arising from injuries sustained by a debtor engaged in a “tree-felling” business while doing such work for his mother without charge did not arise out of commercial or business activities. The debtor, therefore, was not eligible for subchapter V because those debts exceeded his business debts.

In *In re Reis*, 2023 WL 3215833 (Bankr. D. Idaho 2023), *aff’d Reis v. Garvin (In re Reis)*, 2024 WL 4051674 (D. Idaho 2024), the U.S. Trustee challenged debtor’s eligibility because almost all her debt was for student loans incurred to enable her to go to medical school.

The debtor had graduated from medical school in 2009, completed her residency in 2012, and worked as an employee before creating a limited liability company in 2020 and opening her practice in 2021.

The court agreed with the courts that reject the proposition that working as an employee constitutes “commercial or business activities.”⁸ The court reasoned, *id.* at * 6:

Here, the gap between incurring the debt and actually engaging in any sort of commercial or business activity as an owner is simply too great to find that the student loans at issue arose from Debtor’s commercial or business activities. While it is clear that Debtor hoped to earn income from the use of her medical degree, it was entirely unclear for a decade

⁸ E.g., *In re Rickerson*, 636 B.R. 416, 426 (Bankr. W.D. Pa. 2021); *In re Johnson*, 2021 WL 825156, at *7-8 (Bankr. N.D. Tex. 2021). But see *In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021). *SBRA Guide* § III(C)(2) discusses the cases.

whether she had borrowed to follow a career path as an employee working for a hospital, as a business owner, or even in public service.

Accordingly, the court concluded that the student loans did not qualify as business debts and that she was ineligible for subchapter V.

The court observed that its holding did “not foreclose all debt which arises prior to a business opening, as supplies, product, and a space for the business often must be acquired prior to the actual opening, and there is the possibility that a debtor may open more than one business during his or her lifetime and incur debt in doing so.” *Id.* at *7.

The court also noted that it was not establishing a *per se* rule that student debt can never qualify as a debt arising from commercial or business activities. Rather, the court stated, “[T]he student loan debt at issue here, incurred over ten years prior to opening the medical practice, is simply too far removed for Debtor to qualify for Sub V relief.” *Id.* at *7.

Some courts conclude that an individual’s defense of liability on a personal guaranty rising from the debtor’s previous commercial or business activities may be sufficient to meet the requirement of current commercial or business activity.⁹ Others have ruled that defense of liability on a personal guaranty does not constitute engagement in commercial or business activity.¹⁰

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

SBRA Guide § III(E) discusses the debate over whether a nexus must exist between the debtor’s current commercial or business activities and debts arising from previous activities.

Other courts addressing the issue have reached opposite conclusions. The court in *In re Reis*, 2023 WL 3215833, at *4-5 (Bankr. D. Idaho 2023), *aff’d Reis v. Garvin (In re Reis)*, 2024 WL 4051674 (D. Idaho 2024), concluded that no nexus is required but found the debtor was ineligible because the debt in question was not a business or commercial debt. The court in *In re Fama-Chiarizia*, 655 B.R. 48 (Bankr. E.D.N.Y. 2023) and *In re Fama*, 655 B.R. 648 (Bankr. E.D.N.Y. 2023) (discussed *supra* § XVII(A)), held that a nexus is not required and that the debtor was eligible.

In re Hillman, 2023 WL 3804195, at *4-5 (Bankr. N.D.N.Y. 2023), concluded that a nexus is required and that it existed in the case.

⁹ *In re Stevens*, 667 B.R. 428, 439-41 (Bankr. S.D. W. Va. 2026); *In re Fama-Chiarizia*, 655 B.R. 48 (Bankr. E.D.N.Y. 2023); *In re Hillman*, 2023 WL 3804195 (Bankr. N.D.N.Y. 2023).

¹⁰ *In re Tombul*, 2026 WL 1096475 (Bankr. E.D. Tenn. 2026) (Liability on personal guarantee of debts of debtor’s limited liability company that is no longer operating does not establish that debtor is engaged in commercial or business activities.); *In re Bohman*, 663 B.R. 831 (Bankr. D. Utah 2024) (The prosecution of an appeal of a judgment on a personal guarantee is not sufficient to establish that the debtor is engaged in commercial or business activities when the debtor is not “presently or actively” involved in the appeal.).

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, excluding debts to affiliates on insiders¹¹ as of the date of the filing of the petition or the date of the order for relief” exceed the applicable debt limit.

§ 101(51D)(A). In addition, 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 the affiliates exceeds the debt limit.

§ 101(51D)(B)(i). Only the debts of affiliates who are debtors in a bankruptcy case are included.

The calculation of the debt limit is determined as of the date of the filing of the petition or the order for relief. § 101(51D)(A). *In re Hub City Home Health, Inc.*, 667 B.R. 822, 830 (Bankr. S.D. Tex. 2025). Debts entitled to priority under § 507(a) are included in the calculation of the debt limit, including prepetition wages that the court authorized the debtor to pay postpetition. *In re Hub City Home Health, Inc.*, 667 B.R. 822, 830-32 (Bankr. S.D. Tex. 2025).

In determining the amount of a debtor’s debts for purposes of the debt limit, courts have considered both the debtor’s schedules and creditors’ proofs of claim. As the court explained in *In re Zhang Medical P.C.*, 655 B.R. 403, 409 (Bankr. S.D.N.Y. 2023) (citations omitted), the court stated:

The court may look both to the debtor’s schedules and to creditors’ proofs of claim. Proofs of claim are *prima facie valid*. Because the debtor bears the ultimate burden of proving its eligibility for subchapter V, proofs of claim that the debtor does not challenge may be deemed to be valid for subchapter V eligibility purposes.

See also In re McPhillips Flying Service, Inc., 2025 WL 3030284 at *6-8 (Bankr. W.D. Mich. 2025); *In re Heart Heating and Cooling, LLC*, 2024 WL 1228370 at *10-11 (Bankr. D. Col. 2024); *In re Hall*, 650 B.R. 595, 600 (Bankr. M.D. Fla. 2023); *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021).

The debtor has the burden of explaining discrepancies between the amounts of debts shown on its schedules when those amounts are less than those stated in proofs of claim, as well as the reasons for the reduction of debts in amended schedules. The failure to do so may cause a court to conclude that the debtor is manipulating the amounts of debts in its schedules in an effort to skirt the debt limitation for eligibility. *See In re Heart Heating and Cooling, LLC*, 2024 WL 1228370 (Bankr. D. Col. 2024). *Accord, e.g., In re Power Block Coin, LLC*, 2024 WL 4456657 at *2 (Bankr. C.D. Cal. 2024).

In *In re Wilson*, 666 B.R. 828 (Bankr. M.D. Ga. 2024), the debtor scheduled a claim he disputed in pending litigation as partially contingent and unliquidated. Exclusion of the contingent and unliquidated portion was necessary for the debtor’s debts to be within the debt cap; inclusion of the portion of the claim scheduled as noncontingent and liquidated was

¹¹ *See In re Molina*, 2026 WL 363130 (Bankr. M.D. Fla. 2026) (As of petition date, judgment creditors were in adversarial relationship with debtor and were not “affiliates” or “insiders” regardless of whether they previously may have had such status);

necessary for the debtor to have 50 percent of his debts arising from commercial or business activities.

The court agreed that the disputed claim was contingent and unliquidated for debt limit purposes but declined to accept the scheduled amount as a judicial admission that the scheduled amount was liquidated and noncontingent. “The Debtor’s bankruptcy schedules are not the only source of information to determine the amount of debt and whether the debt is unliquidated,” the court observed. *Id.* at 839. Because the amount of the debt was subject to the trial court’s later determination, the court concluded that the debt was unliquidated. The fact that the debtor’s trial attorney had provided the number the debtor used in the schedules, the court explained, was not sufficient to support a conclusion that it was liquidated in that amount.

1. Debt limit: Whether debt is contingent or unliquidated*

Debts for purposes of determining the debt limit for subchapter V eligibility do not include contingent or unliquidated debts. § 101(51D)(A). The requirement that debts be “liquidated” and “noncontingent” for inclusion in the debt limit also appears in the eligibility requirements for relief under chapters 12¹² and 13.¹³

In *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), the court concluded that claims for damages arising from the rejection of unexpired leases were contingent and that the debtor’s obligations under a note pursuant to the Paycheck Protection Funding Program of the CARES Act were both contingent and unliquidated. Excluding those debts from the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In *In re Macedon Consulting, Inc.*, 2023 WL 400484 (Bankr. E.D. Va. 2023), the court ruled that the entire, uncapped liability of the debtor for rent for the remainder of the lease term was noncontingent and liquidated.

The next subsection further discusses a debtor’s liability for future rent under a real estate lease for purposes of the debt cap.

In *In re Hall*, 650 B.R. 595 (Bankr. M.D. Fla. 2023), a creditor objected to the eligibility of the debtor and an affiliated corporation on the ground that their debts exceeded the debt limit. In a pending adversary proceeding, the affiliated debtors contested the claim of a creditor based on fraud in the inducement, intentional misrepresentation, negligent misrepresentation, and equitable subordination. The debtors contended that the creditor’s debt should be excluded because it was disputed and therefore unliquidated.

The court concluded that, under *United States v. Verdunn*, 89 F.3d 799 (11th Cir. 1996) (“vigorously disputed” tax penalties are liquidated), the existence of the dispute did not render the creditor’s claim unliquidated.

¹² 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).

¹³ § 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 [hereinafter “CHAPTER 13 PRACTICE AND PROCEDURE”] §§ 12:8, 12:9.

The court summarized principles relating to determination of whether a debt is liquidated as follows, *id.* at 599:

“[C]ourts have generally held that a debt is liquidated if its amount is readily and precisely determinable, where the claim is determinable by reference to an agreement.” *United States v. May*, 211 B.R. 991, 996 ([Bankr. M.D. Fla. 1997 ([citing Collier on Bankruptcy, 15th Ed. at 1109.06[2][c] (March 1997))]). Ordinarily, debts of a contractual nature are “subject to ready determination and precision in computation of the amount due” and, therefore, are considered liquidated, even if subject to a substantial dispute. *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008, 1014 (B.A.P. 8th Cir. 1997). By contrast, tort claims are generally unliquidated if not reduced to judgment. *Id.* The nature of “the process for determining the claim” dictates whether the claim is liquidated or unliquidated, not the magnitude of the dispute or the length of the trial required to resolve the dispute. *See id.*; *Nicholes v. Johnny Appleseed (In re Nicholes)*, 184 B.R. 82, 91 (B.A.P. 9th Cir. 1995) (“So long as a debt is subject to ready determination and precision in computation of the amount due, then it is considered liquidated and included for eligibility purposes under § 109(e), regardless of any dispute.”); *see also In re Robinson*, 535 B.R. 437, 448 (Bankr. N.D. Ga. 2015) (“Generally, when a debt is owed pursuant to a contractual obligation it is liquidated.”).

Another case discussing whether a disputed claim is unliquidated is *In re Burdock and Associates, Inc.*, 622 B.R. 16 (Bankr. M.D. Fla. 2024). The debtor asserted that a claim for lost profits arising from a breach of contract was unliquidated because it was disputed. Although the dispute did not make the claim unliquidated, the court ruled, it was nevertheless unliquidated because its amount was not capable of ready determination.

The court applied the same analysis to determination of whether a debt is contingent or unliquidated in *In re Power Block Coin, LLC*, 2024 WL 4456657 at * 2-3 (Bankr. C.D. Cal. 2024). The case involved four groups of claims that the debtor contended did not count toward the debt limit because they were unliquidated or contingent.

The parties agreed that claims arising from the debtor’s obligations for SMTF token buyback guarantees that customers had exercised prepetition were noncontingent and liquidated. The claims of customers with such guarantees who had not exercised their options before the filing, however, were unliquidated and contingent because the evidence had not shown whether several conditions for payment of the claims had occurred. *Id.* at *3.

A third group of claims involved a type of account that the debtor’s counsel characterized as a “demand account with a big asterisk” for an “absolute obligation” that was not absolute in time. *Id.* at *3. The court concluded that, regardless of when the debtor would be obligated to return the cryptocurrency in the account, its underlying obligation to do so was determinable by simple mathematical computation, so it was liquidated, and debtor’s obligation was not contingent or any contractual restriction or requirement other than its ability and willingness to return the cryptocurrency, so the claims were noncontingent. *Id.* at *4.

The fourth set of claims included 16 crypto-backed loans to borrowers, who were entitled to their cryptocurrency upon payment of their loans. The court concluded that, like the “demand accounts,” the loan repayment condition did not make the obligation unliquidated (because it was readily capable of mathematical computation). With regard to at least one claimant holding 83% of the claims, the court continued, the obligation was not contingent because the borrower could set off the amount of the loan against the value of the cryptocurrency – an issue that a district court in pending litigation had already decided. This amount alone was sufficient to put the debtor over the debt limit. *Id.* at *4-5.

It is usually the debtor who claims that a debt is contingent or unliquidated so that a debt is excluded from the calculation of the total amount of noncontingent and liquidated debts. In some instances, a creditor may assert that a debt is contingent or unliquidated and that the debt does not count in the calculation of whether at least 50 percent of the debtor’s debts arise from commercial or business activities.

In *In re Wilson*, 666 B.R. 828 (Bankr. M.D. Ga. 2024), the debtor’s former employer asserted claims against him arising from the fact that many of the former employer’s clients took their business to the debtor’s new employer. The new employer had a claim against the debtor for advances of litigation expenses. The debtor had no other debts arising from commercial or business activities.

The former employer objected to the debtor’s eligibility for subchapter V on the grounds that the debtor as an employee was not engaged in commercial or business activities and that less than 50 percent of his debts arose from commercial or business activities. As § IV(A) *supra* discusses, the court concluded that the debtor was engaged in commercial or business activities. The court ruled, however, that the debtor did not have any debt arising from commercial or business activities for purposes of the eligibility determination.

The court noted that the debt to the current employer did not count because the debt limit calculation excludes debts owed to insiders. 666 B.R. at 838. The debt to the former employer did not count because it was unliquidated. *Id.* at 838-39. The court concluded that contract claims ordinarily are liquidated because the contract usually determines the basis for determining the amount of damages for breach. Because the contract with the former employer had no language providing “for ready determination and precision in computation of the amount due” but would be determined in the pending litigation, the court concluded, the debt was unliquidated. *Id.* Because the debtor thus had no debt arising from commercial or business activities for purposes of the eligibility determination, the court ruled that the debtor was not eligible for subchapter V.

The court in *In re McKenzie Contracting, LLC*, 2024 WL 3508375 (Bankr. M.D. Fla. 2024), held that claims arising under merchant cash advance contracts were contingent and unliquidated because the claims were purchases of receivables, not loans where the creditor assumed the risk of non-payment.

In *The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (In re Alecto Healthcare Services, LLC)*, 2025 WL 961482 at * 10-11 (D. Del. 2025), *aff’d* ___ F.4th ___,

2026 WL 2165844 (3d Cir. 2026), the court held that a debt was contingent because the debtor's obligation to pay did not arise until demand for payment, which had not occurred prepetition. The court also concluded that the debt was unliquidated because the amount of the obligation was uncertain until the demand was made. 2025 WL 961482 at * 12.

In *Articon Hotel Services LLC*, 2025 WL 3714787 (Bankr. E.D. Ill. 2025), the debtor filed a subchapter case after entry of a final judgment of over \$10 million against it in a state court but before the state court had ruled on the debtor's post-trial motion to vacate it. The court concluded that the debt was liquidated and noncontingent based on the judgment, *id.* at *4 and that the fact that it remained disputed did not matter. *Id.* at *5.

A creditor in *In re Mowatt*, 2026 WL 1294475 (Bankr. C.D. Cal. 2026), had obtained a judgment on a jury verdict for approximately \$ 2 million. At the time of the subchapter V filing, however, the trial court had not yet ruled on the creditor's motion for pre- and post-judgment interest in the amount of approximately \$ 1.6 million. The creditor objected to the debtor's subchapter V eligibility because debts including the interest exceeded the debt limit.

The *Mowatt* court concluded that the amount of interest was not "readily ascertainable" and that the debtor did not act improperly in scheduling the amount of the debt without interest and that, therefore, the debtor was eligible to proceed under subchapter V.

In *McPhillips Flying Service, Inc.*, 2025 WL 3030284 (Bankr. W.D. Mich.), a wrongful death plaintiff during pre-trial discovery retained a forensic accountant who concluded that the debtor had made material misrepresentations about its eligibility for four loans in the total principal amount of \$ 980,000 it obtained from the Small Business Administration under the Economic Injury Disaster Loan ("EIDL") program during the Covid pandemic and that the debtor had misapplied the loan proceeds by using them for purposes other than working capital and by purchasing assets not manufactured, contrary to the terms of the loans.

The plaintiff filed a *qui tam* complaint alleging that the Debtor violated the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and misapplied loan proceeds, triggering liability for civil penalties under 15 U.S.C. § 636(b). As of the date of the filing of the subchapter V petition, the complaint remained sealed, had not been served on the debtor, and the United States Department of Justice had initiated an investigation but had not yet decided whether to intervene. The debtor in its schedules listed (1) a secured claim of the SBA in the amount of \$ 965,789 for principal and interest on the EIDL loans; (2) a contingent, unliquidated, and disputed unsecured claim of the plaintiff in the amount of \$1.00; and (3) the name of the Assistant U.S. Attorney assigned to the *qui tam* action in the amount of \$ 0, "for notice only" (to disclose the claim asserted in the then sealed *qui tame* proceeding) without the plaintiff's claim.

After the filing of the case, the United States elected to intervene for purposes of settlement and the district court unsealed the *qui tam* action. The SBA filed two proofs of claim, one for the amounts due under the EIDL loans and a second for the civil penalty under 15 U.S.C. § 636(b) for misuse of loan proceeds in the amount of 1,470,000, the statutory amount of the

penalty, the original principal amount of the loans multiplied by 1.5. The United States filed a proof of claim for False Claims Act liability in the approximate amount of \$ 3,054,476 that included treble damages (three times the principal amount of the loans, or \$ 2,940,000) and a misrepresentation penalty in the maximum amount of \$ 28,619 for each of the four loans.

The debtor's schedules showed total secured and unsecured debts to non-insiders, including the amount of the EIDL loans, of \$ 2,204,006.22 but did not include the amounts asserted in the *qui tam* complaint and reflected in the claims of the SBA for a civil penalty or the United States for liability under the False Claims Act.

The plaintiff objected to the debtor's eligibility for subchapter V because the inclusion of the SBA civil penalty claims and the False Claim Act claims of the United States put the debtor over the debt limit of \$3,424,000. The debtor contended that the debts were properly excluded from calculation of the debt limit because they were contingent and unliquidated.

Because inclusion of either claim in the debt limit calculation made the debtor ineligible, the court considered whether each was either contingent or unliquidated.

A contingent debt, the court explained, "is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor," and that "a debt is not automatically rendered 'contingent' solely by virtue of its being disputed." 2025 WL at *9 (collecting cases; quotations and emphasis omitted).

The court quoted the Sixth Circuit's summary of the caselaw on the definition of liquidated debt, *id.* at *10, quoting *Comprehensive Accounting Corp. v. Pearson (In re Pearson)*, 773 F.2d 751, 754 (6th Cir. 1985):

The common thread through the cases . . . has been ready determination and precision in computation of the amount due . . . [A] liquidated debt [is] one that can be determined by mathematical computation. Some cases have stated the test as whether the amount due is capable of ascertainment by reference to an agreement or by simple computation.

Applying these standards, the court concluded that the civil penalty claim of the SBA, although liquidated, was excluded from the debt calculation because it was contingent, 2025 WL at * 10-13, and that the False Claim Act claims were both unliquidated and contingent. *Id.* at 13-16.

The *McPhillips Flying Service* court reviewed regulatory provisions implementing the civil penalty in 15 U.S.C. § 636(b) that define "wrongful misapplication" and prescribe the procedure for determination a wrongful misapplication.¹⁴ As of the date of the petition, the court found, the debtor's evidence supported the conclusion that "the SBA had not taken any of the actions the regulation states will occur upon a finding of a wrongful application: it had not called the loan, had not informed the Debtor that the Section 636(b) Penalty had been assessed or was due and owing, and had not taken any action to collect or enforce the civil penalty." *Id.* at

¹⁴ 13 C.F.R. § 123.9(a), and (b).

*11. The court concluded, therefore, that the debtor’s liability for the penalty “had not been triggered as of the petition date and therefore is a contingent debt.” *Id.* at * 11. The debt was liquidated, however, because the amount of the liability was readily determinable. *Id.* at 13.

Liability under the False Claims Act, the court observed, requires a showing that the debtor made false claims or statements “knowingly” and “involves an inquiry into the subjective knowledge and state of mind of the Debtor and its representatives, a standard akin to the one applied to common law fraud claims.” *Id.* at 14. Applying the traditional view that claims sounding in tort are contingent as to liability until a judicial determination occurs, the court concluded that they were contingent. *Id.* The claims were also unliquidated, the court concluded, because damages and penalties under the False Claims Act are not determined by a simple mathematical formula. *Id.* at 15.

Because the civil penalty was contingent and the False Claim Act claims were both contingent and unliquidated, the claims were excluded from calculation of the debt limit, and the debtor was eligible for subchapter V.

2. Debt Limit: Whether debtor’s liability for future rent under a real estate lease is contingent or unliquidated and amount of debt*

A debtor often has an unexpired lease for its business premises under which substantial future rent is due. For purposes of determining whether the debtor’s debts exceed the debt cap, two questions arise with regard to the obligation for future rent.

The first is whether the obligation is contingent or unliquidated. The second is whether the amount for eligibility purposes is the total future rent that is due (*i.e.*, the entire rent reserved under the lease for its remaining term) or the amount that is allowable under § 501(b)(6) (*i.e.*, the greater of future rent for one year or 15 percent of future rent, not to exceed three years).

In *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), the court concluded that claims for damages arising from the rejection of unexpired leases were contingent because they did not arise unless the debtor rejected the leases. Excluding those debts from the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In *In re Macedon Consulting, Inc.*, 2023 WL 400484 (Bankr. E.D. Va. 2023), the court ruled that the entire, uncapped liability of the debtor for rent for the remainder of the lease term was noncontingent and liquidated. The court reasoned, *id.* at *4:

In this case, the debt at issue is liability under the Leases, and that liability arose pre-petition, on the dates the Leases were fully executed. For example, it could not be said that if the Debtor vacated the premises on the 31st of one month during the lease term, that it would not still owe the landlord for the next month and the remainder of the lease term. While it may be argued that the timing of payments is the future extrinsic event that may never occur, the Court disagrees. The timing of lease payments is simply that – timing. Absent the end of the world, we know the future date will occur. As a result, liability under the Leases must be considered noncontingent and liquidated, and the Debtor in this case is therefore above the debt limits for subchapter V, which are capped at \$7.5 million of aggregate noncontingent liquidated debts.

The court in *In re Zhang Medical P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y. 2023), declined to follow *Macedon Consulting* and concluded that claims for future rent were contingent and unliquidated. The court observed that an executory contract “represents both an asset (the debtor’s right to performance) and a liability (the debtor’s own obligation to perform).”¹⁵ Accordingly, the court continued, § 365(a) gives the debtor the option to assume or reject the executory contract or unexpired lease. *Id.* at *6.

If the debtor assumes the executory contract or unexpired lease, the court reasoned, the debtor’s future obligations should not be considered “debts” for purposes of subchapter V eligibility because assumption means that the contract or lease is a net asset, *i.e.*, its benefit to the estate outweighs the debtor’s future liability. *Id.* at *6. The court then explained that, until the debtor elects to assume or to reject, the amount and nature of the debtor’s obligations are contingent and unliquidated. The court stated, *id.*:

Because the amount and nature of the debtor’s obligations, as well as whether these are even “debts,” depend on an uncertain event – the debtor’s election to either assume or reject – any eventual debt is both contingent and unliquidated prior to that election.

Although the court determined that the debtor’s obligations for future rent were not included in determining the amount of the debtor’s debts, the court held that the existence of other debts made the debtor ineligible for subchapter V.

3. Debt limit: Debts of affiliates*

As amended by the Bankruptcy Threshold Adjustments and Technical Corrections Act (“BTATCA”), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022), debts for purposes of the debt limit for subchapter V eligibility include debts of affiliates of the debtor if the affiliate is a debtor in a bankruptcy case. § 1182(a). Entities under common control are affiliates of the controlling person and of each other. *In re Village Oaks Senior Care, LLC*, 664 B.R. 170 (Bankr. E.D. Cal. 2024).

When an affiliate of an eligible subchapter V debtor later files its own bankruptcy case, and the combined debts of all affiliates exceed the debt limit, the second debtor is not eligible for subchapter V. The question is whether the second filing affects the eligibility of the debtor in the first case.

Two courts have ruled that, because eligibility is determined as of the filing date, the second filing does not render the first debtor ineligible, even when their total debt exceeds the debt limit.

In *In re Free Speech Systems, LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023), the debtor filed a subchapter V petition. The debtor was eligible despite the existence of substantial defamation claims against it because the damages had not yet been determined and, therefore, were unliquidated debts excluded from the calculation of debts for purposes of eligibility. After

¹⁵ *Zhang Medical*, 655 B.R. 403, 411 (Bankr. S.D.N.Y. 2023), quoting *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S.370, 139 S.Ct. 1652, 1658 (2019).

the court lifted the stay to permit the defamation litigation to proceed and a jury awarded substantial damages against the debtor and its jointly liable principal, the principal filed his own chapter 11 case.

Plaintiffs in the defamation action sought revocation of the subchapter V election in the first case based on the fact that the total debt of the affiliates exceeded the debt limit. The court rejected the argument, ruling that determination of eligibility on the effective date was not affected by the affiliate's later filing. The court observed, "If postpetition affiliate filings lead to ineligibility and revocation, it means that debtors could float in and out of Subchapter V at any time." *Id.* at 734.

In *In re Dobson*, 2023 WL 3520546 (Bankr. W.D. Va. 2023), the sole shareholder of a construction company and his spouse filed a joint subchapter V petition. The next day, the corporation filed a chapter 7 case. The U.S. Trustee contested the eligibility of the individuals for subchapter V because the total of their debts and the corporation's debts exceeded the debt limit. The court agreed with *Free Speech* and ruled that the debtors' correct statement of eligibility on the petition date did not become incorrect based on a later event.

The court also rejected the U.S. Trustee's argument that the timing of the filing demonstrated an abuse. The court stated, *id.* at *6:

The U.S. Trustee asks this Court to consider the strategic decision by [the corporation] to not file a bankruptcy petition until after its sole shareholder filed his petition as if the professional planning is by itself an abuse or an indication of harm. Yet, the U.S. Trustee has failed to show how professional advice and deliberate planning of the timing of a bankruptcy petition is unlawful or abusive.

A debtor desiring to proceed in subchapter V must pay careful attention to the debts of any affiliate in a pending bankruptcy case, even if the debtor has no realizable interest in the affiliated entities in bankruptcy. In *In re Carter*, 2023 WL 9103614 (Bankr. N.D. Ga. 2023), the individual debtor owned 65 percent of one company that had been in bankruptcy for seven years and 99 percent of another that had been in bankruptcy for five years. Both had been pending under chapter 7 for five years, and their cases remained open.

Although the individual's debts were less than the debt limit, inclusion of the debts of the chapter 7 debtors put the debtor over the limit. The court rejected the debtor's contention that the two companies were not his affiliates because they were controlled by the chapter 7 trustees.

A debtor in such a situation might seek to avoid this result through divestment of the worthless ownership interests prior to the filing of a subchapter V case.

Without considering the timing of the filings, the court in *In re 305 Petroleum, Inc.*, 622 B.R. 209 (Bankr. S.D. Miss. 2020), concluded that none of four affiliated debtors were eligible for subchapter V because their collective debts exceeded the debt limit. The debtors argued that the debts of one of the debtors should be excluded because it was ineligible for subchapter V

because it was a single asset real estate debtor. *SBRA Guide* § III(F) and footnote 91 discuss the analysis in more detail.

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

H. Ineligibility of Single Asset Real Estate Debtor*

A debtor is not eligible for subchapter V if its primary activity is the business of owning “single asset real estate.” § 101(51D). Section 101(51B) defines “single asset real estate” as “real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.”

The court in *In re Evergreen Site Holdings*, 652 B.R. 307 (Bankr. S.D. Ohio 2023), found from the evidence that a debtor who owned two adjacent properties was not using the properties together in a common scheme and that the debtor would likely conduct substantial business on the properties other than leasing them and collecting rent. Accordingly, the court concluded that the debtor had established its eligibility for subchapter V.

In contrast, the court in *In re Bridle Path Partners, LLC*, 2024 WL 86601 (Bankr. D. Utah 2024), ruled that a debtor was a single asset real estate debtor when its business was the development in four phases of an equestrian community to include residential lots, open space, riding trails, and riding facilities on seven parcels of land acquired at various times with different financing. The court rejected the debtor’s contention that the development involved several economic enterprises, concluding that the debtor’s “clear intent [was] to create a master-planned recreational development for a mountain-based community” that was a “cohesive, unified project.” *Id.* at *4.

In *In re Celebration Cottage AB, LLC*, 663 B.R. 846 (Bankr. E.D.N.C. 2024), the debtor owned three adjacent properties that it leased to an affiliate that used the properties as a venue for parties and events. It also owned another parcel some three miles away. The court held that the properties did not constitute a single or unified real estate project and that, therefore, the debtor was not a single asset real estate debtor and could proceed under subchapter V.

The debtor in *In re Amerivest, LLC*, 2025 WL 1210562 (Bankr. E.D. Va. 2025) similarly owned three parcels of real estate but they were contiguous, the debtor had purchased the lots simultaneously, and they were all subject to a single deed of trust and assignment of rents. Finding that the debtor had treated the three lots as one economic unit with a common purpose of acting as a commercial landlord for the three parcels, the court concluded that the three parcels constituted a single project and that the debtor as a single asset real estate debtor. *Id.* at *5-7.

In re 255 North Front Street Condos, Inc., 2025 WL 1068714 (Bankr. E.D.N.C. 2025), ruled that a unit owners' association is not a single asset real estate debtor because its income is from services it provides to unit owners, not from the property.

In *In re 25 My Rentco LLC*, 2026 WL 1453505 (Bankr. S.D. N.Y. 2026), the court concluded that debtors owning six condominium units in projects they sponsored were single asset real estate debtors.

The debtor in *In re Jerry's Place Cleveland, LLC*, 2026 WL 1416440 (Bankr. N.D. Miss. 2026) owned two contiguous parcels, acquired by the debtor at the same time and subject to a single deed of trust. The debtor leased the building on one parcel to a commercial tenant, which also used the adjoining parcel as a parking lot. The debtor leased a billboard on the adjoining property to a billboard company. The court ruled that the debtor was a single asset debtor because the two parcels were a single project, the project generated substantially all of the debtor's income, and the debtor conducted no other substantial business other than operation of the project.

In *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023), a single-asset real estate debtor filed a subchapter case shortly after an affiliate filed its own subchapter V case. The debtor argued that, although it was an excluded single asset real estate debtor, it was nevertheless eligible for subchapter V as an affiliate of an eligible subchapter V debtor. The court concluded that the plain language of the statute “expressly excludes SARE debtors, regardless of whether they are affiliates of Subchapter V debtors.” *Id.* at *6.

I. Procedures For Determination of Eligibility*

1. Time for objecting to eligibility; authority of court to raise eligibility issue *sua sponte*; waiver of eligibility objection*

Bankruptcy Rule 1020(b) requires the filing of an objection to a debtor's subchapter V election within 30 days after the later of the conclusion of the § 341(a) meeting or an amendment to the petition that makes the election. Under Rule 1020(c), the objection is a contested matter that Rule 9013 governs and must be served on the debtor, the debtor's attorney, the U.S. trustee, the subchapter V trustee, and the 20 largest unsecured creditors or a creditor's committee if one has been appointed.

A court may hear an untimely objection if the delay in filing is due to excusable neglect under Bankruptcy Rule 9006(b)(1). In *re Hub City Home Health, Inc.*, 667 B.R. 822, 830-32 (Bankr. S.D. Tex. 2025).

In *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023), the court concluded that it had the authority to raise the question of the eligibility of a debtor *sua sponte* even after expiration of the deadline for objections to eligibility under Bankruptcy Rule 1020(a).

The court in *In re 2202 East Anderson St., LLC*, 2024 WL 1340655 at * 5 (Bankr. C.D. Cal. 2024), noted that an objecting party may waive an objection to subchapter V eligibility and that the court has the authority to approve a stipulation permitting a case to proceed under subchapter V even when the debtor does not satisfy the requirements for subchapter V eligibility.

In *In re Village Oaks Senior Care, LLC*, 664 B.R. 170 (Bankr. E.D. Cal. 2024), an objecting creditor timely objected to the eligibility of three affiliated debtors on the ground that their aggregate debts exceeded the debt limit. In response, the debtors asserted that the creditor had waived the objection.¹⁶

The court first resolved confusion among the parties concerning the difference between “forfeiture” – the failure to timely assert a right – and “waiver” – the intentional relinquishment or abandonment of a known right or privilege. Because the timely objection did not result in forfeiture, the court considered whether waiver had occurred, observing that eligibility is not jurisdictional and that a party can waive the objection. *Id.* at 175.

Applying chapter 13 caselaw involving waiver of an objection to a debtor’s eligibility,¹⁷ the court concluded, *id.* at 176:

[A]n eligibility objection waiver may arise from the objecting party’s litigation conduct which, in turn, requires a factual examination of the extent to which an objecting party knew it could object, failed to assert its objection, proceeded in the case, and raised the objection only after participating substantially in the case.

The court found that the creditor, from the time of appearance at the outset of the case, had known about the eligibility issue but “over a period of several months [the creditor] engaged the debtors, invoked the Code, and prevailed on a number of issues.” *Id.* at 177. From these circumstances, the court observed, it could hold that the objection had been waived. *Id.*

Nevertheless, the court continued, “waiver is an equitable doctrine” that should not be applied to produce an inequitable result.” *Id.* The court found that the debtors had intentionally used knowingly false schedules in an effort to manufacture subchapter V eligibility or make it more likely. *Id.* at 178. The court declined to apply the waiver doctrine in these circumstances, explaining, *id.* at 178.

[I]t would encourage – if not reward – the knowing and intentional use of false schedules in which debt is manipulated to achieve subchapter V eligibility or at least make it more likely. It would also allow the debtor entities here to proceed under subchapter V when the debtors knew – or at least anticipated – that they were not – or that they may not be – eligible subchapter V debtors in the first instance.

The court “de-designated” the three debtors for them to proceed as traditional chapter 11 cases.

¹⁶ Two limited liability companies, each owned and controlled 100 percent by an individual, filed their cases one day before the individual filed his. 664 B.R. at 174. The objecting creditor was the former wife of the individual debtor, who had obtained “significant sanctions” in the divorce court, affirmed by the California Court of Appeal based on his litigation and discovery tactic. *Id.* at 172 n. 1, 174 n. 5.

¹⁷ The court cited *Mission Hen, LLC v. Lee (In re Lee)*, 655 B.R. 340, 352 & n. 7 (B.A.P. 9th Cir. 2023). The chapter 13 eligibility provision is 11 U.S.C. § 109(e). The court noted that the Supreme Court recognized implied waiver in its ruling in *Wellness International Network, Ltd., v. Sharif*, 575 U.S. 665 (2015), that a party by its conduct in a case may impliedly waive a constitutional objection to the bankruptcy court’s authority to enter a final judgment. See generally CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 12:2.

As § III(F)(3) discusses, some courts have held that the first of affiliated debtors to file a subchapter V case is eligible because the other debtors at the exact time of filing are not in bankruptcy cases and, therefore, the debts of those affiliates are not included in the calculation of the debt cap. The *Village Oaks* court dismissed all three cases without addressing this issue.

2. A determination of ineligibility does not “revoke” the election*

In ruling that a debtor is not eligible for subchapter V, some courts have stated that the election is “revoked.” *E.g.*, *In re Carter*, 2023 WL 9103614 (Bankr. N.D. 2023); *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023). The terminology is inaccurate.

Bankruptcy Rule 1020(a) provides that the debtor must state on the petition whether it is a small business debtor and whether it elects to proceed under subchapter V. The rule further provides that the case proceeds in accordance with the debtor’s statement “unless and until the court enters an order finding that the debtor’s statement is incorrect.”

Section 103(i) provides that subchapter V applies “only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of chapter 11 shall apply.” Section 1182(1) defines “debtor” as a “small business debtor.” Official Forms 101 and 201 each require a debtor to state (by checking the appropriate boxes) that the debtor is a small business debtor and whether the debtor elects application of subchapter V.

If a court determines that the debtor’s statement that the debtor is not a small business debtor, the provisions of subchapter V are inapplicable under § 103(i). As a result, the proper remedy for the debtor’s incorrect statement is for the court to determine that the provisions of subchapter V do not apply and that the case will proceed as a non-subchapter V case. The court in *In re Village Oaks Senior Care, LLC*, 664 B.R. 170, 178 (Bankr. E.D. Cal. 2024), ruled that the cases of ineligible debtors be “de-designated as subchapter V cases.”

3. Finality of order determining eligibility; mootness*

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). A district court or bankruptcy 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.¹⁸ 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.¹⁹

¹⁸ *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.”).

¹⁹ 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

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. 3.²⁰ 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).

The Ninth Circuit Bankruptcy Appellate Panel in an unreported order had previously dismissed an earlier appeal of eligibility, determining that the eligibility order was interlocutory and denying leave to appeal. *NetJets Sales, Inc. v. RS Air, LLC*, Case No. NC-21-1053, Doc. No. 20-1 (B.A.P. 9th Cir. May 26, 2021). There, the court concluded, *id.* at 2:

"Orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582, 586 (2020) (citing *Bullard v. Blue Hills Bank*, 525 U.S.C. 496, 501 (2015)). The order on appeal is an interlocutory order since determination of whether a debtor qualifies for subchapter V relief under 11 U.S.C. § 1182(1)(A) is part of the Chapter 11 confirmation process and as such, does not definitively dispose of a discrete issue within the bankruptcy case.

In *Reis v. Garvin (In re Reis)*, 2024 WL 4051674 (D. Idaho 2024), the district court disagreed with *RS Air*, ruling that the bankruptcy court's order that the debtor was not eligible for subchapter V was a final order.

The *Reis* court observed that the concept of finality is more "flexible and pragmatic," than finality in ordinary civil litigation. The court discussed two Supreme Court decisions that guide application of the finality requirement in bankruptcy cases.

One of the cases is *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015), which held that an order denying confirmation of a chapter 13 plan did not conclusively resolve the relevant proceeding. The *Reis* court noted that the bankruptcy court in *Bullard* had denied confirmation with leave to amend. The court stated, 2024 WL at *3:

In that context, *Bullard* explained that only plan confirmation, or case dismissal, "alters the status quo and fixes the rights and obligations of the parties." [*Bullard*, 575 U.S. at 502.] "Denial of confirmation with leave to amend, by contrast, . . . 'leaves the 'parties' rights and obligations . . . unsettled,' and therefore could not be deemed 'final.'" [*Bullard*, 575 U.S. at 503].

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).

²⁰ The *RS Air* 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).

The other case is *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. 35 (2020). *Ritzen* applied the *Bullard* analysis to a bankruptcy court order denying relief from the automatic stay. The Supreme Court reasoned a motion for relief from the stay triggered “a discrete procedural sequence” and that “a discrete dispute of this kind constitutes an independent ‘proceeding’ within the meaning of 28 U.S.C. § 158(a).” *Id.* at 43-44. Because the entry of an order conclusively denying the motion “ended the stay-relief adjudication and left nothing more for the Bankruptcy Court to do in that proceeding,” the *Ritzen* Court concluded that the order was final and appealable. *Id.* at 47.

The *Reis* court reasoned that *Bullard* and *Ritzen* required two inquiries to determine whether the eligibility order was final and appealable, 2024 WL 4051674 at *3:

- (1) Was the order entered in a distinct procedural unit within the larger bankruptcy case?
- and (2) Did the order “terminate” that distinct proceeding by completely resolving all substantive litigation within that proceeding?

“More broadly,” the *Reis* court continued, “the Court will ask whether the bankruptcy court’s order ‘alters the status quo and fixes the rights and obligations of the parties . . . [or] alters the legal relationships among the parties.’”²¹ In a nutshell, a bankruptcy order is final ‘if it is both procedurally complete and determinative of substantive rights.’”²² 2024 WL 4051674 at *3 (citations omitted and referenced in added footnotes).

Disagreeing with *RS Air*, the *Reis* court concluded that a subchapter V eligibility determination is “a discrete procedural unit that occurs before, and separately from, plan-confirmation proceedings.” 2024 WL 4051674 at *4. The court reasoned that the filing of an objection to the debtor’s eligibility and the debtor’s response resulted in an evidentiary hearing on that discrete issue and a separate decision that definitively disposed of the eligibility issue.

The *Reis* court concluded, “Under the Supreme Court’s rationale in *Ritzen*, [the eligibility] proceeding has the hallmarks of a ‘discrete procedural unit’ that leads to a final, appealable order.” 2024 WL 4051674 at *4. Further, the court noted, the eligibility determination affected the entire outcome of the case, given the advantages of subchapter V for the debtor, including plan exclusivity, the ability of the individual to obtain a discharge on the effective date, and the inapplicability of the absolute priority rule. *Id.*

The *Reis* court found “tangential support” for its ruling in cases dealing with conversion orders, because the “upshot” of the denial of eligibility is that the debtor would proceed in a traditional chapter 11 case. The court noted that most courts rule that an order converting a reorganization case to chapter 7 are immediately appealable²³ because it finally determines a

²¹ The court quoted *Bullard*, 575 U.S. at 502, 506.

²² The court quoted *In re Jackson Masonry, LLC*, 906 F.3d 494 (6th Cir. 2018), *aff’d sub nom.* *Ritzen Group, Inc., v. Jackson Masonry, LLC*, 589 U.S. 35 (2020)

²³ The court cited *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 770 (9th Cir. 2008), *overruled on other grounds by In re Nichols*, 10 F.4th 956 (9th Cir. 2021); *In re Cal. Palms Addiction Recovery Campus, Inc.*, 87 F.4th 734, 739-40 (6th Cir. 2023).

discrete issue and because conversion to chapter 7, by taking control of the estate out of the hands of the debtor, “seriously affects substantive rights and may lead to irreparable harm to the debtor if immediate review is denied.” 2024 WL 4051674 at *5, quoting *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 770 (9th Cir. 2008), *overruled on other grounds by In re Nichols*, 10 F.4th 956 (9th Cir. 2021). The court noted that courts are divided on whether an order converting a case *from* chapter 7 is final.²⁴

The *Reis* court was persuaded by the cases ruling that conversion orders are immediately appealable. The court explained, “If a debtor is going to be vaulted into a different chapter of the bankruptcy code, with all the different rules that will apply, it makes sense to view such as motion as a distinct procedural unit that is finally resolved with the conversion order.” 2024 WL 4051674 at *5.

Finally, the court noted that a Ninth Circuit ruling that an order denying a motion to dismiss an individual’s chapter 7 case as abusive was a final order²⁵ also supported its ruling. 2024 WL 4051674 at *5.

In *Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (E.D. N.Y. 2022), 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.

In addressing the debtor’s eligibility for subchapter V in the context of an appeal from the confirmation of the debtor’s plan, the Eleventh Circuit noted, “[The creditor’s] challenge to the Bankruptcy Court’s non-final order determining [the debtor’s] subchapter V eligibility is properly before us because that interlocutory order merged into her appeal from the Bankruptcy Court’s final order confirming the reorganization plan.” *Guan v. Ellingsworth Residential Community Association, Inc., (In re Ellingsworth Residential Community Association, Inc.)*, 125 F.4th 1378 n. 7 (11th Cir. 2025).²⁶

In *Reed Action Judgment Creditors v. Alecto Health Services, Inc. (In re Alecto Health Services, Inc.)*, ___ F.4th ___, 2026 WL 2165844 (3d Cir. 2026), the Third Circuit considered the bankruptcy court’s eligibility determination in the context of an appeal from an order confirming the debtor’s plan. The court rejected the debtor’s arguments that the appeal was constitutionally and equitably moot.

The objecting creditors objected to confirmation because the plan released insiders from potential avoidance claims. The debtor based its mootness arguments on the contention that the statute of limitations on the claims had expired, thereby making it impossible to grant any effective relief.

²⁴ The court cited *Bannish v. Tighe (In re Bannish)*, 311 B.R. 547, 548-49 (C.D. Cal. 2004) (conversion order appealable) and *Mason v. Young (In re Young)*, 237 F.3d 1168, 1172-73 (10th Cir. 2001) (order converting case from chapter 7 to chapter 13 is not final until after chapter 13 plan confirmation).

²⁵ *Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 873 F.3d 1060, 1066 (9th Cir. 2017).

²⁶ For a discussion of earlier rulings in the case on the interlocutory nature of the eligibility determination, see *SBR4 Guide* § III(A) n. 34.

The court observed that the limitations period arguably had not expired under applicable state law because of the concealment of the transfers. Concluding that it could not say that it was “impossible for the court to grant any effectual relief whatsoever,” as the constitutional mootness standard requires, the court ruled that the appeal was not equitably moot. *Id.* at *3 n. 6.²⁷

Equitable mootness, the court concluded, is “only available in complex bankruptcies where the reorganization involves intricate transactions.” *Id.*²⁸ Because subchapter V is less complicated by design and the plan involved a “single integrated transaction,” the court held that the appeal was not equitably moot.

J. Revocation of Subchapter V Election*

A subchapter V debtor has the exclusive right to file a plan. § 1189(a). If the court removes the debtor from possession under § 1185(a), the subchapter V trustee takes over the assets and management of the business, but only the debtor can file a plan. If reorganization of the debtor after removal is advantageous for creditors, but the debtor is unwilling or unable to propose a confirmable plan, the inability of the trustee or creditors to file a plan may leave conversion or dismissal as the only alternatives for conclusion of the case. Section V(E) of this Update discusses alternative exit strategies.

This section considers whether a court has the authority to address the problem through revocation of the debtor’s subchapter V election so that the case proceeds as a traditional or small business case in which the trustee and creditors have authority to file a plan, and the debtor has no exclusive period within which to file a plan? § 1121(c)(1).

In *In re National Small Business Alliance*, 642 B.R. 345 (Bankr. D.D.C. 2022), the court revoked the debtor’s subchapter V designation, “converting” the case to a standard chapter 11. The debtor operated a 700-strong membership network for small businesses, providing its dues-paying members with referrals and marketing support. It filed under subchapter V in early 2021.

Two very active creditors—one secured and one unsecured—had used the case as a battleground to litigate claims among themselves and the debtor, to the detriment of other stakeholders in the debtor, *id.* at 349-50, and the case had accordingly sprawled. In the course of the lengthy proceedings, the debtor had been removed from possession for cause under § 1185, the docket had ballooned to over 300 entries, and the debtor had proposed five plans, none of which had been timely filed or were confirmable. *Id.* at 347.

After considering conversion to chapter 7 and dismissal under § 1112, the court concluded that the interests of creditors and of the estate would best be served by permitting the debtor to remain in chapter 11 but revoking the debtor’s subchapter V designation so that the trustee or other parties could file a plan.²⁹

²⁷ The court cited and quoted *In re World Imports*, 820 F.3d 576, 582 (3d Cir. 2016) (quoting *In re Continental Airlines*, 91 F.3d 553, 558 (3d Cir. 1996) (en banc)).

²⁸ The court cited and quoted *In re Boy Scouts of America*, 137 F.4th 126, 160 (3d Cir. 2025).

²⁹ “If a debtor discovers post-petition that it is unable to meet the deadlines of Subchapter V, the option to revoke such designation provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter 11.” *In re National Small Business Alliance*, 642 B.R. 345, 349 (Bankr. D.D.C. 2022)

Although nothing in the Code explicitly permits the revocation of a subchapter V election, the court noted, courts permitted pre-SBRA chapter 11 debtors to amend their petitions pursuant to Bankruptcy Rule 1009 to take advantage of the newly effective subchapter V provisions. “[I]f a petition may be amended to elect to proceed under Subchapter V post-petition, logically it follows that the opposite must also be an option for debtors and courts.” *Id.* at 348.

The court also reasoned that the Bankruptcy Code permits an eligible debtor to convert its case from one chapter to another, and that—although moving into or out of subchapter V is not properly a *conversion* between chapters—“chapter 11 and Subchapter V are materially different, much like the differences in chapters under the Bankruptcy Code[, and] the ability to revoke a Subchapter V election is consistent with the Bankruptcy Code.” *Id.* at 348.

The court accordingly revoked the subchapter V designation and directed that the U.S. Trustee immediately appoint a chapter 11 trustee.

In re CYMA Cleaning Contractors, Inc., 2023 WL 7117445 at *2-3 (Bankr. D.P.R. 2023), the court concluded that it had authority to revoke the subchapter V election of an ineligible debtor *sua sponte* even after expiration of the time for objection to the election based on the analysis in *National Small Business Alliance*.

In *In re ComedyMX, LLC*, 647 B.R. 457 (Bankr. D. Del. 2022), the court addressed whether revocation of the debtor’s subchapter V designation was permissible but did not decide the issue, deciding that the proper remedy was removal of the debtor from possession.

Alleging that current management was unfit to manage the debtors, a rival company and the U.S. Trustee filed motions to minimize the principal’s impact on the debtor’s business. They requested, alternatively, (1) the conversion of the case to a traditional chapter 11 case to permit the appointment of a chapter 11 trustee, as had occurred in *National Small Business Alliance*; (2) the § 1185 removal of the debtor as debtor-in-possession, which would permit the already-appointed subchapter V trustee to run the debtor’s business under § 1183(b)(5); or (3) the dismissal of the case for cause under § 1112(b).

In considering the “close” question of whether a court could permissibly revoke the subchapter V designation over a debtor’s objection, the court noted that the *National Small Business Alliance* result was the right one on policy grounds, *id.* at *4, and that the cases permitting debtors in pending cases to elect subchapter V after its enactment support that result.³⁰

³⁰ The court elaborated on the argument: “Indeed, the argument can be taken a step further. Because Rule 1009(a) states that a petition may be amended ‘on a motion of a party in interest,’ while Rule 1009(b) permits the statement of intention to be amended only by ‘the debtor,’ one might draw an inference that the Advisory Committee, at least, made an express determination to permit parties in interest other than just the debtor to move the Court to amend a bankruptcy petition.” *In re ComedyMX, LLC*, 647 B.R. at 463

The court was concerned, however, that § 103(i) reserves the decision to proceed under subchapter V to the *debtor*. In the post-SBRA cases in which the courts permitted a debtor to amend its petition to proceed under subchapter V, the debtor had requested the amendment.

Because non-debtor parties in interest may not force a debtor into subchapter V over the debtor's objection, the *ComedyMX* court reasoned, "it cannot be argued that parties in interest have *carte blanche* to . . . move debtors in or out subchapter V as they see fit." *Id.* at *5. Further, the court noted, Rule 1020³¹ implies that the debtor's subchapter V designation controls unless the court finds the debtor statutorily ineligible. *Id.* at *5.

The court did not decide the issue because it concluded that revocation of the election would be permissible only as a measure of last resort and that removal of the debtors from possession was the appropriate remedy. Because the case was in an early stage and the debtors had not yet proposed a plan, the court reasoned that they should have the chance to proceed under subchapter V, although under the control of the subchapter V trustee. *Id.* at *5.

Some courts in declining to revoke the subchapter V election based on the circumstances of the case have expressed doubt that a court has the authority to do so in view of the fact that § 103(i) provides for the debtor to control the subchapter V election.³²

A creditor in *In re USA Cricket*, 2025 WL 3635717 (Bankr. D. Colo. 2025), requested that the court revoke the debtor's subchapter V election and appoint a chapter 11 trustee because of dysfunctional corporate governance that made the debtor incapable of proposing a confirmable plan of reorganization. Another creditor and four members of the board of directors supported the request; the debtor, the U.S. Trustee, and the other five members of the board opposed it.

After reviewing the rulings in *National Small Business Alliance* and *ComedyMX*, the court concluded that a bankruptcy court has authority to revoke a debtor's subchapter V election in narrow circumstances. *Id.* at *2-3. Whether such circumstances existed, the court continued, "turns on whether the Debtor's case and prospects for reorganization are so hopeless and counter to the goals of Subchapter V that the only viable option for the debtor to reorganize is to de-designate it and appoint a Chapter 11 trustee." *Id.* at 3.

The U.S. Trustee argued that the provisions in subchapter V for removal of the debtor from possession and expansion of the powers of the trustee made it unnecessary to revoke the debtor's designation. The court concluded, however, that such a remedy would not resolve the governance issues because, even after removal from possession, the debtor would retain the sole power to file a plan. *Id.*

³¹ "The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect." Bankruptcy Rule 1020(a).

³² *In re Pinnacle Foods of California, LLC*, 2024 WL 3873478 at *5 (Bankr. E.D. Cal. 2024); *In re Free Speech Systems, LLC*, 649 B.R. 729, 734-35 (Bankr. S.D. Tex. 2023).

The court reasoned that whether it was “entirely implausible” for the debtor to reorganize under subchapter V was a close question and that the standards for revocation of the election are high. *Id.* at 3. The debtor had complied with most of the deadlines and requirements of the Bankruptcy Code, and the 90-day deadline for the filing of a plan had not yet occurred.

Because the deadline had not passed, the court concluded, the Debtor has not yet demonstrated that it is truly incapable of successfully reorganizing under Subchapter V.” *Id.* at 4. Accordingly, the court ruled that it could not “at this time, find that cause exists to revoke the Debtor’s designation.” *Id.*

The court denied the request without prejudice and cautioned the debtor that if it “fails to comply with the obligations of Subchapter V, including filing a timely plan, the Court will likely grant any future motion to revoke the Debtor’s designation and appoint a Chapter 11 trustee.” *Id.* The court noted that it would not extend the plan deadline.

After the plan deadline expired without the filing of a plan, the creditor renewed its motion, which the court considered in a later order. *In re USA Cricket*, 2026 WL 88217 (Bankr. D. Colo. 2026). Incorporating its prior ruling, *id.* at * 1, the court concluded that cause existed to revoke the subchapter V election and to require the debtor to proceed in a traditional chapter 11 case, *id.* at * 3:

The Debtor’s failure to comply with the requirements of Subchapter V by filing a plan by the 90-day deadline coupled with repeated disputes among its board members and questions regarding its management lead the Court to believe that the Debtor is incapable of succeeding in Subchapter V. Therefore, the Court finds cause exists to revoke the Debtor’s designation and require it to proceed under the provisions of a regular Chapter 11.

The court then concluded that cause existed for appointment of a trustee in the traditional chapter 11 case based on “the Debtor’s failure to file a plan by the deadline, mismanaged operations, acrimonious relationship with creditors, and demonstrated inability to function.” *Id.* at 3.

K. Conversion of Chapter 12 Case to Subchapter V; Creditor Request for Conversion of Chapter 7 Case*

In chapter 12 cases, § 1208 governs conversion or dismissal to another chapter. Section 1208(a) permits the debtor to convert the case to chapter 7, and § 1208(b) provides for dismissal of the case at the request of the debtor, if the case has not previously been converted from chapter 7 or chapter 11. Section 1208(c) permits dismissal for cause, and section 1208(d) provides for dismissal or conversion to chapter 7 for cause. Section 1208(e) prohibits conversion to another chapter if the debtor may not be a debtor under such chapter.

Section 1208 does not have any provision that permits conversion to chapter 11. Some courts have held that a debtor may not convert from chapter 12 to chapter 11, while others have permitted it. *See, e.g., In re Cardwell*, 2018 WL 4846520 (Bankr. N.D. Tex. 2018) (permitting conversion and collecting cases); *In re Colon*, 2016 WL 35498821 (Bankr. D. P.R. 2016) (not

permitting conversion and collecting cases); W. Homer Drake, Jr., and Karen D. Visser, *BANKRUPTCY PRACTICE FOR THE GENERAL PRACTITIONER* § 14:8 & nn. 9 & 10.

A debtor ineligible for chapter 12 sought conversion of her case to subchapter V as an alternative to dismissal in *In re Leonaggeo*, 2023 WL 3638053 (Bankr. S.D.N.Y. 2023). The court concluded that conversion was not an available option. The court reasoned, *id.* at *4:

In the Second Circuit, when the plain meaning of the statute fails to clarify ambiguity, Courts look to legislative history. *United States v. Jones*, 965 F.3d 190, 195 (2d Cir. 2020). While some Courts read the statute to be permissive, there is nothing in the legislative history suggesting that Congress intended for a chapter 12 debtor to convert to chapter 11. *See In re Orr*, 71 B.R. 639 (Bankr. E.D. N.C. 1987); *Matter of Bird*, 80 B.R. 861 (Bankr. W.D. Mich. 1987); *In re Johnson* 73 B.R. 107 (Bankr. S.D. Ohio 1987). This Court declines to accept the permissive reading and finds that conversion from chapter 12 to chapter 11 subchapter V is not possible under section 1208 of the Bankruptcy Code.

The *Leonaggeo* court noted that the debtor might choose to file a new case under subchapter V and cautioned that the automatic stay would not go into effect under § 362(c)(4) because it would be the debtor's third case within a year.

The court in *In re Powell*, 2022 WL 10189109 (Bankr. M.D. Pa. 2022), noted that it had denied the chapter 12 debtor's motion to convert to subchapter V in connection with its dismissal of the case.

A creditor sought conversion of a corporate debtor's chapter 7 case to subchapter V in *In re Roberson Cartridge Co., LLC*, 2023 WL 2393809 (Bankr. N.D. Tex. 2023). Acknowledging that § 706(b) permits conversion of a chapter 7 case to a chapter 11 case on request of a creditor or other party in interest, the court concluded that it could not order conversion to a case under subchapter V because only the debtor may elect its application.

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

B. Role and Duties of Subchapter V Trustee

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

Several cases illustrate how subchapter V trustees have participated in subchapter V cases and assisted in their administration and confirmation of plans.

In *In re Corinthian Communications, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022), the court observed:

Subchapter V provides for the appointment by the United States Trustee of a non-operating trustee who provides oversight of the debtor in possession and helps facilitate

negotiation of what will hopefully be a consensual plan of reorganization plan. *See* 11 U.S.C. § 1183. In this Court’s experience, Subchapter V trustees are the “honest brokers,” who through their efforts have provided credibility in evaluating the debtor’s business prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor’s stakeholders, thereby enabling a small business to reorganize.

The court in *In re New York Hand & Physical Therapy PLLC.*, 2023 WL 2962204, at *1 (Bankr. S.D.N.Y. 2023), summarized the subchapter V trustee’s role:

Importantly, Subchapter V provides for the appointment of a trustee to assist the debtor in possession, provide oversight, and to help facilitate negotiation of a consensual plan of reorganization. 11 U.S.C. § 1183. The Subchapter V trustee appears at status conferences and provides the Court with valuable information on the progress of the case. *Id.* § 1183(b)(3). The Subchapter V trustee may be called on to perform the duties of the debtor in possession and operate the business. *Id.* § 1183(b)(5). Bankruptcy courts rely on the Subchapter V trustee to provide candid advice concerning a debtor’s efforts to comply with its duties under the Code. *Id.* § 1183(b)(4); *In re Corinthian Commc’n, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022) (“Subchapter V Trustees are the ‘honest brokers,’ who through their efforts have provided credibility in evaluating the debtor’s business prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor’s stakeholders, thereby enabling a small business to reorganize.”). The success of an individual Subchapter V case and of the bankruptcy courts in overseeing them depends in part on “the openness and transparency of the debtor with the Subchapter V Trustee, the U.S. Trustee, creditors, and with the Court.” *Id.*

In *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), an objector attacked the projections attached to the debtor’s plan. The court noted that the subchapter V trustee “testified convincingly that he not only had a hand in preparing the financial projections but has also reviewed them and concludes they show a viable path forward for Debtor.”

The court continued, *id.* at 6:

As the subchapter V trustee, his primary duty is to facilitate development of a consensual plan of reorganization. 11 U.S.C. § 1183(b)(7). The [subchapter V] Trustee’s expertise as a financial advisor is integral to this process of attempting to bridge the gap between debtors in distress and creditors seeking repayment.

Although the court concluded that other issues required amendment of the plan for it to be confirmable, the court ruled that the debtor had met its burden of establishing that the plan complied with the requirement of § 1190(1)(C) that the plan contain financial projections that demonstrated the debtor’s ability to make payments under the plan.

The *Channel Clarity* court also discussed the subchapter V trustee's views and proposals stated at the hearing concerning management of the debtor and encouraged the debtor to explore them with the trustee and other parties objecting to confirmation in response to the court's concerns about management. Section VIII(D)(12) *infra* discusses this aspect of the case.

In *In re Lapeer Aviation, Inc.*, 2022 WL 7204871 (Bankr. E.D. Mich. 2022), the court denied confirmation because the plan did not meet the "best interests of creditors test" of § 1129(a)(7) and because it unfairly discriminated against the holder of an equity interest. The court overruled objections based on good faith and feasibility.

The good faith objection, in part, was that the debtors had not provided accurate financial disclosures in their monthly operating reports. The court agreed that initial reports were not entirely accurate and were incomplete. The court found no absence of good faith, however, stating, *id.* at *4:

[T]he Debtors readily provided Debtors' complete financial records to the Subchapter V Trustee, . . . a seasoned financial consultant with decades of experience assisting troubled companies, [who] testified that the Debtors were cooperative and responsive in providing the source documents containing the financial information he needed to prepare his 13 week cash flow and the projections which form the basis of the Plan. The monthly operating reports played no role in [the trustee's] formulation of the Plan's financial projections and, in any event, those monthly operating reports have now been amended and corrected.

The court concluded that the debtors had not filed the inaccurate reports to mislead creditors or the court and that, while "certainly imperfect," they generally complied with the reporting requirements in § 308.

With regard to feasibility, the court found that the plan was feasible based in part on the subchapter V trustee's testimony that he had reviewed all of the necessary source financial information to "model a 13-week rolling cash flow inclusive of all income and expenses" and that his plan projections based on this cash flow forecast were realistic and achievable. *Id.* at *6.

The "best interests" problem was that the debtors had identified potential claims that the debtors *might* pursue for the benefit of creditors. The court concluded that the best interests test required pursuit of the claims and that the plan must include provisions requiring the debtors to pursue them or granting derivative standing to other interested parties if the debtors chose not to pursue them. *Id.* at 5.

The court did not mention it, but an alternative might be to provide for the subchapter V trustee to pursue the claims.³³

In re Corinthian Communications, Inc., 642 B.R. 224 (Bankr. S.D.N.Y. 2022), involved an apparently viable business that might reorganize. The debtor's management, however, had

³³ See *Update* § IV(B)(5).

been accused of fraud with several conflicts of interest and had failed to provide information to, and otherwise cooperate with, the subchapter V trustee. The court found that the debtor's "grudging disclosure of information" was "completely unacceptable." *Id.* at 232.

Concerned that "the result of removing the debtor as debtor-in-possession could very well lead to the failure or collapse of the business," the court instead expanded the powers of the subchapter V trustee to include investigation of the debtor under § 1183(b)(2). *Id.* at 234. The court noted that further relief, such as removal of the debtor from possession, dismissal, or conversion might be required, based on the outcome of the investigation. *Id.* at 234.

Corinthian Communications illustrates two points. First, it is an example of how a debtor should *not* deal with the subchapter V trustee. Second, it is an example of how the presence of the subchapter V trustee provides an opportunity to salvage a viable business *if* the debtor follows the approach of the debtors in *Channel Clarity* and *Lapeer Aviation*.

One of the duties of a trustee under § 704(a) is to "examine proofs of claims and object to the allowance of any claim that is improper," if a purpose would be served. § 704(a)(5). A subchapter V trustee has this duty under § 1183(a). In *In re Mallett, Inc.*, 2024 WL 150628 (Bankr. S.D.N.Y. 2024), the court approved the subchapter V trustee's settlement of claims of affiliates of the debtor after confirmation of a plan over the objection of the debtor's largest unsecured creditor other than the affiliates. The trustee's duties and authority with regard to the review of proofs of claims were not issues in the case, but it illustrates the role that the trustee may play in resolving issues with the debtor's insiders and confirms that the trustee's authority to object to proofs of claim necessarily includes the authority to settle objections under Bankruptcy Rule 9019.

In *In re Major Model Management, Inc.*, 641 B.R. 302 (Bankr. S.D.N.Y. June 21, 2022), the court declined to permit the filing of a proof of claim on behalf of a class under Rule 23 of the Federal Rules of Civil Procedure. Noting that an independent trustee serves in subchapter V cases to provide "oversight and guidance" to the court and the parties, the court agreed with the subchapter V trustee's views at the hearing that the most efficient way to deal with the claims of the putative class members was through the claims objection process.

In *In re Central Florida Civil, LLC*, 649 B.R. 77 (Bankr. M.D. Fla. 2023), the court confirmed a plan providing for an injunction that prevented pursuit of guaranty claims against the debtor's managers pending payments under plan. The court observed that the input of trustee in support of confirmation was "especially instructive." The trustee stated the plan could not go forward without an injunction to protect the debtor's managers.

The court in *In re Rosa Mosaic & Tile Company*, 643 B.R. 865 (Bankr. W.D. Ky. 2022), permitted the debtor to reject a collective bargaining agreement after an extensive factual analysis of the debtor's negotiations with the union to determine whether § 1113(c) permitted the rejection. The subchapter V trustee participated in the negotiations and testified at the hearing on the debtor's application for approval of the rejection.

The subchapter V trustee's involvement in the case provided an "extra safeguard" with regard to patient issues that provided "additional comfort" to the court that the debtor's dental practice operations were being monitored such that the appointment of a patient care ombudsman under § 333 was not necessary. *In re Sameh H. Aknouk Dental Services, P.C.*, 648 B.R. 755, 766 (Bankr. S.D.N.Y. 2023).

A subchapter V trustee and a bankruptcy administrator have standing to appear and be heard in an adversary proceeding brought by a creditor to determine ownership of personal property. *Palmetto State Armory, LLC v. Ikon Weapons, LLC (In re Ikon Weapons)*, 650 B.R. 670, 677 n. 3 (Bankr. M.D. N.C. Nov. 30, 2022). *See also* 7 COLLIER ON BANKRUPTCY ¶¶ 1109.04, 1112.04[1] n. 5 (16th ed.).

2. Other duties of the trustee

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

4. Expansion of trustee's duties to include investigative duties*

A subchapter V trustee's duties do not include the broad investigative duties of a trustee in a traditional chapter 11 case under § 1106(a)(3)³⁴ and the duty under § 1106(a)(4) to file a statement of any investigation.

Section 1183(b)(2) authorizes the court to expand the trustee's duties to include investigative duties for "cause," but it does not define "cause."

Courts have not formulated a specific definition of "cause" to expand the trustee's duties. Rather, they have identified circumstances that provide appropriate reasons for the trustee to undertake an investigation. Thus, a court may expand the trustee's duties when the case involves potential claims against insiders or affiliates or 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, or the accuracy and completeness of the debtor's disclosures and reports.³⁵ The court may consider whether the subchapter V trustee is satisfied with the debtor's disclosures and administration of the case and whether the asserted need for the trustee to investigate justifies the additional fees of the trustee in conducting it.³⁶

The decision is a discretionary one; § 1183(b)(2) requires the trustee to perform investigative duties if the court "so orders," but does not require the court to do so. The court may limit the scope of the trustee's investigation to specified issues of concern.³⁷

A court may remove a debtor from possession or expand the trustee's powers *sua sponte*. *In re Coeptis Equity Fund, LLC*, 2022 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff'd*

³⁴ Under § 1104(a)(3), a chapter 11 trustee has the duty to investigate the "acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan."

³⁵ *In re Velsicol Chemical LLC*, 2024 WL 4879960 at *3 (Bankr. N.D. Ill. 2024); *In re Corinthian Communications, Inc.*, 642 B.R. 224, 233 (Bankr. S.D.N.Y. 2022); *In re Ozcelebi*, 639 B.R. 365, 383 (Bankr. S.D. Tex. 2022); *In re AJEM Hosp., LLC*, 2020 WL 3125276 at *2 (Bankr. M.D.N.C. 2020).

³⁶ *In re Velsicol Chemical LLC*, 2024 WL 4879960 at * 3 (Bankr. N.D. Ill. 2024).

³⁷ *In re AJEM Hosp., LLC*, 2020 WL 3125276 at *2 (Bankr. M.D.N.C. 2020).

2024 WL 1133580 (9th Cir. 2024) (unpublished); *In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re Ozcelebi*, 639 B.R. 365, 425 (Bankr. S.D. Tex. 2022).

5. Authority of subchapter V trustee to exercise trustee powers; management of conflicts of interest*

Section 1184 provides that “a debtor in possession shall have all the rights, other than the right to compensation under [§ 330], and powers . . . of a trustee serving in a case under [chapter 11], including operating the business of the debtor.” Section 1186(b) provides that the debtor remains in possession of all property of the estate, unless the debtor is removed from possession or a confirmed plan or confirmation order provides otherwise.

A question is whether the subchapter V trustee has the authority to exercise the powers that a trustee has in a chapter 11 case. A chapter 11 trustee’s powers include the rights to use, sell, or lease property of the estate under § 363(b) other than in the ordinary course of business, to obtain postpetition financing under § 364, and to pursue avoidance actions under §§ 545, 547, 548, 549.

One theory is that § 1184 does not provide for the subchapter V debtor in possession to have the rights and powers of a trustee exclusive of the subchapter V trustee. *In re Roe*, 2024 WL 206678 at * 2 (Bankr. D. Ore. 2024). In *Roe*, the subchapter V trustee filed a motion under § 363(b) to require the debtor to post a retainer for the trustee’s fees and expenses. The court ruled that the trustee had authority to seek the use of estate property outside the ordinary course of business, concluding, *id.*:

[A] subchapter V trustee may use the trustee’s rights and powers under the Bankruptcy Code to the extent it is necessary for a subchapter V trustee to fulfill the statutory duties given to subchapter V trustees in section 1183. Such authority is concurrent with the debtor’s authority to use those same trustee’s rights and powers under the Bankruptcy Code to fulfill the debtor’s duties as a debtor in possession, including those duties under section 1184.

The *Roe* court held that it could not grant the trustee’s motion because the trustee had not served it on all parties in interest, as Bankruptcy Rule 2002(a)(2) requires for a motion to use property outside of the ordinary course of business. The court ruled, however, that it would require the debtor to establish a trust account for the benefit of all administrative claimants if, after service of the motion on all parties in interest, no one objected. *Id.* at *5. Section IV(E)(4) discusses deposits for payment of the trustee’s compensation.

Other cases conclude that § 1184 vests trustee powers exclusively in the debtor in possession.

In *Singh v. Price (In re Turkey Leg Hut & Co., LLC)*, 659 B.R. 539 (Bankr. S.D. Tex. 2024), the subchapter V trustee filed a complaint and motion for a temporary restraining order and preliminary injunction on behalf of the debtor in possession to restrain the spouse of the debtor’s principal from interfering with the debtor.

The court dismissed the complaint and motion *sua sponte* for lack of standing, concluding that the subchapter V trustee had no statutory authority to bring an action on behalf of the debtor. The court ruled, *id.* at 544:

None of the subchapter V trustee’s general duties authorize the Subchapter V Trustee to pursue claims belonging to the estate, on behalf of the estate. Therefore, this Court finds, that the debtor in possession has exclusive standing to pursue causes of action pursuant to 11 U.S.C. § 1184.

In *Ghatanfard v. Zivkovic (In re Ghatanfard)*, 666 B.R. 14 (S.D.N.Y. 2024), the district court affirmed conversion of the subchapter V case to chapter 7 because of conflicts of interest between the debtor arising from substantial prepetition transfers to his “life partner.” The debtor had acknowledged the conflict of interest and proposed that the subchapter V trustee’s powers be expanded to permit the trustee to take over the fraudulent transfer claims. The bankruptcy court, however, determined that it could not order such relief over the opposition of a creditor and the subchapter V trustee. *Id.* at 20.

The district court affirmed the bankruptcy court’s ruling that the conflict of interest was cause for conversion to chapter 7 and ruled that the bankruptcy court had not “abused its discretion in determining that it did not have the authority, over the objection of a creditor, to expand the Subchapter V Trustee’s powers to include litigation of the fraudulent conveyance claims on behalf of the estate.” *Id.* at 27. In its analysis, the district court observed that the debtor had provided no authority for the proposition that a subchapter V trustee can be empowered to pursue avoidance actions and that *Singh v. Price (In re Turkey Leg Hut & Co., LLC)*, 659 B.R. 539 (Bankr. S.D. Tex. 2024), discussed above, held to the contrary. *Id.* at 26. (The court did not cite *In re Roe*, 2024 WL 206678 at *2 (Bankr. D. Ore. 2024), which states that the subchapter V trustee has concurrent authority with the debtor to exercise trustee powers “to fulfill the statutory duties given to subchapter V trustees in section 1183.”)

Careful analysis of the issue shows that a bankruptcy court has the discretion to expand the trustee’s powers and that expansion of trustee’s powers may be a useful tool in a subchapter V case.

The Bankruptcy Code vests avoidance powers³⁸ and authority over assets (including their sale³⁹ and assumption or rejection of executory contracts⁴⁰) and other matters in the trustee. Section 1184, however, provides that a debtor in possession in a subchapter V case has all the rights of a chapter 11 trustee, other than the right to compensation. This vesting of rights in the debtor in possession is not unconditional. Importantly, § 1184 begins with the limitation that the debtor’s trustee powers are “subject to such limitations or conditions as the court may prescribe.”

³⁸ 11 U.S.C. §§ 544 -- 549, 553(b).

³⁹ 11 U.S.C. §§ 363, 542, 543.

⁴⁰ 11 U.S.C. § 365.

Because § 1184 permits the court to condition or limit the trustee's powers, it provides authority for the court to remove specified trustee powers from the debtor in possession, thereby necessarily vesting them in the trustee.

The fact that § 1182(b) does not impose a *duty* on the subchapter V trustee to pursue avoidance actions or exercise other trustee powers does not mean that the trustee does not have the *power* to exercise trustee powers that the court removes from the debtor in possession.

Indeed, a trustee's authority in a traditional chapter 11 case to pursue such matters does not arise from the trustee's duties under § 1106(a), which do not include any duty to pursue claims of the estate or liquidate its assets. The trustee's authority instead derives from § 323, which makes the trustee the representative of the estate, § 323(a), and gives the trustee the capacity to sue and be sued, § 323(b).⁴¹

The ability of the bankruptcy court to exercise its discretion to authorize a subchapter V trustee to exercise certain trustee powers instead of the debtor is important. Conflicts of interest in subchapter V cases are not uncommon, and the enlistment of the trustee to handle such matters on an independent, fiduciary basis permits the other aspects of the reorganization of the debtor to continue under the debtor in possession. A subchapter V debtor who candidly discloses potential claims involving a conflict of interest at the outset of the case should not face conversion or dismissal if the conflict can be managed by putting the trustee in charge of matters involving the conflict.

Ghatanfard and *Turkey Leg* do not require a different conclusion. The district court's ruling in *Ghatanfard* is correct to the extent of its holding that a bankruptcy court has discretion to determine whether a conflict of interest requires conversion as opposed to expansion of the subchapter V trustee's powers to handle litigation that the conflict involves. The *Turkey Leg* decision, likewise, is correct to the extent that it holds that a subchapter V trustee cannot pursue estate claims in the specific context of that case, where the debtor was in possession and the court had not entered any order regarding the subchapter V trustee's pursuit of estate claims.

Turkey Leg does not address whether a bankruptcy court may exercise its discretion to authorize a subchapter V trustee to pursue claims where a conflict of interest exists or, more generally, to authorize a trustee to exercise other estate powers (such as liquidation of the debtor's assets) in appropriate circumstances.

Ghatanfard does not hold that a court may not do so. The recitation of the bankruptcy judge's oral ruling in the district court's opinion in *Ghatanfard* indicates that the bankruptcy judge may have preferred expansion of the trustee's powers to permit the trustee to prosecute the claim, but it does not discuss the bankruptcy judge's reasoning for the conclusion that the statute did not authorize such expansion. *Id.* at 19-20.

It is arguable that, having concluded that the conflict of interest was cause for conversion, the bankruptcy court in *Ghatanfard* had no option to expand the trustee's powers rather than

⁴¹ See Thomas T. McClendon, *Is It In the Name? A Sub V Trustee's Pursuit of Avoidance Actions*, XLIV ABI JOURNAL 5, 16-17, 56-57, May 2025.

convert the case because § 1112(b)(1) mandates conversion if cause exists. But if a conflict of interest is manageable through expansion of the trustee's powers, that alternative should be an alternative to conversion for one of two reasons.

First, a court could conclude that "cause" does not include a conflict of interest that is manageable.

Second, a court could decide that managing the conflict of interest by expansion of the trustee's powers satisfies the requirements of § 1112(b)(2) that preclude conversion if "unusual circumstances" establish that conversion is not in the best interests of creditors and the estate,⁴² a reasonable likelihood exists that a plan will be confirmed within a reasonable time,⁴³ a reasonable justification for act or omission that constitutes grounds for conversion exists,⁴⁴ and cure of the grounds for conversion will occur with a reasonable time fixed by the court.⁴⁵

Where the cause for conversion is a conflict of interest, the conflict is manageable, a plan is confirmable within a reasonable time, and creditors are better off under a plan than in a chapter 7 case, unusual circumstances establish that conversion is not in the best interests of creditors and the estate.

The conflict of interest exists because of prepetition events that the debtor cannot change. The cause for conversion is the need to investigate and prosecute the potential claims, not the existence of the claims themselves. As such, cause for conversion based on a conflict of interest does not involve an "act or omission" for which the debtor could provide a "reasonable justification." Nevertheless, the fact that the conflict of interest arises from prepetition events that the debtor cannot change provides a "reasonable justification" for the grounds for conversion. Management of the conflict by permitting the trustee to investigate and prosecute the claims that give rise to the conflict of interest provides an immediate cure of the problem.

In *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024), the court confirmed a plan over the objection of a creditor who contended that it did not adequately take account of various claims against the principal and affiliates. Without addressing the conflict of interest issue, the court analyzed each potential claim and determined that none of them were viable.

In *The Reed Action Judgment Creditors v. Alecko Healthcare Services, LLC (In re Alecko Healthcare Services, LLC)*, 2025 WL 961482 at * 10-11 (D. Del. 2025), *aff'd* ___ F.4th ___, 2026 WL 2165844 (3d Cir. 2026), the court affirmed the bankruptcy court's confirmation of a plan that included the settlement of potential fraudulent conveyance and breach of fiduciary duty claims against the debtor's insiders. Evidence before the bankruptcy court included testimony of the debtor's independent director that supported the bankruptcy court's determination that the

⁴² 11 U.S.C. § 1112(b)(2).

⁴³ 11 U.S.C. § 1112(b)(2)(A). The applicable time is a "reasonable period of time" because a subchapter V case is not a small business case in which 11 U.S.C. §§ 1121(e) and 1129(e) apply.

⁴⁴ 11 U.S.C. § 1112(b)(2)(B)(i).

⁴⁵ 11 U.S.C. § 1112(b)(2)(B)(ii).

proposed settlement fell above the lowest point in the range of reasonableness. The court did not address conflict of interest issues.

C. Trustee's Disbursement of Payments to Creditors

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

SBRA Guide § IV(C)(1) discusses the trustee's preconfirmation receipt and distribution of payments and funds the trustee receives from the debtor prior to confirmation. It states, *id.* at 61, "Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the debtor to make preconfirmation payments to the trustee."

The court in *In re Roe*, 2024 WL 206678 (Bankr. D. Ore. 2024), discussed in the previous Section, however, found an appropriate situation to require the debtor to make payments to the trustee. As section IV(E)(4) of this Update discusses, the court concluded that it had authority to require the debtor to make a preconfirmation payment to the trustee to establish a trust account for the benefit of administrative claimants, including the trustee. The court stated, *id.* at *3:

Section 1194(a) authorizes subchapter V trustees to hold funds before plan confirmation. Funds may not be paid from the trust account unless and until payment to the Subchapter V Trustee and any other administrative expenses is authorized by the Bankruptcy Code and approved by the court.

A potential problem with the use of § 1194 in this circumstance is that § 1194(a) requires the trustee to hold prepetition payments and funds until confirmation or denial of confirmation of a plan. A court might avoid this complication (which could prevent, for example, use of the funds for the trustee's interim compensation prior to a hearing on confirmation) by stating the terms for disbursement in the order requiring the trust account. As the *Roe* court held (see *supra* Section IV(B)(4)), § 363(b) may authorize the trustee to use funds of the debtor outside the ordinary course of business to establish a trust account that the trustee controls, without the necessity of invoking § 1194.

2. Disbursement of plan payments by trustee

D. Termination of Service of Trustee and Reappointment

1. Termination of service of trustee*

Section IX(D) of this Update discusses termination of service of the subchapter V trustee after cramdown confirmation when the debtor makes payments under the plan.

2. Reappointment of trustee

E. Compensation of Trustee

1. Compensation of standing subchapter V trustee

2. Compensation of non-standing subchapter V trustee*

Confirming what appears to be universal practice, the court in *In re Robert J. Ambruster, Inc.*, 653 B.R. 461 (Bankr. E.D. Mo. 2023), in an opinion denying a motion to reconsider various rulings, noted that it had awarded compensation to the subchapter V trustee based on 330(a)(1) and had overruled objections that U.S. Trustee should have appointed a standing trustee under 28 U.S.C. § 586(b) and that § 586(b) limits compensation to five percent of payments under confirmed plan.

Section IV(E)(5) of this Update discusses additional caselaw dealing with conditioning dismissal of a case on payment of the subchapter V trustee's compensation.

3. Deferral of non-standing trustee's compensation

4. Deposits and postpetition retainers for payment of compensation and expenses of trustee*

Judges in the Middle District of Florida have included a provision for interim trustee compensation in subchapter V cases in an "Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference."⁴⁶ The orders require the debtor to pay \$ 1,000 as interim compensation to the subchapter V trustee within 30 days of the petition date and monthly thereafter. The amount is subject to adjustment upon request of any interested party and to the court's approval of the trustee's compensation under § 330. The debtor must include the interim compensation in any cash collateral budget.

Other courts are requiring similar deposits.

Courts have stated that a postpetition retainer for debtor's counsel is permissible in appropriate circumstances.

The court considered a subchapter V trustee's request for the debtor to post a retainer for the subchapter V trustee in *In re Roe*, 2024 WL 206678 (Bankr. D. Ore. 2024), discussed in § IV(B)(4) of this Update.

The *Roe* court concluded that the trustee had shown a valid business judgment to require the debtor to set money aside "to establish a viable source of funds to pay an obligation that Debtor has incurred in [the] case" and that a deposit of \$ 7,500 was reasonable given the fees that the trustee had incurred and was likely to incur. *Id.* at *3. The court ruled, however, that the funds should be available on a pro rata basis for benefit of all administrative claimants, not just the trustee, reasoning that claims of equal priority under the Bankruptcy Code must be treated the same.

⁴⁶ E.g., *In re Nostalgia Family Medicine P.A.*, Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Bankr. M.D. Fla. Mar. 26, 2021).

The court stated, *id.* at *3 (footnote omitted):

[The] funds should be placed in a trust account to be used to pay administrative expenses, and not in the form of a retainer in which only the Subchapter V trustee would have a property interest. Section 1194(a) authorizes subchapter V trustees to hold funds before plan confirmation. Funds may not be paid from the trust account unless and until payment to the Subchapter V Trustee and any other administrative expenses is authorized by the Bankruptcy Code and approved by the court.

The court in *In re Golden Fleece Beverages, Inc.*, 2021 WL 6015422 (Bankr. N.D. Ill. 2021), approved a postpetition retainer for the subchapter V debtor's replacement counsel. The *Golden Fleece Beverages* court looked to the four factors identified in *In re Knudsen Corp.*, 84 B.R. 668, 672-73 (B.A.P. 9th Cir. 1988), for consideration when reviewing compensation arrangements that depart from typical ones: (1) whether the case is an unusually large one in which an exceptionally large amount of fees accrue each month; (2) whether waiting an extended period for payment would place an undue hardship on counsel; (3) whether counsel can respond to reassessment of fees if reduction occurs upon application for approval; and (4) the fee retainer procedure is the subject of a noticed hearing before any payment occurs.

The *Golden Fleece Beverages* court also noted that other relevant factors could include “whether debtors would prefer monthly rather than quarterly payments, the effect of the proposal on the court's ability to adequately review fee applications, the economic impact of the payment arrangement on the debtor, the debtor's ability to reorganize, and the reputation of proposed counsel.” 2021 WL at 6, *citing In re Mariner Post-Acute Network, Inc.*, 257 B.R. 723, 731 (Bankr. D. Del. 2000).

The court in *In re Raocore Tech, LLC*, 2025 WL 82880 (Bankr. D.D.C. 2025), declined to approve an “evergreen retainer” whereby the debtor would make postpetition payments as an additional retainer as counsel submitted statements for services during the case. The court noted that evergreen retainers are permissible in appropriate circumstances and discussed factors for consideration in making the determination, *id.* at *5 (footnote omitted):

[R]easonable evergreen retainers are permissible in certain chapter 11 cases with: (i) appropriate notice; (ii) specific disclosure of the existence of an evergreen retainer in any employment application filed with the Court; (iii) the inclusion of any retention agreement with any employment application; (iv) terms in the applicable retention agreement making clear that any amounts paid shall be held in trust until a final fee application is approved (or other time period as agreed by the parties and approved by the Court); and (v) ultimate approval of any employment application by the Court prior to any payments made by any entity thereunder. In addition to the foregoing notice and disclosure requirements, before approving an evergreen retainer provision, the Court must consider the reasonableness of the employment application and underlying evergreen retainer, especially whether they are tailored to both the requirements of the Bankruptcy Code and the particular circumstances of the individual chapter 11 proceeding. *See [In re Insilco Techs., Inc. 291 B.R. 628, 634 (Bankr. D. Del. 2003)].*

Although no one factor is determinative, factors to be considered in determining whether the terms of a proposed retention are reasonable include (i) the relationship between the Debtor and the applicant, including whether the parties have equal bargaining power engaging in an arms-length negotiation; (ii) whether the proposed terms of retention are in the best interests of the estate; (iii) whether there is creditor opposition to the retention or retainer provisions; and (iv) whether given the size and circumstances of the case, the amount and terms of the retainer are reasonable, including whether the terms provide an appropriate level of risk minimization taking into consideration any other risk minimization factors such as an administrative order or carve-outs. See *id.*; see also *In re Knudsen*, 84 B.R. 668, 672–73 (B.A.P. 9th Cir. 1988) (holding that an applicant seeking approval of an evergreen retainer agreement bears the burden of establishing that the case is one in which such agreement is necessary, such as a case where exceptionally large fees will accrue each month or that waiting an extended period of time for payment would place an undue hardship on counsel). Additionally, if an applicant seeks approval of an evergreen retainer, the terms of the evergreen retainer must be clearly disclosed in the applicable employment application and the retention agreement outlining the terms and conditions of the evergreen retainer must be attached to the application. See *Insilco*, 291 B.R. at 636.

In re Soul Wellness LLC, 669 B.R. 848 (Bankr. S.D. Fla. 2025), involved the debtor’s request for approval of postpetition retainers for both its counsel and the subchapter V trustee. Although the debtor had enough cash to post a larger prepetition retainer, the debtor’s lawyers had agreed to take a smaller one so that the debtor would have sufficient cash to address the imminent eviction from its business premises, which had precipitated the filing.

The debtor’s application for approval of employment of the law firm also sought approval of the agreement in the engagement letter for the debtor, subject to court approval, to set aside money every month to pay a portion of the law firm’s fees and expenses and the subchapter V trustee’s fees and expenses as postpetition retainers, to be held in the lawyer’s trust fund account for payment to the lawyers and the subchapter V trustee only upon application by each and the court’s approval. *Id.* at 851.

The United States Trustee did not object to employment of the law firm or the holding of funds in the lawyer’s trust account as the debtor proposed but objected to approval of the payments to the lawyers as a postpetition retainer. The United States Trustee did not object to treating the funds deposited for the benefit of the subchapter V as a postpetition retainer. *Id.* at 851-52. The United States Trustee noted that, unlike debtor’s counsel, a subchapter V trustee does not have an opportunity to obtain a retainer, and some assurance of payment, before the case is filed. *Id.* at n. 6.

The court had earlier approved retention of counsel but deferred ruling on “whether the post-petition payments will be characterized as a post-petition retainer available only to pay Debtor’s counsel or money held in trust, and subject to the claims of all administrative claimants should the Debtor’s bankruptcy case be administratively insolvent.” 669 B.R. at 850.

The court sustained the objection with regard to the postpetition retainer but approved the monthly deposit of funds. Any transferred funds, the court ruled, would remain property of the estate. Although the court's order addressed only the propriety of the proposed postpetition retainer for the lawyers, and the United States Trustee had not objected to a postpetition retainer for the subchapter V trustee, the language of the court's ruling indicates that it did not approve either retainer.⁴⁷

The court began its analysis by observing, "The law is clear that the Court has discretion to authorize a post-petition retainer under 11 U.S.C. § 328(a)." 669 B.R. at 852. The court then reviewed the factors that courts had considered in cases that permitted periodic postpetition payments to professionals without prior court approval,⁴⁸ that approved a postpetition retainer for replacement counsel for a subchapter V debtor,⁴⁹ and that concluded that an "evergreen retainer" procedure is permissible in certain cases.⁵⁰

Addressing some of the factors identified in the caselaw, the court concluded that the case was not of a "size or exceptional nature" to warrant a postpetition retainer. 669 B.R. at 857. Specifically, the court noted that (1) the prepetition relationship of the lawyers and the debtors played a role in the decision to take the case on a small retainer; (2) the lawyers brought "nothing unique" to the case that would support approval of the postpetition retainer as in the best interest of the estate; (3) nothing about the size and circumstances of the case warranted a postpetition retainer; and (4) failure to treat the escrowed funds as a retainer would not create an undue hardship on the law firm. 669 B.R. at 854-57.

5. Payment of trustee's fees as condition of dismissal*

SBRA Guide § IV(E)(2) discusses the issue of conditioning dismissal of a subchapter V case on payment of the trustee's fees.

The court in *In re New York Hand & Physical Therapy PLLC*, 2023 WL 2962204 (Bankr. S.D. N.Y. 2023), concluded that § 349(b) permits a structured dismissal and that payment of professional fees as a condition to dismissal is appropriate. The court required payment of the trustee's fees within 45 days, in the absence of which the case would be converted to chapter 7.

In *In re East Coast Diesel, LLC*, 2022 WL 19078763 (Bankr. M.D.N.C. 2022), the court declined to condition dismissal on payment of the trustee's fees and postpetition taxes. The court

⁴⁷ The decretal language at the end of the Order is, "The Application is DENIED in part with respect to the Post-petition Retainer incorporated into the Retainer Agreement attached to the Application." 669 B.R. at 857. The court earlier referred to payments to the trust account for both the law firm and the subchapter V trustee as the "Post-petition Retainer." *Id.* at 850. The decretal language also orders that "Any funds transferred to Counsel's trust account post-petition remain property of the estate." *Id.* at 857. The issue became moot in view of the fact that the court confirmed the debtor's plan less than a month after entry of the order on the retainers. *In re Soul Wellness, Order Confirming Debtor's Plan of Reorganization*, Case No. 24-233658, Docket No. 113 (May 20, 2025).

⁴⁸ *In re Knudsen Corp.*, 84 B.R. 668 (B.A.P. 9th Cir. 1988) (factors noted in earlier text discussing *Golden Fleece Beverages*).

⁴⁹ *In re Golden Fleece Beverages, Inc.*, 2021 WL 6015422 (Bankr. N.D. Ill. 2021) (discussed in earlier text).

⁵⁰ *In re Raocore Tech, LLC*, 2025 WL 828880 (Bankr. D.D.C. 2025) (discussed in earlier text).

refused to permit a structured dismissal as proposed because the evidence did not establish that all postpetition wages had been paid and because disputes over the amount of the prepetition taxes existed. Because the parties had not demonstrated that payments would occur in accordance with the priority provisions of the Bankruptcy Code, the court dismissed the case without conditions.

The bankruptcy court in *In re Baby Blue of Junction, LLC*, 2024 WL 1241940 (E.D.N.Y. 2024), had conditioned dismissal of the debtor's subchapter V case on payment of the trustee's compensation over the objection of the landlord who had received no postpetition rent for 10 months and sought conversion of the case instead. The district court reversed, concluding that the bankruptcy court had not analyzed whether conversion or dismissal was in the best interests of creditors.

F. Trustee's Employment of Attorneys and Other Professionals

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

B. Duties of Debtor in Possession*

In *In re TLC Medical Group*, 2024 WL 4283801 (Bankr. S.D. Fla. 2024), the court in dismissing the case due to the debtor's failure to provide information to the U.S. Trustee (among other reasons) discussed the usual practices of the U.S. Trustee with regard to requiring information and initial debtor interviews.

In *In re Absolute Dimensions, LLC*, 2026 WL 93834 (Bankr. D. 2026), the court concluded that inaccuracies in the debtor's monthly operating reports could demonstrate gross mismanagement that could constitute cause for dismissal or conversion under § 1112(b)(4)(B) but that the filing of inaccurate reports was not a failure to timely file them that is cause under § 1112(b)(4)(F). Because the trustee's motion sought conversion or dismissal only under subparagraph (F), the court denied the motion.

It is not an abuse of discretion, however, for a bankruptcy court to deny a motion to dismiss and the confirm the debtor's plan where the debtor has filed all monthly operating reports, even if some of them were untimely. *Singh v. Reliable Roadside Services, Inc.*, 2026 WL 980556 at *10-12 (S.D.N.Y. 2026).

C. Removal of Debtor in Possession*

Section V(D)(1) of this Update discusses issues concerning the choice of conversion, dismissal, or removal of the debtor from possession when cause for such remedies exists. Section V(D)(2) considers the alternative remedy of expansion of the subchapter V trustee's powers when cause arises from conflicts of interest between the debtor's principals and the estate.

Section V(E) deals with issues that arise when removal of the debtor from possession occurs, including alternative exit strategies after removal (§ V(E)(1)), compensation of debtor's

professionals after removal (§ V(E)(2)), and alternative theories for compensation of debtor's professionals. (§ V(E)(3)).

D. Dismissal, Conversion, Removal of Debtor From Possession, or Expansion of Powers of Subchapter V Trustee*

Subchapter V,⁵¹ like traditional chapter 11,⁵² contemplates that the debtor, as debtor in possession, remains in charge of property of the estate, the debtor's business, and administration of the case. In addition, the debtor in possession in a subchapter V case under § 1184 has all the rights and powers of the trustee (except the right to compensation). The debtor in possession's duties do not include any investigative duties,⁵³ and the subchapter V trustee does not have them, either, unless the court orders otherwise.⁵⁴

In some cases, however, circumstances may require a departure from this norm.

One set of circumstances involves problems (often many problems) in the administration of the case or operation of the business, including things like debtor misconduct, continuing losses from business operations, or lack of any reasonable prospects for confirmation of a feasible plan. The misconduct may be, among other things, the failure to file required papers (often the monthly operating reports), failure to make proper disclosures (or worse, intentional concealment or misstatement of information required to be disclosed), and improper use of estate assets (such as improper transfers of money or property to insiders).

When these circumstances arise, the court may dismiss⁵⁵ or convert the case under § 1112 or remove the debtor from possession under § 1185(a). The court may also expand the trustee's duties to require an investigation of such matters under § 1183(b)(2).

A second set of circumstances involves a conflict of interest between the debtor's principals and the estate. For example, the estate may have potential claims against insiders for the avoidance of prepetition transfers to insiders. A conflict of interest is cause for conversion, dismissal, or removal of the debtor from possession. An alternative possibility is expansion of the trustee's powers to authorize the trustee to investigate, and prosecute if appropriate, claims that involve a conflict of interest.

Section V(D)(1) discusses the alternatives of conversion, dismissal, or removal of the debtor from possession (Section IV(A)). Section V(D)(2) then deals with expansion of the trustee's powers to include authority to prosecute claims of the estate as a way to manage conflicts of interest in a subchapter V case as an alternative to conversion, dismissal, or removal.

⁵¹ § 1184.

⁵² § 1107.

⁵³ § 1184 requires the debtor in possession to perform all of the trustee's duties in a traditional chapter 11 case except the trustee's investigative duties under § 1106(a)(3) and (4) and the duty to file schedules and other papers if the debtor has not done so under § 1106(a)(2).

⁵⁴ § 1183(b)(2). See § IV(B)(4).

⁵⁵ Denial of a motion to dismiss is not a final order for purposes of appeal under 28 U.S.C. § 158(a). *E.g.*, Singh v. Reliable Roadside Services, Inc. (*In re* Reliable Roadside Services, Inc.), 2026 WL 980556 at *6-9 (D. Md. 2026).

1. The alternatives of conversion, dismissal, or removal of debtor from possession*

In a traditional chapter 11 case, § 1112 provides for dismissal or conversion to chapter 7 for “cause,” § 1104(a) authorizes appointment of a trustee for cause or in the best interests of the estate, and § 1104(b) provides for the appointment of an examiner if it is in the interests of creditors, equity security holders or the estate or if fixed, liquidated, unsecured debts other than for goods, services, taxes, or owing to insiders exceed \$ 5,000,000.

Section 1112 applies in a subchapter V case. Because § 1112 applies in both traditional and subchapter V cases, the issues of whether “cause” for conversion or dismissal exists under § 1112(c)(4)⁵⁶ and whether “unusual circumstances” nevertheless preclude dismissal or conversion despite such cause under § 1112(b)(2)⁵⁷ are the same.

The provisions in § 1104 for the appointment of a trustee or examiner, however, do not apply in a subchapter V case.⁵⁸ Instead, subchapter V has different remedies that serve similar purposes as appointment of a trustee or examiner.

A subchapter V trustee already exists, so the substitute for appointment of a trustee is the removal of the debtor from possession under § 1185(a). Chapter 12 has a similar provision.⁵⁹ The effect of removal of the debtor from possession in a subchapter V case is the same as appointment of a trustee in a traditional case, except that a subchapter V trustee cannot file a plan.⁶⁰

An examiner’s duties are to perform the trustee’s investigative duties under § 1104(a)(3) and (4) and “any other duties of the trustee that the court orders the debtor in possession not to perform.”⁶¹ As Section IV(B)(4) of this Update explains, § 1183(b)(2) permits the court in a subchapter V case, for cause, to expand the trustee’s duties to include these investigatory duties,⁶² and § 1184 permits the court to limit the rights, powers, and duties of the debtor in possession, thereby transferring them to the subchapter V trustee.⁶³

The statutory language in § 1185(a) for removal of a debtor from possession in a subchapter V case is materially the same as the statutory language in § 1104(a)(1) that describes “cause” for appointment of a trustee in a traditional case: the court must appoint a trustee in a traditional case or remove the debtor from possession in a subchapter V case “for cause,

⁵⁶ § 1112(c)(4) defines “cause” as including 16 separate circumstances.

⁵⁷ § 1112(b)(2) provides that the court may not dismiss or convert a case if it “finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate” if the debtor or other party establishes a reasonable likelihood that a plan will be confirmed within a reasonable time (or within the time required by §§ 1121(e) and 1129(e) in a small business case) and the grounds for conversion or dismissal include an act or omission of the debtor (1) for which a reasonable justification exists and (2) cure will occur within a reasonable period of time that the court fixes.

⁵⁸ § 1181(a).

⁵⁹ § 1204.

⁶⁰ § 1189(a). The duties of a subchapter V trustee in § 1183 are the same as the duties of a trustee in a traditional case, except that the subchapter V trustee’s duties do not include the traditional trustee’s duty under § 1106(a)(5) to file a plan, file a report of why the trustee will not file a plan, or recommend conversion or dismissal of the case.

⁶¹ § 1106(b).

⁶² § 1183(2).

⁶³ See § V(D)(2).

including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case.”⁶⁴

Because § 1185(a) states that “cause” for removal *includes* the specified circumstances, other reasons may support removal of the debtor in possession. Courts have found guidance in the caselaw under § 1104(a) because removal of the debtor in a subchapter V case effects the same result as appointment of a trustee in a traditional case.⁶⁵

A request for conversion, dismissal, or removal of the debtor from possession in a subchapter V case usually asserts some type of debtor misconduct in the management of the business or property of the estate (such as gross mismanagement or improper use of estate assets), deficiencies in case administration (such as improper disclosure of required information or failure to file timely reports or other papers), failure to file a plan timely or lack of any reasonable prospects for a confirmable plan, the existence of conflicts of interest between the principals or insiders of the debtor and the estate (often arising from potentially avoidable transfers), or some combination (or all) of these circumstances. Frequently, a request for one remedy alternatively seeks one of the others for the same reasons.

Although conversion, dismissal, or removal of the debtor from possession usually occurs upon the request of a party in interest, the court may raise such issues *sua sponte*.⁶⁶

A common thread in subchapter V cases considering dismissal, conversion, or removal of the debtor from possession is inaccurate or incomplete disclosure of required information, failure to file proper operating reports, or both. Cases may also involve questionable transactions with, or transfers to, insiders and failure to disclose information about them or conflicts of interest arising from them. They often involve a noncooperative relationship with the subchapter V trustee that may border on hostility, failure to timely comply with court orders, and feasibility issues. Gross mismanagement of the estate or continuing losses may also be issues.⁶⁷

⁶⁴ §§ 1104(a)(1), § 1185(a). Section 1104(a)(1) adds “or similar cause” to the specific grounds, which § 1185(a) does not include. Section 1185(a)(1) adds failure of the debtor to perform the obligations of the debtor under the confirmed plan as a ground for removal of the debtor in possession. Section 1104(a)(1) does not state this circumstance as a ground for appointment of a trustee, but inability to effectuate substantial consummation of a confirmed plan and material default under a confirmed plan are grounds for conversion or dismissal under § 1112(a)(4)(M) and (N), and § 1112(b)(1) permits appointment of a trustee as an alternative to conversion or dismissal.

⁶⁵ See 8 COLLIER ON BANKRUPTCY ¶ 1185.01[1] (16th ed.).

⁶⁶ *In re Coeptis Equity Fund, LLC*, 2022 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff’d* 2024 WL 1133580 (9th Cir. 2024) (unpublished); *In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re Ozcelebi*, 639 B.R. 365, 425 (Bankr. S.D. Tex. 2022).

⁶⁷ *E.g.*, *In re Coeptis Equity Fund, LLC*, 2022 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff’d* 2024 WL 1133578, 2024 WL 1133580, and 2024 WL 1155450 (9th Cir. 2024) (all unpublished); *In re Barnette*, 2026 WL 1991769 (Bankr. D. D.C. 2026) (dismissal for Debtor’s failures to timely file reports, to comply with court order, to timely file a plan, and gross mismanagement); (*In re Earthsnap, Inc.*, 2026 WL 1971388 (E.D. Tex. 2026) (conversion to chapter 7 based on failure to timely file monthly reports, failure to timely file plan, failure to comply with discovery orders, and gross mismanagement of the estate; negligence and mistakes of debtor’s attorney do not establish unusual circumstances that preclude conversion); *In re Los Trece Texas, LLC*, 2025 WL 2793109 (Bankr. W. D. Tex. 2025) (case dismissed because of substantial or continuing loss to or diminution of the estate and an absence of reasonable likelihood of rehabilitation under § 1112(b)(4)(A) and for bad faith); *In re Kadiric*, 670 B.R.

If “cause” exists and no unusual circumstances preclude conversion or dismissal,⁶⁸ § 1112(b)(1) requires the court to convert or dismiss a case if cause exists unless “the court determines that the appointment *under section 1104(a)* of a trustee or examiner is in the best interests of creditors and the estate.”⁶⁹ Because § 1104 does not apply in a subchapter V case and a subchapter V trustee already exists, the language of § 1112(a)(1) does not expressly permit removal of the debtor from possession as an alternative to otherwise mandatory conversion or dismissal in a subchapter V case.

At the same time, the directive in § 1185(a) that the court “shall” order removal of the debtor as debtor in possession if cause exists also makes removal of the debtor mandatory.⁷⁰ Because both alternatives are mandatory, the court implicitly has the authority to determine which is the better one.

Further, although § 1104(a) does not apply in a subchapter V case, one court reasoned, “[S]ubchapter 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.”⁷¹ The court noted that removal of a debtor from possession is “simply a lesser form of the conversion option” and that § 1112(b)(1) in a traditional case requires consideration “in every instance where cause is shown whether the appointment of a trustee might better serve the interests of creditors and the estate.”⁷² The court thus concluded that removal of the debtor is an available alternative to dismissal or conversion in a subchapter V case.

307 (Bankr. W.D. Mich. 2025) (case converted to chapter 7 based on continuing loss to estate and lack of reasonable likelihood of rehabilitation, failure to timely file plan, and debtors' bad faith and unfitness as fiduciaries as shown by prepetition transfers designed to hinder, delay, or defraud creditors); *In re Ghaffari*, 2025 WL 869518 (Bankr. D. N. M. 2025) (case dismissed because of failure to comply with court orders requiring debtor to provide notice of confirmation hearing and inability to file a plan that was not facially defective); *In re TLC Medical Group*, 2024 WL 4283801 (Bankr. S.D. Fla. 2024) (case dismissed due to failure to provide information reasonably requested by U.S. Trustee in a timely manner, unauthorized use of cash collateral, and lack of application to retain debtor's counsel); *In re Lashley*, 664 B.R. 408 (Bankr. W.D. Ky. 2024) (case converted to chapter 7 for cause, including (1) debtor's untimely filing of operating reports that were deficient because they did not explain \$57,920 in cash withdrawals and cash app transactions; (2) debtor's failure to file or confirm plan within reasonable period of time; (3) debtor's little prospect for reorganization; and (4) payment of accountant to prepare tax returns without court permission. Under the circumstances, conversion was in best interest of creditors to permit trustee to administer unencumbered assets.); *In re United Safety and Alarms, Inc.*, 2024 WL 973674 (Bankr. S.D. Fla. 2024); *In re Exigent Landscaping, LLC*, 656 B.R. 757 (Bankr. E.D. Mich. 2024); *In re Jar 259 Food Corp.*, 2023 WL 6201739 (E.D.N.Y. 2023); *In re California Palms Addiction, Recovery Campus, Inc.*, 2023 WL 2664284 (N.D. Ohio 2023), *aff'd* 87 F.4th 734 (6th Cir. 2023); *In re Duling Sons, Inc.*, 650 B.R. 578 (Bankr. D.S.D. 2023); *In re East Coast Diesel*, 2022 WL 19078763 (Bankr. M.D.N.C. 2022); *In re No Rust Rebar, Inc.*, 641 B.R. 412 (Bankr. S.D. Fla. 2022). *In re Hao*, 644 B.R. 339 (Bankr. E.D. Va. 2022); *In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re KLMKH, Inc.*, 2022 WL 4281478 (Bankr. W.D.N.C. 2022); *In re Neosho Concrete Products Co.*, 2021 WL 1821444 (Bankr. W.D. Mo. 2021).

⁶⁸ § 1112(b)(2).

⁶⁹ § 1112(b)(1) (emphasis added).

⁷⁰ *In re No Rust Rebar, Inc.*, 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022); *see In re Duling Sons, Inc.*, 650 B.R. 578, 582 (Bankr. D.S.D. 2023).

⁷¹ *In re Pittner*, 638 B.R. 255, 258 (Bankr. D. Mass. 2022).

⁷² *Id.* at 259.

Accordingly, when cause exists for both conversion or dismissal and removal of the debtor from possession, courts have considered which alternative is in the best interests of creditors and the estate.⁷³

Determination of whether conversion, dismissal, or removal of the debtor from possession is the best choice is a discretionary one involving an assessment of which alternative provides the best prospects for a distribution to creditors. If the business is viable such that confirmation of a plan based on its continued operations may be possible or a sale of the business in the subchapter V case may produce more value than sale in a chapter 7 case, removal of the debtor may be the better choice.

Courts have removed the debtor from possession rather than converting or dismissing the case when continuation of the case in subchapter V with the subchapter V trustee in possession provides better prospects for a distribution to creditors than conversion or dismissal,⁷⁴ but not when subchapter V administration is not likely to enhance recovery by creditors.⁷⁵

2. Expansion of trustee powers as alternative to conversion, dismissal, or removal to manage conflicts of interest*

A creditor or the subchapter V trustee may identify, or the debtor's schedules may disclose, potential claims of the estate against the debtor's principals, insiders, or affiliates. The potential claims create a conflict of interest because the debtor's principals control the debtor and, therefore, are responsible for investigating and, if necessary, prosecuting, claims against themselves, their own other entities, or other insiders and affiliates such as family members. A subchapter V plan must include a liquidation analysis,⁷⁶ and a plan must take the likely recovery on potential claims into account for purposes of establishing that it meets the "best interest of creditors" requirement for confirmation in § 1129(a)(7).⁷⁷

Resolution of potential claims may occur through a plan if the court at the confirmation hearing determines that the potential claims have no merit⁷⁸ or that their proposed settlement in

⁷³ *E.g.*, *In re Pinnacle Foods of California, LLC*, 2025 WL 951650 (Bankr. E.D. Cal. 2025); *In re M.A.R. Designs & Construction, Inc.*, 653 B.R. 843 (Bankr. S.D. Tex. 2023); *In re Duling Sons, Inc.*, 650 B.R. 578 (Bankr. D.S.D. 2023); *In re No Rust Rebar, Inc.*, 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022); *In re Pittner*, 638 B.R. 255, 258-59 (Bankr. D. Mass. 2022); *In re Young*, 2021 WL 1191621 at *7 (Bankr. D.N.M. 2021).

Because § 1104 does not apply in a subchapter V case, 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.

⁷⁴ *In re Duling Sons, Inc.*, 650 B.R. 578 (Bankr. D.S.D. 2023); *In re Pittner*, 638 B.R. 255, 258-59 (Bankr. D. Mass. 2022).

⁷⁵ *In re Exigent Landscaping, Inc.*, 656 B.R. 757 (Bankr. E.D. Mich. 2024); *In re M.A.R. Designs & Construction, Inc.*, 653 B.R. 843 (Bankr. S.D. Tex. 2023); *In re No Rust Rebar, Inc.*, 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022).

⁷⁶ § 1190(1)(B).

⁷⁷ *In re Lapeer Aviation, Inc.*, 2022 WL 7204871 (Bankr. E.D. Mich. 2022); *see* The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (*In re Alecto Healthcare Services, LLC*), 2025 WL 961482 at * 10-11 (D. Del. 2025), *aff'd* __ F.4th __, 2026 WL 2165844 (3d Cir. 2026); *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024).

⁷⁸ *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024).

the plan is reasonable.⁷⁹ But a creditor or the subchapter V trustee may assert that the existence of the conflict of interest is cause for conversion, dismissal, or removal of the debtor from possession.⁸⁰

In a traditional chapter 11 case, the court may manage a conflict of interest situation by granting derivative standing to the creditors' committee to pursue the potential claims⁸¹ or by appointing an examiner,⁸² but subchapter V does not provide for an examiner⁸³ and committees do not ordinarily exist.⁸⁴ Expansion of the subchapter V trustee's powers to include authority to investigate and prosecute potential claims involving a conflict of interest (or to assume responsibility for other matters involving a conflict of interest) provides a similar alternative for an independent fiduciary to handle the potential claims while permitting the debtor to proceed in the case.

Section 1183(b)(2) permits the court to expand the subchapter V trustee's *duties*, as Section IV(B)(4) discusses, but it does not address the expansion of the trustee's *powers*.

The question is whether the court may authorize a subchapter V trustee, rather than the subchapter V debtor, to exercise specified powers of the trustee. The issue does not arise in a traditional chapter 11 case because the debtor in possession and the trustee do not exist at the same time.

Analysis of whether the court has the authority to expand the trustee's powers to prosecute claims starts with § 1184. In a subchapter V case, § 1184, like § 1107(a) in a traditional chapter 11 case, vests the rights and powers of a trustee under the Bankruptcy Code in the debtor in possession.⁸⁵ The trustee's powers include the rights to use, sell, or lease property of the estate under § 363(b) other than in the ordinary course of business, to obtain postpetition financing under § 364, to assume, reject, or assume executory contracts and unexpired leases under § 365, and to pursue avoidance actions under §§ 545, 547, 548, 549.

Although § 1184 vests the trustee's powers in the subchapter V debtor in possession, it is not unconditional. Importantly, § 1184 begins with the limitation that the debtor's trustee powers are "subject to such limitations or conditions as the court may prescribe."

⁷⁹ The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (*In re Alecto Healthcare Services, LLC*), 2025 WL 961482 at *10-11 (D. Del. 2025), *aff'd* ___ F.4th ___, 2026 WL 2165844 (3d Cir. 2026).

⁸⁰ See § V(D)(1).

⁸¹ See NORTON BANKRUPTCY LAW AND PRACTICE (3D ED.) § 98:33.

⁸² § 1104(c).

⁸³ § 1181(a).

⁸⁴ § 1181(b).

⁸⁵ § 1184. See *Singh v. Price (In re Turkey Leg Hut & Co., LLC)*, 659 B.R. 539 (Bankr. S.D. Tex. 2024). But see *In re Roe*, 2024 WL 206678 at *2 (Bankr. D. Ore. 2024). The *Roe* court concluded that a subchapter V has concurrent authority with the debtor to exercise trustee powers "to fulfill the statutory duties given to subchapter V trustees in section 1183." *In re Roe*, 2024 WL 206678 at *2. The court held that the subchapter V trustee had the authority to request an order requiring the use of estate property under § 363(b)(1) to fund an escrow account for the payment of administrative claims. *Roe* at best states a limited exception to the general rule, but the exception arguably is not necessary to support the result. The authority of the court in § 1184 to limit the rights and powers of a debtor in possession provides ample authority for the court to require the use of funds for such a purpose.

Because § 1184 permits the court to condition or limit the trustee's powers, it provides authority for the court to remove specified trustee powers from the debtor in possession, thereby necessarily vesting them in the trustee.

The fact that § 1182(b) does not impose a *duty* on the subchapter V trustee to pursue avoidance actions or exercise other trustee powers does not mean that the trustee does not have the *power* to exercise trustee powers that the court removes from the debtor in possession. Indeed, a trustee's authority in a traditional chapter 11 case to pursue such matters does not arise from the trustee's duties under § 1106(a), which do not include any duty to pursue claims of the estate or liquidate its assets. The trustee's authority instead derives from § 323, which makes the trustee the representative of the estate,⁸⁶ and gives the trustee the capacity to sue and be sued.⁸⁷

Two reported cases deal with the trustee's authority to pursue claims of the estate but do not control the issue and are distinguishable.

In *Singh v. Price (In re Turkey Leg Hut & Co., LLC)*,⁸⁸ the subchapter V trustee filed a complaint and motion for a temporary restraining order and preliminary injunction on behalf of the debtor in possession to restrain the spouse of the debtor's principal from interfering with the debtor.

The court dismissed the complaint and motion *sua sponte* for lack of standing, concluding that the subchapter V trustee had no statutory authority to bring an action on behalf of the debtor. The court ruled: "None of the subchapter V trustee's general duties authorize the Subchapter V Trustee to pursue claims belonging to the estate on behalf of the estate. Therefore, this Court finds that the debtor in possession has exclusive standing to pursue causes of action pursuant to 11 U.S.C. § 1184."⁸⁹

Turkey Leg does not address whether the authority of the court in § 1184 to limit or condition the debtor's right to exercise the trustee's powers permits the court to exercise its discretion to authorize a subchapter V trustee to pursue claims where a conflict of interest exists or, more generally, to authorize a trustee to exercise other estate powers (such as liquidation of the debtor's assets) in appropriate circumstances.

The other case is *Ghatanfard v. Zivkovic (In re Ghatanfard)*.⁹⁰ There, the bankruptcy court in an oral ruling had converted an individual's subchapter V case to chapter 7 because of conflicts of interest between the debtor and the estate arising from substantial prepetition transfers to his "life partner." The debtor had acknowledged the conflict of interest and proposed that the subchapter V trustee's powers be expanded to permit the trustee to take over the fraudulent transfer claims. The bankruptcy court, however, determined that it could not order such relief over the opposition of a creditor and the subchapter V trustee.⁹¹

⁸⁶ § 323(a).

⁸⁷ § 323(b). See Thomas T. McClendon, *Is It In the Name? A Sub V Trustee's Pursuit of Avoidance Actions*, 44-May AM. BANKR. INST. J. 5, 16-17, 56-57 (2025).

⁸⁸ 659 B.R. 539 (Bankr. S.D. Tex. 2024).

⁸⁹ *Id.* at 544.

⁹⁰ 666 B.R. 14 (S.D.N.Y. 2024).

⁹¹ *Id.* at 19-20.

The district court affirmed the bankruptcy court’s ruling that the conflict of interest was cause for conversion to chapter 7 and ruled that the bankruptcy court had not “abused its discretion in determining that it did not have the authority, over the objection of a creditor, to expand the Subchapter V Trustee’s powers to include litigation of the fraudulent conveyance claims on behalf of the estate.”⁹²

The district court’s ruling in *Ghatanfard* is correct to the extent of its holding that a bankruptcy court has discretion to determine whether a conflict of interest requires conversion as opposed to expansion of the subchapter V trustee’s powers to handle litigation that the conflict involves. But *Ghatanfard* does not hold that a court may not do so.

The recitation of the bankruptcy judge’s oral ruling in the district court’s opinion in *Ghatanfard* indicates that the bankruptcy judge may have preferred expansion of the trustee’s powers to permit the trustee to prosecute the claim, but it does not discuss the bankruptcy judge’s reasoning for the conclusion that the statute did not authorize such expansion.⁹³

It is arguable that, having concluded that the conflict of interest was cause for conversion, the bankruptcy court in *Ghatanfard* had no option to expand the trustee’s powers rather than convert the case because § 1112(b)(1) mandates conversion if cause exists. But if a conflict of interest is manageable through expansion of the trustee’s powers, that remedy should be an alternative to conversion for one of two reasons.

First, a court could conclude that “cause” does not include a conflict of interest that is manageable.⁹⁴

Second, a court could decide that managing the conflict of interest by expansion of the trustee’s powers satisfies the requirements of § 1112(b)(2) that preclude conversion if “unusual circumstances” establish that conversion is not in the best interests of creditors and the estate,⁹⁵ a reasonable likelihood exists that a plan will be confirmed within a reasonable time,⁹⁶ a reasonable justification for the act or omission that constitutes grounds for conversion exists,⁹⁷ and cure of the grounds for conversion will occur within a reasonable time fixed by the court.⁹⁸

⁹² *Id.* at 27. In its analysis, the district court observed that the debtor had provided no authority for the proposition that a subchapter V trustee can be empowered to pursue avoidance actions and that *Singh v. Price (In re Turkey Leg Hut & Co., LLC)*, 659 B.R. 539 (Bankr. S.D. Tex. 2024), discussed in earlier text, held to the contrary. *Ghatanfard*, 666 B.R. at 26. As earlier text explains, *Turkey Leg* did not address this issue and is distinguishable.

⁹³ *Ghatanfard*, 66 B.R. at 19-20.

⁹⁴ See *In re Neosho Concrete Products Co.*, 2021 WL 1821444 at *8-9 (Bankr. W.D. Mo. 2021) (Cause for removal of debtor from possession based on conflicts of interest does not exist where debtor’s 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.).

⁹⁵ § 1112(b)(2).

⁹⁶ § 1112(b)(2)(A). The applicable time is a “reasonable period of time” because a subchapter V case is not a small business case in which §§ 1121(e) and 1129(e) apply.

⁹⁷ § 1112(b)(2)(B)(i).

⁹⁸ § 1112(b)(2)(B)(ii).

Where the cause for conversion is a conflict of interest, the conflict is manageable, a plan is confirmable within a reasonable time, and creditors are better off under a plan than in a chapter 7 case, unusual circumstances establish that conversion is not in the best interests of creditors and the estate.

The conflict of interest exists because of prepetition events that the debtor cannot change. The cause for conversion is the need to investigate and prosecute the potential claims, not the existence of the claims. As such, cause for conversion based on a conflict of interest does not involve an “act or omission” for which the debtor could provide a “reasonable justification.” Nevertheless, the fact that the conflict of interest arises from prepetition events that the debtor cannot change provides a “reasonable justification” for the grounds for conversion. Management of the conflict by permitting the trustee to investigate and prosecute the claims that give rise to the conflict of interest provides an immediate cure of the problem.

The ability of the bankruptcy court to exercise its discretion to authorize a subchapter V trustee to exercise certain trustee powers instead of the debtor is important. Conflicts of interest in subchapter V cases are not uncommon, and the enlistment of the trustee to handle such matters on an independent, fiduciary basis permits the other aspects of the reorganization of the debtor to continue under the debtor in possession. A subchapter V debtor who candidly discloses potential claims involving a conflict of interest at the outset of the case should not face conversion or dismissal if the conflict can be managed by putting the trustee in charge of matters involving the conflict.

Moreover, if the court must convert, dismiss, or remove the debtor from possession based on *allegations* of potential claims and the debtor contends that the claims are meritless, rather than authorize the trustee to investigate and pursue the claims, the court might determine that a hearing on the viability of the claims is necessary. Independent evaluation of the claims by the trustee seems a better approach to the problem not only because it permits the debtor to proceed in the subchapter V case on all other matters but also because it permits the trustee and potential defendants to settle the claims and removes the debtor as an advocate against the claims.

E. Issues When Removal of Debtor From Possession Occurs*

When the court removes the debtor from possession under § 1185(a), the parties – and the court – must figure out how the case will proceed and what the exit strategy will be.

The business question is whether reorganization of the debtor as a going concern is feasible or if liquidation of its assets will occur. The legal question is how to effect either alternative in view of the fact that, because only the debtor may file a plan in a subchapter V case,⁹⁹ the trustee may not.

If the exit strategy is a confirmed plan that the debtor files, the question is whether compensation of the debtor’s professionals for post-removal services is permissible under the Supreme Court’s decision in *Lamie v. United States Trustee*.¹⁰⁰ In *Lamie* the Court ruled that an attorney for a former chapter 11 debtor in possession who provided services after conversion to

⁹⁹ § 1189(a).

¹⁰⁰ 540 U.S. 526 (2004).

chapter 7 was not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor’s attorney.

One court avoided exit strategy issues in a subchapter V case by revoking the debtor’s subchapter V election after removal of the debtor in possession, thus “converting” the case to a traditional chapter 11 case, and appointing a chapter 11 trustee under § 1104 so that the trustee and creditors could file a plan.¹⁰¹ Other courts in declining to revoke the subchapter V election based on the circumstances of the case have expressed doubt that a court has the authority to do so in view of the fact that § 103(i) provides for the debtor to control the subchapter V election.¹⁰² Section III(J) of this Update discusses the issue.

Another way to avoid exit strategy issues is reinstatement of the debtor to possession under § 1185(b). The debtor thus has 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 or dismissal. As a practical matter, it is unlikely that a debtor could convince the court to order reinstatement if the trustee does not support it.

Section V(E)(1) considers alternative exit strategies after removal of the debtor in possession, and Section V(E)(2) deals with the *Lamie* issue.

1. Alternative exit strategies after removal of the debtor from possession*

Upon removal of the debtor from possession, the initial business question is whether the trustee will operate the debtor’s business, as § 1183(b)(5)(B) permits. As a practical matter, the trustee’s operation of the business will usually require the debtor’s cooperation because it is unlikely that the business can operate without day-to-day management by the principals of the debtors. Moreover, the trustee, as well as creditors and the court, must have confidence in the commitment of the debtor’s principals to operate the business under the trustee’s control and in compliance with the Bankruptcy Code.

When the trustee does not continue business operations, continuation of the subchapter V case usually serves no purpose. Conversion or dismissal is the end of the subchapter V case.

If the trustee will operate the business, the business question is whether to reorganize the debtor or liquidate its business as a going concern. If reorganization is feasible, the trustee will operate the business while the debtor pursues confirmation of a plan.¹⁰³

¹⁰¹ *In re National Small Business Alliance*, 642 B.R. 345 (Bankr. D.C. 2022); *cf. In re CYMA Cleaning Contractors, Inc.*, 2023 WL 7117445 at *2-3 (Bankr. D.P.R. 2023) (The court concluded that it had authority to revoke the subchapter V election of an ineligible debtor *sua sponte* even after expiration of the time for objection to the election based on the analysis in *National Small Business Alliance*).

¹⁰² *In re Pinnacle Foods of California, LLC*, 2024 WL 3873478 at *5 (Bankr. E.D. Cal. 2024); *In re Free Speech Systems, LLC*, 649 B.R. 729, 734-35 (Bankr. S.D. Tex. 2023); *In re ComedyMX, LLC*, 647 B.R. 457, 463-64 (Bankr. D. Del. 2022).

¹⁰³ *See In re Athena Medical Group, LLC*, 672 B.R. 788 (Bankr. D. Ariz. 2025), *rev’d and remanded*, 2026 WL 2017210 (D. Ariz. 2026) (dealing with compensation of debtor’s attorneys after confirmation of plan for reorganization of debtor following removal of debtor from possession); *In re National Small Business Alliance*, 642 B.R. 345 (Bankr. D.C. 2022) (Over a year after removal of the debtor from possession and trustee’s operation of business, the court revoked subchapter V election, converted case to traditional chapter 11 case, and appointed trustee under § 1104).

The subchapter V trustee has the duty under § 1183(b)(7) to “facilitate the development of a consensual plan of reorganization.” This duty continues after removal of the debtor in possession, so it is appropriate for the trustee to explore the possibility of a plan with the debtor and other parties in interest. The trustee’s work could include the drafting of a proposed plan for review by the debtor and its counsel.¹⁰⁴

In this situation, the subchapter V case will conclude either upon confirmation of a plan or denial of confirmation, resulting in conversion, dismissal, or liquidation in subchapter V.

When reorganization is not feasible and the debtor’s business has value as a going concern, the question is whether to conduct a sale in the subchapter V case or convert it to chapter 7.

Liquidation by the subchapter V trustee may result in more value for the estate than chapter 7 liquidation. Although the court may authorize a chapter 7 trustee to operate the debtor’s business under § 721 “for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate,” sale of a business as a going concern in a chapter 7 case raises significant problems.¹⁰⁵ Moreover, the subchapter V trustee’s familiarity with the case and the debtor’s business and the trustee’s pre-removal relationships with the debtor and creditors may favor sale of the business through continuation of the subchapter V case,¹⁰⁶ although appointment of the subchapter V trustee to serve in the chapter 7 case, as § 701(a)(1) permits,¹⁰⁷ also has these benefits. Whether liquidation should proceed under subchapter V or chapter 7 after removal of the debtor from possession is a fact-specific determination.

A subchapter V trustee’s sale of the debtor’s business as a going concern produces money for the estate. Administration of the case and distribution of the proceeds may proceed in one of three ways.

¹⁰⁴ *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 44. See also *In re Duling Sons, Inc.*, 650 B.R. 578, 582 (Bankr. D.S.D. 2023) (requiring filing of joint plan by debtor and subchapter V trustee after removal of debtor from possession within 90 days, in the absence of which conversion would occur).

¹⁰⁵ *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 45. The Final Report observes: “Conversion to Chapter 7 may adversely affect the business’s relationships with its customers, suppliers, and employees, who may perceive Chapter 7 as the end of the debtor’s business. If the Subchapter V trustee is not appointed as the Chapter 7 trustee, it may be difficult to effect an optimal continuation of the business pending sale.”

Id. The Report also noted that the trustee’s duty under § 704(a)(1) to liquidate assets “as expeditiously as is compatible with the best interests of parties in interest” may result in the realization of less value than would occur in a Subchapter V case.” *Id.* See also *In re Boteilho Hawaii Enterprises Inc.*, 2023 WL 7117223 at *2 (Bankr. D. Haw. 2023) (Discussing hypothetical liquidation of subchapter V debtor’s assets in a chapter 7 case, the court noted that a trustee under § 704(a)(1) must “always dispose of the property quickly (although not necessarily at ‘fire sale’ prices.)”).

¹⁰⁶ See *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 45-46.

¹⁰⁷ §§ 701(a)(1) (The United States trustee shall appoint as interim trustee “one disinterested person” that is a panel trustee or that “is serving as trustee in the case immediately before” conversion of the case.); 701(b)(d) (Interim trustee serves as trustee in the case unless creditors elect a trustee at § 341 meeting of creditors.).

One alternative is confirmation of a liquidation plan proposed by the debtor.¹⁰⁸ If the debtor declines to file a plan or proposes one that is unconfirmable, the trustee and creditors may consider either conversion to chapter 7 or disbursement of the proceeds through a structured dismissal.¹⁰⁹

Conversion is necessary if the estate has claims to recover avoidable transfers or other claims against principals or others, such as breach of fiduciary duty claims, accounts receivable, or loans that the debtor made. Conversion may also be required if disputed claims must be resolved through the claims allowance process.

If a chapter 7 estate is likely to have no other assets, a structured dismissal¹¹⁰ providing for distributions to creditors in accordance with their priorities under the Bankruptcy Code may be preferable because it will result in creditors receiving more money more promptly, without the delay and expenses of chapter 7 administration. A structured dismissal could include provisions for resolution of disputed claims prior to dismissal and disbursement of funds.

In some cases, the debtor, creditors, and the subchapter V trustee may reach consensus as to the appropriate exit strategy after removal of the debtor in possession. When they do not, questions may arise concerning the role of the subchapter V trustee and the authority of the trustee to exercise trustee powers after the debtor's removal.¹¹¹

A subchapter V trustee has the authority to operate the debtor's business upon removal of the debtor from possession,¹¹² the authority to sell assets under § 363, and the rights under the

¹⁰⁸ See *In re Duling Sons, Inc.*, 650 B.R. 578 (Bankr. D.S.D. 2023) (In removing debtor from possession rather than converting case, court required filing of joint liquidation plan by debtor and subchapter V trustee within 90 days, in absence of which conversion would occur.).

¹⁰⁹ 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

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

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

¹¹⁰ See *supra* note 103.

¹¹¹ See *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 46 ("A court may want to hear and consider the Subchapter V trustee's perspective regarding the discussions, negotiations, and dealings among all the parties in the case before deciding to keep a case in Subchapter V after removal of the debtor in possession. . . . Otherwise, questions may arise concerning the trustee's authority to sell the debtor's assets under section 363 or to pursue avoidance claims arising from the trustee's initial role in the case with the responsibility to facilitate a consensual plan.").

¹¹² § 1183(b)(5).

Bankruptcy Code (among others) to avoid transfers under §§ 544-549. Nevertheless, parties opposed to the trustee's sale of the debtor's business or to the trustee's exercise of avoidance powers may assert that the trustee lacks authority to do such things without a court order.¹¹³

Although the argument is not well-founded,¹¹⁴ subchapter V trustees may be concerned that the scope of their powers after the debtor's removal may be unclear.¹¹⁵ Accordingly, the *ABI Subchapter V Task Force Final Report* encouraged courts "to be specific in the role, duties, and powers of the Subchapter V trustee after removal of the debtor in possession to ensure that all parties have clarity concerning the timing, cost, and anticipated actions to resolve the Subchapter V case."¹¹⁶

2. Compensation of debtor's professionals after removal of debtor from possession*

When a dispossessed subchapter V debtor wants to pursue confirmation of a plan, to seek reinstatement as the debtor in possession, or to otherwise participate in the case, it must have a lawyer, and perhaps other professionals, as a practical matter. Indeed, an entity cannot appear in a bankruptcy case without a lawyer.¹¹⁷ This section discusses whether the reasonable fees and expenses of a subchapter V debtor's attorney or other professionals for post-removal services are payable as an administrative expense.

Because a chapter 11 debtor in possession has the rights and powers of a trustee,¹¹⁸ the debtor in possession has the trustee's right to employ attorneys and other professionals under § 327(a). Section 330(a) provides that professionals employed under § 327(a) are entitled to allowance of reasonable compensation and reimbursement of expenses.¹¹⁹ An award of compensation and reimbursement under § 330(a) is an administrative expense under § 503(b)(2).

Simply put, the language of these statutes provides for allowance of an administrative expense for compensation and reimbursement of professionals employed by the *trustee*, which includes a chapter 11 or subchapter V debtor in possession. Section 330(a) does not provide for

¹¹³ See *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 31-32. The Report explains and rejects the argument:

This view is that the statutory rights, powers, and functions that revert to the trustee upon removal of a debtor from possession in standard Chapter 11 cases and Subchapter V cases are not the same because section 1181 makes section 1106 inapplicable in Subchapter V cases except as otherwise stated in section 1183. Close scrutiny of section 1183's references to section 1106 indicates that when the debtor has been removed from possession, there are no material differences in duties, and the powers necessary to exercise those duties, between the trustee in a standard Chapter 11 case and the trustee in Subchapter V except for the ability to file a plan.

Id. at 32 n. 8.

¹¹⁴ See *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 32 n. 8 (quoted in note 219 *supra*).

¹¹⁵ See *id.* at 31-32.

¹¹⁶ *Id.* at 44-45.

¹¹⁷ *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.").

¹¹⁸ § 1107(a) (traditional chapter 11 case); § 1184 (subchapter V case).

¹¹⁹ § 330(a) also provides for allowance of compensation and expenses of a trustee, an examiner, a professional employed by a committee under § 1103, and an ombudsman appointed under § 332 or § 333. A debtor in possession does not have the trustee's right to compensation. §§ 1107(a) (traditional case), § 1184 (subchapter V case).

allowance of compensation and reimbursement of a *debtor's* professionals (as opposed to a *debtor in possession's* professionals), except for the provision in § 330(a)(4) that authorizes compensation for an individual debtor's attorneys in a chapter 12 or 13 case.

A debtor removed from possession under § 1185(a) is no longer a debtor in possession. Thus, the debtor's professionals now represent the debtor, not the debtor in possession. In a traditional chapter 11 case, a debtor's professionals are not entitled to allowance of compensation and reimbursement for services rendered under § 330 after conversion of the case to chapter 7 or appointment of a chapter 11 trustee, both of which terminate the debtor's status as a debtor in possession, under the Supreme Court's decision in *Lamie v. United States Trustee*.¹²⁰

In *Lamie*, the attorney for the debtor sought compensation under § 330(a) for services after conversion of the case to chapter 7. The Court ruled that the attorney was not entitled to compensation under § 330(a) for postconversion services because, after conversion, the debtor in possession no longer existed, and the attorneys were not employed by the trustee. The same principle applies when a trustee is appointed in a traditional chapter 11 case, thus removing the debtor as debtor in possession.¹²¹

Subchapter V does not address this issue. If the *Lamie* ruling precludes payment from the estate of a subchapter V debtor's professionals after removal, the debtor must find an alternative way to pay them (or find professionals willing to work for free) to have a realistic chance of pursuing a plan, obtaining reinstatement, or otherwise participating in the case. And a debtor who is not an individual will not be able to file anything or be heard without a lawyer. (When the services of the debtor's professionals in the administration of the case would be useful to the trustee because of their familiarity with the debtor and its business – for example, assisting the trustee in connection with the sale of the debtor's business – the trustee may employ the debtor's counsel for specific purposes under § 327(e)¹²²).

The question is whether and to what extent a debtor's professionals may be entitled to compensation for fees and expenses in view of *Lamie*. Several courts have addressed the issue.

In *In re ComedyMX, LLC*,¹²³ the court entered an unreported order, without objection by the U.S. Trustee or any other party after notice and a hearing, that granted an application for an

¹²⁰ 540 U.S. 526 (2004).

¹²¹ *In re Sunergy California, LLC*, 646 B.R. 840, 845 (Bankr. E.D. Cal. 2022), *aff'd* 2023 WL 4184860 (B.A.P. 9th Cir. 2023); *In re Flying Roadrunner, Inc.*, 2015 WL 1344445 at *9 (Bankr. W.D. Pa. 2015); *In re Johnson*, 397 B.R. 486, 490 (Bankr. E.D. Cal. 2008).

¹²² *In re Johnson*, 397 B.R. 486 (Bankr. E.D. Cal. 2008). *Lamie v. United States Trustee*, 504 U.S. 526, 538-39 (2004), recognized that a trustee may employ debtor's counsel under § 327(e); see *In re Athena Medical Group, LLC*, 672 B.R. 788, 798 n. 35 (Bankr. D. Ariz. 2025), *rev'd and remanded*, 2026 WL 2017210 (D. Ariz. 2026) (noting that subchapter V trustee had employed debtor's lawyers after removal as special counsel for non-plan work under § 327(e)).

Section 327(e) authorizes a trustee, with the court's approval, to employ an attorney who has represented the debtor for "a specified special purpose, other than to represent the trustee in conducting the case," if such employment is in the best interest of the estate and if the attorney does not hold or represent any interest adverse to the debtor or the estate with respect to the representation.

¹²³ *In re ComedyMX, LLC*, Case No. 22-11181, Dkt. No. 153 (Bankr. D. Del. Apr. 25, 2023).

order permitting attorneys for the dispossessed subchapter V debtor to seek compensation for services to be rendered after the debtor's removal.

The court identified three potential bases to support compensation of the debtor's attorneys for post-removal services:

1. The fees may be awarded on the ground that they are actual, necessary costs and expenses of preserving the estate under § 503(b)(1)(A).
2. An award of fees is appropriate under § 330 on the ground that, as prior counsel to the debtor, the firm is a professional person employed under § 327.
3. Only a debtor may file a plan under § 1189(a). The effect of § 1189(a) is to leave a dispossessed debtor with certain limited obligations of a trustee, such that the dispossessed debtor may retain counsel under § 327(a) to carry out that role.

The *ComedyMX* court noted that each ground is subject to counterarguments and expressly stated that its order did not resolve any of the issues. Noting that, in an adversary system, circumstances may make it appropriate to grant relief that is unopposed,¹²⁴ the court concluded that, in the absence of any objection, the attorneys could be awarded compensation from the estate for actual, necessary work performed for the benefit of the estate after the debtor's dispossession.

In *In re Athena Medical Group, LLC*,¹²⁵ the debtor's lawyers provided services to the debtor after the debtor's removal that resulted in confirmation of a plan. The bankruptcy court held that the law firm could not have an administrative expense claim under § 503(b)(2) because *Lamie* precluded allowance of compensation under § 330(a) for services after removal of the debtor from possession.¹²⁶ And it could not have an administrative expense claim under § 503(b)(1) as an actual necessary cost and expense for the preservation of the estate, the court ruled, because the more specific provisions of § 503(b)(2) applied to fees of a chapter 11 debtor's lawyers. The court thus rejected the debtor's arguments for allowance of the fees based on the theories the *ComedyMX* court mentioned.¹²⁷

On appeal, the district court reversed and remanded.¹²⁸ The district court agreed that, under *Lamie*, the law firm had no claim for an administrative expense claim under § 503(b)(2) because the debtor no longer had trustee duties.¹²⁹ But the district court ruled that the law firm

¹²⁴ The court cited its unreported decision in *In re Arsenal Intermediate Holdings, LLC*, Case No. 23-10097, Dkt. No. 176 (Bankr. D. Del. March 27, 2023), which addresses addressing the circumstances in which it may be appropriate, in an adversary system, for a court to grant relief on the ground that it is unopposed.

¹²⁵ 672 B.R. 788 (Bankr. D. Ariz. 2025), *rev'd and remanded*, 2026 WL 2017210 (D. Ariz. 2026).

¹²⁶ *Id.* at 794-96. *Accord*, *In re NIR West Coast, Inc.*, 638 B.R. 441, 452-53 (Bankr. E.D. Cal. 2022).

¹²⁷ *Id.* at 796-802.

¹²⁸ *Athena Medical Group LLC v. Wound Care Specialists LLC (In re Athena Medical Group LLC)*, 2026 WL 2017210 (D. Ariz. 2026).

¹²⁹ *Id.* at *3-13.

could assert that an administrative expense claim for its fees on the ground as an actual necessary expense under § 503(b)(1)(A).¹³⁰

In its opinion, the *Athena Medical* bankruptcy court concluded that *Lamie* controlled the issue: because the post-removal debtor no longer had trustee rights and duties, the law firm was not entitled to compensation under § 330(a) and thus did not have an administrative expense claim under § 503(b)(2).¹³¹

The bankruptcy court rejected the theories that the *ComedyMX* court suggested for allowance of an administrative expense under § 503(b)(2) for compensation allowable under § 330(a).

First, the fact that the attorneys had been employed under § 327(a) to represent the debtor in possession at the outset of the case could not provide a basis for allowance of the fees. Upon removal of the debtor from possession, the court explained, the debtor no longer functioned as a trustee, and attorneys it hired are no longer employed under § 327 unless the trustee retained them.¹³²

Second, the *Athena Medical* bankruptcy court rejected the contention that, because only the debtor can file a plan in a subchapter V case, a removed debtor retains the limited obligation of a trustee to file a plan that authorizes the retention of counsel under § 327(a), entitled to compensation under § 330(a), to perform that function.

The bankruptcy court noted that a trustee in a traditional chapter 11 case has a duty to file a plan under § 1106(a)(5), which does not apply in a subchapter V case, and that the debtor's right to file a plan arises under § 1189(a), not from a duty of a trustee. "Therefore," the court reasoned, "it is illogical to argue that a debtor continues to retain the rights of the trustee to file a plan, when the debtor's right never emanated from the trustee's rights in the first place."¹³³

The *Athena Medical* bankruptcy court then turned to the claim for allowance of fees for post-removal services under § 503(b)(1)(A) as an actual necessary cost of preserving the estate.

The *Athena Medical* court acknowledged that the legal services benefitted the estate because they resulted in confirmation but ruled that section 503(b)(1)(A)'s provisions for allowance of an administrative expense for "actual, necessary costs and expenses of preserving the estate" does not include fees for a debtor's lawyers.¹³⁴ Sections 327, 330, and 503(b)(2) specifically govern fees and expenses of the debtor's attorney, the court explained, while allowance of an administrative expense under § 503(b)(1) applies more generically. Allowance

¹³⁰ *Id.* at 14-19.

¹³¹ *Id.* at 792-86.

¹³² *Id.* at 799-800.

¹³³ *Id.* at 797.

¹³⁴ *In re Athena Medical Group LLC*, 672 B.R. 788, 799-802 (Bankr. D. Ariz. 2025), *rev'd and remanded*, 2026 WL 2017210 (D. Ariz. 2026).

of the fees under § 503(b)(1), the court concluded, “would improperly circumvent more specific provisions of the Code that do not allow for such fees.”¹³⁵

The district court on appeal reversed and remanded.¹³⁶ The district court agreed that *Lamie* precluded allowance of an administrative expense under § 503(b)(2)¹³⁷ but ruled that the law firm could assert an administrative expense claim under § 503(b)(1)(A).¹³⁸

The district court in *Athena Medical* acknowledged that courts generally conclude that professionals “cannot use § 503(b)(1)(A) to circumvent their inability to claim compensation under § 503(b)(2).”¹³⁹ In those cases, the court observed, the debtor-in-possession had hired professionals to assist in the performance of its duties as debtor-in-possession, but the professionals were not entitled to compensation under section 330(a) because their retention under section 327(a) did not occur prior to the rendition of services or because they were not “disinterested persons” eligible for employment under section 327(a).¹⁴⁰

But the court explained that §§ 327(a), 330, and 503(b)(2) did not apply upon dispossession of the debtor. Those sections apply to fees for services to assist a debtor in possession in performing its trustee duties, which the debtor no longer had upon removal. The post-removal services to the debtor, however, assisted the debtor in filing a plan, which is a duty of the debtor, not the trustee, under § 1189.¹⁴¹

Sections 503(b)(2), 327(a), and 330, the district court explained, apply to fees for services to assist a debtor in possession from carrying out its trustee duties. Because these sections are inapplicable, the court concluded, assertion of an administrative expense claim under § 503(b)(1)(A) would not circumvent § 503(b)(2) because § 503(b)(2) did not apply.¹⁴²

Moreover, the district court noted, the standards for allowance of professional compensation under § 330(a) and an administrative expense claim under § 503(b)(1)(A) are “materially similar” in that both require services be “actual and necessary” and require notice and a hearing. Thus, the availability of a claim under § 503(b)(1)(A) did not create a “loophole” in the Bankruptcy Code.¹⁴³

The district court noted that § 503(b)(1)(A) “expressly tolerates” its ruling. In allowing an administrative expense for services rendered after commencement of the case, the court reasoned, section 503(b)(1)(A) “envisions that providers may be paid for services that do not fall under §§ 327, 330, and 503(b)(2). Because § 503(b)(1)(A) and § 503(b)(2) are listed as separate administrative expenses, they must cover different circumstances.”¹⁴⁴

Recognizing the need for a subchapter V debtor to retain and compensate professionals after removal in appropriate circumstances,¹⁴⁵ the *ABI Subchapter V Task Force Final Report*

¹³⁵ *Id.* at 801-02.

¹³⁶ *In re Athena Medical Group LLC*, 2026 WL 2017210 (D. Ariz. 2026).

¹³⁷ *Id.* at *4-13.

¹³⁸ *Id.* at *14-202.

¹³⁹ *Id.* at *14.

¹⁴⁰ *Id.* at *15-16 (discussing *In re Milwaukee Engraving Co., Inc.*, 219 F.3d 635, 637 (7th Cir. 2000); *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 109 (3d Cir. 1988); and *In re Weibel, Inc.*, 176 B.R. 209, 213 (B.A.P. 9th Cir. 1994)).

¹⁴¹ *Id.* at *16-17.

¹⁴² *Id.* at *17.

¹⁴³ *Id.* at *18.

¹⁴⁴ *Id.* at *19.

¹⁴⁵ *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 47-51.

recommended an amendment to § 1185 to add a new section to permit the court, after notice and a hearing, to authorize the employment and compensation of professionals by the debtor after removal if the court finds that one of three circumstances exist:¹⁴⁶

1. There is a reasonable likelihood that the debtor can file a confirmable plan within a reasonable period of time, and the debtor requires the services of a professional to do so;
2. The debtor requires the services of a professional to perform any duties of the debtor; or
3. The debtors' employment of a professional is in the best interests of creditors and the estate.

3. Alternative theories for compensation of debtor's professionals after removal of debtor from possession*

In the absence of legislation that permits payment of a subchapter V debtor's professionals after removal or the ability of the debtor to obtain an unopposed order like the one in *ComedyMX*,¹⁴⁷ to persuade the court to disregard the bankruptcy court's ruling in *Athena Medical*¹⁴⁸ and grant such relief despite an objection, or to persuade the court to allow a § 503(b)(1)(A) administrative expense for post-removal fees under the district court's decision in *Athena Medical*,¹⁴⁹ the debtor and its professionals must make arrangements for compensation of the professionals other than from the estate. Under the analysis of the bankruptcy court in *Athena Medical*, the debtor will be able to pay the professionals only if a plan is confirmed, and then only after payments to creditors have occurred.¹⁵⁰

The logical source for payment of post-removal compensation and reimbursement is the holders of the equity interests in the debtor. The debtor (out of possession, and therefore with no fiduciary duties), the professional, and the equity holders could agree that the equity holders will pay the fees and expenses. Because the debtor (not the debtor in possession as trustee) is employing the professional, the court's approval under § 327(a) is not necessary.

¹⁴⁶ *Id.* at 50-51. The proposed amendment incorporates the standards of § 330 for allowance of compensation: The court after notice and a hearing may award to a professional employed under this subsection reasonable compensation for actual, necessary services rendered by the professional and by any paraprofessional person employed by such person and reimbursement for actual, necessary expenses based on a consideration of the necessity and benefit of such services and the other factors set forth in section 330.

Id. at 51. The proposed amendment further provides that the court may limit the scope of the services of any professional that the debtor employs.

¹⁴⁷ *In re ComedyMX, LLC*, Case No. 22-11181, Dkt. No. 153 (Bankr. D. Del. Apr. 25, 2023) (discussed in § V(E)(2)).

¹⁴⁸ *In re Athena Medical Group, LLC*, 672 B.R. 788 (Bankr. D. Ariz. 2025), *rev'd and remanded*, 2026 WL 2017210 (D. Ariz. 2026) (discussed in § V(E)(2)).

¹⁴⁹ *In re Athena Medical Group, LLC*, 2026 WL 2017210 (D. Ariz. 2026) (discussed in § V(E)(2)).

¹⁵⁰ *See In re Athena Medical Group, LLC*, 672 B.R. 788, 798 n. 35 (Bankr. D. Ariz. 2025), *rev'd and remanded*, 2026 WL 2017210 (D. Ariz. 2026). Because compensation and reimbursement for post-removal services are not allowable as an administrative expense, payments to the professionals cannot be included in the calculation of projected disposable income.

Nevertheless, with regard to attorneys and perhaps other professionals, the arrangement requires attention to ethical considerations relating to payment of fees by a person other than the client, including provisions in the terms of the engagement that deal with waiver of potential conflicts of interest after informed consent.¹⁵¹ Absent unusual circumstances, the arrangement should not involve a nonwaivable conflict of interest because the debtor and its equity holders have the same objective: confirmation of a plan and reinstatement of the debtor in possession.¹⁵²

In addition, § 329(a) requires disclosure of any agreement between the debtor and an attorney, and any payment made, for services rendered or to be rendered in connection with the case. Bankruptcy Rule 2016(b) requires that the attorney file the disclosure statement and send it to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Because payment will not come from the estate, it is not necessary for the court to allow the fees. In the case of an attorney, however, if compensation of the attorney exceeds the reasonable value of services, § 329(b) permits the court to cancel the agreement or order the return of any payment in excess of reasonable compensation.

If the services of an attorney or other professional results in confirmation of a plan, the owners who have paid them have an argument that they have an administrative expense claim under § 503(b)(3)(D). Section 503(b)(3)(D) permits allowance of an administrative expense for (among others) an equity security holder (1) who makes a “substantial contribution” to a chapter 11 case and (2) incurred an “actual, necessary expense” in doing so (3) unless the expense is for compensation and reimbursement specified in paragraph (4) of § 503(b), which provides for an administrative expense for “reasonable compensation for professional services rendered” and “reimbursement for actual, necessary expenses” incurred by an attorney or accountant of a creditor, indenture trustee, equity security holder or committee not appointed under § 1102.

The owners’ premise is that confirmation could not have occurred without counsel for the debtor (and possibly other professionals) and that, therefore, their arranging for the retention of attorneys (or perhaps other professionals) made a substantial contribution to the case. At least with regard to a debtor that is an entity, the premise is irrefutable: only a debtor may file a plan, and an entity must have a lawyer to appear in a bankruptcy court. One could quibble that an individual could achieve confirmation *pro se* with the assistance of the subchapter V trustee, but an individual’s ability to obtain confirmation of a plan without a lawyer is questionable at best.

To obtain the required professional services for the debtor necessary for the substantial contribution, the owners had to incur the expense of paying the professional themselves. The causal link is likewise irrefutable unless one accepts the notion that a professional will provide services for free.

¹⁵¹ American Bar Association Model Rule of Professional Conduct 1.7.

¹⁵² An issue could arise if a dispute exists among various factions of equity security holders of the treatment of equity security holders under the plan or if one or more equity holders do not want the debtor to proceed.

Although the expense is for professional compensation and reimbursement of a professional, the professional is not a professional specified in paragraph (4) of § 503(b) that paragraph (3) excludes. The professionals listed in paragraph (4) do not include professionals employed by a debtor.

Objectors may raise three arguments against allowance of a § 503(b)(3) administrative expense.

The first two involve the text of the statutes. One is that “expense” in paragraph (3) of § 503(b) does not include fees of the debtor’s professionals. The related argument is that paragraph (4) of § 503(b) governs professional compensation and reimbursement and, therefore, paragraph (3) does not permit allowance of professional compensation and reimbursement of expenses at all.

The owners’ response is that paragraph (3) expressly excludes compensation and reimbursement only of certain professionals (those specified in paragraph (4)) as an allowable expense, but the debtor’s professionals are not in that list. Similarly, paragraph (4) deals only with attorneys and accountants for those specified entities and thus the specific provisions for them do not exclude reimbursement and expenses for other professionals.

More generally, the third argument is that allowance of an administrative expense to the owners for payment of the debtor’s professionals is inconsistent with the statutory interplay of §§ 503(b), 327(a), and 330 and the *Lamie* ruling that professionals of a debtor (other than an individual in a chapter 12 or 13 case) are not entitled to compensation and reimbursement as an administrative expense. Allowing an indirect payment of the debtor’s professionals from the debtor’s estate when the debtors make the payment in the first instance is an impermissible end-run around the statutory scheme that prohibits direct payment.

The owners’ response is that (1) the statutory language permits allowance and excludes compensation and reimbursement only of specified professionals and (2) the result is consistent with the operation of other statutes and *Lamie* because allowance of an administrative expense occurs only when the expense was necessary for a substantial contribution.

An alternative arrangement for the debtor and owners to consider is joint representation of the debtor and the owners after removal, with the owners assuming responsibility for payment. The post-removal debtor is no longer a fiduciary, and the debtor and owner have the same interests and objectives in the representation. Court approval is not required under § 327 because the debtor is not a debtor in possession.

This alternative permits an attorney or accountant to seek allowance of compensation and reimbursement of expenses as an administrative expense under paragraph (4) of § 503(b) because of the services rendered in making a substantial contribution to the case in representing the owners, whose expenses in making a substantial contribution are allowable under paragraph 3. Other professionals are not included in paragraph (4), so a joint representation agreement with other professionals would not provide this advantage.

Allowance of an administrative expense under paragraph (4) in this situation is subject to the same objections that arise under the first alternative that seeks allowance under paragraph (3). Under a “substance over form” analysis, it is no different than allowance of the fees of debtor’s professionals under § 330 and payment of the fees by the estate as an administrative expense under § 503(b)(2). As in the previous situation, it is an end-run around other provisions of the Bankruptcy Code and the *Lamie* ruling that prohibit payment of attorneys and accountants for the debtor by the estate.

A third alternative that takes the “end-run” objection into account is retention of current professionals to represent the debtor (with payment by the owners) and retention of independent counsel to represent the owners. Debtor’s counsel must file the plan, but the owners’ counsel (or other professionals) takes the lead and does most of the work in its drafting and negotiating.

Like the trustee and creditors, the owners are parties in interest and may consult with the debtor about the plan and prepare a proposed plan for the debtor to consider. Similarly, the debtor’s lawyer must represent the debtor in confirmation litigation, but the owners – like the trustee and creditors – are entitled to appear and be heard at the confirmation hearing and to participate in pre-confirmation litigation.

Under this arrangement, the owner’s lawyer (or other professional) is clearly providing services for the owners, and not for the debtor. Those services are consistent with the rights of the owners as parties in interest to participate in the case.

The result is that the owners’ lawyer (or other professional) does most of the work and most of the total compensation and reimbursement arises from that work. The owners have an administrative expense claim under paragraph (3) for compensation and reimbursement of their lawyers and other professionals that does not involve compensation of the debtor’s professionals. In addition, they have a paragraph (3) claim for their payment of the debtor’s professionals.

Objectors still have the argument that “expense” in paragraph (3) does not include the expense of compensation and reimbursement of professionals that an owner incurs in making a substantial contribution, but the argument seems weaker when it is not connected to the debtor’s professionals.

F. Employment and Compensation of Subchapter V Debtor’s Attorneys and Professionals*

Like a debtor in possession in a traditional case,¹⁵³ a subchapter V debtor in possession has the rights, powers, and duties of a trustee under § 1184, with limited exceptions.¹⁵⁴

The Bankruptcy Code requires that the court approve a trustee’s employment of attorneys and other professionals, § 327, and allow their compensation under § 330.¹⁵⁵ Because a debtor

¹⁵³ 11 U.S.C. § 1107(a).

¹⁵⁴ A debtor in possession does not have a trustee’s right to compensation under § 330 and does not have a trustee’s duty to file lists, schedules and statements under § 1106(a)(2) (a duty of the debtor under § 521(a)(1)) or a trustee’s investigative duties under § 1109(a)(3), and (4).

¹⁵⁵ Section 328 permits retention of professionals on specified terms.

in possession exercises rights and powers of a trustee, these provisions apply to a subchapter V debtor's employment and of professionals and their compensation.

The principles and standards governing employment and compensation of debtor's professionals are the same in traditional and subchapter V cases. Although they are familiar to practitioners with experience in chapter 11 cases, professionals with little or no chapter 11 experience may not be aware of them.

This section reviews basic concepts and notes illustrative problems that have arisen in subchapter V cases.

Bankruptcy Rule 2014 requires an application for the employment of professionals and specifies its required contents. Generally, a professional is not entitled to compensation for services rendered before the filing of the application in the absence of "excusable neglect" for proceeding to provide services before the filing or the existence of unusual circumstances to justify retroactive approval of employment.¹⁵⁶

Bankruptcy Rule 6003 (a)(1) prohibits a court from granting an application to employ professionals within 21 days after the filing of the petition unless necessary to avoid immediate and irreparable harm. Nevertheless, an application for employment of the debtor's attorneys (and other professionals) should be filed at the same time as the petition. Courts generally permit compensation for services rendered after the filing of an employment application but before it is granted, but they usually will not permit compensation for services rendered before its filing.¹⁵⁷

A professional employed by a debtor in possession must be a "disinterested person" under § 327(a). Section 101(14) defines "disinterested person" to mean a person who is not a creditor, equity security holder, or insider and who is not, and was not in the two years before the filing of the petition, an officer, director, or employee of the debtor. § 101(14)(A), (B). In addition, a disinterested person must not have an interest "materially adverse to the estate or 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). Representation of an adverse interest, such as the debtor's principal, or failure to disclose it is a basis for denial of compensation.¹⁵⁸

Bankruptcy Rule 2014 requires that the application for approval of employment of a debtor's professional disclose all of the professional's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the United States trustee's office and include a verified statement setting forth all of the connections. Bankruptcy Rule 2002(a)(2)(F), (3).

¹⁵⁶ *E.g.*, *In re Russ's Mulch & Trucking LLC*, 2025 WL 3558053 (Bankr. E.D. Wisc. 2025) (court found no excusable neglect and denied compensation for services prior to filing of application); *In re Golexis*, 659 B.R. 767 (Bankr. D. Utah 2024) (court found no unusual circumstances and denied compensation for services prior to filing of application).

¹⁵⁷ *E.g.*, *In re Russ's Mulch & Trucking LLC*, 2025 WL 3558053 (Bankr. E.D. Wisc. 2025); *In re Golexis*, 659 B.R. 767 (Bankr. D. Utah 2024).

¹⁵⁸ *E.g.*, *In re NIR West Coast, Inc.*, 638 B.R. 441 (Bankr. E.D. Cal. 2022).

A professional's failure to make complete disclosure of all connections and potential conflicts of interest often results in denial of compensation.

Issues arise when a principal of a debtor or other third party advances funds for a professional's prepetition retainer or guarantees payment of compensation for services during the case.

In *In re Doug Gross Construction, Inc.*, 2024 WL 2990298 (Bankr. W.D.N.Y. 2024), the court concluded that the debtor's law firm did not represent the debtor's principal, who had lent \$40,000 to the debtor to pay a retainer for the law firm, and that no actual conflict of interest existed, and approved its employment, but noted that counsel should have made better disclosure of the connections in the application for employment.

In re Vistam, 2024 WL 2037846 (Bankr. C.D. Cal. 2024), illustrates the need for debtor's counsel to carefully consider the details of arrangements for a principal of the debtor to fund a retainer for services in the case and to make full disclosure of them.

The principal of the debtor had provided \$25,000 as a retainer to debtor's counsel. The court denied the application for approval of the attorney's employment and continued the hearing. Upon request of the principal, the attorney returned the retainer to the principal. The subchapter V trustee moved for a contempt sanction of \$25,000 plus the trustee's fees in pursuing the motion against the principal and the attorney.

The principal and the attorney contended that return of the retainer was appropriate because it remained the principal's money. The court, however, concluded that it could find based on the circumstances that the debtor acquired the funds either as an equity contribution or a loan. The court held both in contempt and required payment of \$39,892.

Section 330 governs compensation of a debtor in possession's professionals. It permits "reasonable compensation for actual, necessary services rendered" by the debtor's professional, § 330(a)(1), and reimbursement for "actual, necessary expenses." § 330(a)(2). Section 330(a)(3) specifies the factors for the court to consider in allowing compensation. Section 330(a)(4) prohibits compensation for "unnecessary duplication of services" or services that were not reasonably likely to benefit the estate or were not necessary to the administration of the case.

A number of courts have considered objections to compensation of a subchapter V debtor's lawyers.

In *In re Doug Gross Construction, Inc.*, 2024 WL 2990298 (Bankr. W.D.N.Y. 2024), the court reduced the compensation of the debtor's attorneys in a subchapter V case in which a liquidating plan had been confirmed from \$839,020 to \$637,829.09. The reduction of \$201,191.91 was based on the court's conclusion that fees in certain categories were "unreasonable and tainted by conflict" with the interests of insiders.

In *In re Hillman*, 2024 WL 409118 (Bankr. N.D.N.Y. 2024), the court reduced the hourly rate for attorneys who performed administrative tasks and reduced the overall compensation by ten percent for the attorney's failure to comply with local rules regarding project billing categories, inclusion of a statement concerning the debtor's ability to pay, and other deficiencies, including "lumping" and "vagueness."

The debtor's counsel in *In re 2202 East Anderson St., LLC*, 2024 WL 1340655 (Bankr. C.D. Cal. 2024), sought a total of \$ 50,035.25 in fees for services rendered after the court ruled that the debtor was ineligible for subchapter V and appointed a chapter 11 trustee, who sold its real estate.¹⁵⁹ The court considered two objections of the trustee to the fees.

First, the trustee objected that fees of \$15,385 were not allowable because they were for services in an effort to keep the case in subchapter when it was inevitable that its subchapter V status would be terminated and a trustee appointed. The court concluded that most of the attorney's services trying to allow the case to proceed under subchapter V were reasonably likely to benefit the estate at the time they were performed. But the attorney had not done a cost/benefit analysis of the attorney's services seeking an alternative to the sale of the property and how those services benefitted the estate, as opposed to the principal. The court reduced the requested compensation by \$ 8,000.

The trustee also asserted that the lawyer should receive only \$ 1,000 for services to obtain approval of employment instead of the requested \$ 9,060.40. The court reduced the fees by \$ 3,000, concluding that the lawyer would have spent less time had it complied with the court's procedures concerning disclosures regarding payment of counsel's retainer by a principal.

In *In re Pinnacle Foods of California, LLC*, 2025 WL 1090920 (Bankr. E.D. Cal. 2025), the debtor sought to assume franchise agreements, which the court had denied under applicable Ninth Circuit precedent.¹⁶⁰ Although the court allowed attorney's fees for services in connection with filing and prosecution of the motion to assume the franchise agreements, it disallowed fees for continued efforts to assume them after the court had ruled, concluding that such services were not necessary or beneficial to the estate.

The court in *1333 Beacher Lane Va., LLC*, 2025 WL 3083057 (Bankr. E.D. Va. 2025), allowed the fees of the debtor's attorney over the objection of the debtor's principal asserted on behalf of the debtor. The case contains an extensive factual analysis of the standards required for allowance of compensation under § 330.

Courts have stated that a postpetition retainer for debtor's counsel is permissible in appropriate circumstances. The court in *In re Golden Fleece Beverages, Inc.*, 2021 WL 6015422 (Bankr. N.D. Ill. 2021), approved a postpetition retainer for the subchapter V debtor's replacement counsel.

¹⁵⁹ Section V(E)(2) discusses the issue of whether a debtor's professionals are entitled to compensation after removal of the debtor from possession.

¹⁶⁰ *Catapult Entertainment, Inc. v. Perlman (In re Catapult entertainment, Inc.)*, 165 F.3d 747 (9th Cir. 1999).

In *In re Soul Wellness LLC*, 669 B.R. 848 (Bankr. S.D. Fla. 2025), however, the court declined to approve a postpetition retainer for debtor’s counsel who filed the case, finding no exceptional circumstances to warrant authorizing the postpetition retainer. Section IV(E)(4) of this Update discusses the issue in connection with deposits for payment of the subchapter V trustee’s fees and expenses.

The court in *In re Raocore Tech, LLC*, 2025 WL 82880 (Bankr. D.D.C. 2025), declined to approve an “evergreen retainer” whereby the debtor would make postpetition payments as an additional retainer as counsel submitted statements for services during the case. The court noted that evergreen retainers are permissible in appropriate circumstances and listed factors for consideration in making the determination. Section IV(E)(4) of this Update discusses the factors the court identified.

VI. Administrative and Procedural Features of Subchapter V

A. Elimination of Committee of Unsecured Creditors*

A subchapter V case does not have a creditor’s committee unless the court orders otherwise for cause.¹⁶¹ The provision is consistent with the objectives of subchapter V to provide an expedited process for the quick, inexpensive, and efficient reorganization of smaller businesses.¹⁶² It is also consistent with the practical reality that, prior to enactment of subchapter V, many cases of smaller business did not have a creditors’ committee due to the lack of creditors willing to serve on the committee.

Moreover, the subchapter V trustee’s oversight duties under § 1183(b)(1) and (3), together with the court’s authority under § 1183(b)(2) to expand the trustee’s duties to include investigative responsibilities, give the subchapter V trustee a role in the case that serves many of the purposes of a creditors’ committee and makes a creditors’ committee less necessary.¹⁶³

In *In re Cinemex Holdings USA, Inc.*, 2025 WL 2489585 (Bankr. S. D. Fla. 2025), a creditor requested that the court appoint a creditors’ committee. As cause for the appointment, the creditor asserted the need to investigate the eligibility of the three related debtors for subchapter V because the debtor was close to the debt ceiling, to investigate a \$ 50 million claim of the debtor’s parent and determine whether it should be recharacterized as equity, and to provide a “unified voice” for unsecured creditors in the case.¹⁶⁴

¹⁶¹ In a traditional case, § 1102(a)(1) provides for the U.S. Trustee to appoint a committee of creditors holding unsecured claims. In a subchapter V case, § 1181(a)(2) provides that § 1102(a)(1) does not apply unless the court orders otherwise for cause.

¹⁶² See, e.g., *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 339-340 (Bankr. S.D. Fla. 2020).

¹⁶³ E.g., *In re Cinemex Holdings USA, Inc.*, 2025 WL 2489585 at *3 (Bankr. S.D. Fla. 2025); 7 COLLIER ON BANKRUPTCY ¶ 1102.04[1] (16th ed.); cf. *In re Peak Serum, Inc.* 623 B.R. 609, 634 (Bankr. D. Colo. 2020) (Because appointment of a trustee is mandatory in a subchapter V case, debtor is subject to “some level of oversight by a neutral third party.”).

¹⁶⁴ *Id.* at *2.

The court noted¹⁶⁵ that *In re Sharity Ministries*¹⁶⁶ was the only subchapter V case it had found in which a court appointed an official committee. In *Sharity Ministries*, the court at a hearing *sua sponte* ordered the appointment of a members' committee so that approximately 10,000 members could "have a voice" in their treatment "without individual members having to incur the costs of doing so."¹⁶⁷ The U.S. Trustee had filed a motion to remove the debtor from possession or to expand the subchapter V trustee's duties to include investigatory duties and presented evidence "that the debtor had misled its members, was an insurance company operating without licensure and regulation, and that a substantial amount of the members' contributions were used to pay a third party rather than the members' medical expenses."¹⁶⁸

The *Cinemex Holding* court found no guidance on the standards for determining "cause" for the appointment of a committee in two other cases.

One was *In re Bonert*,¹⁶⁹ where the debtor in a traditional case sought to amend its petition to elect subchapter V. The committee, appointed a few weeks prior to the filing of the amendment, objected that allowing the case to proceed under subchapter V would prejudice it. In rejecting the committee's argument, the court noted, "The Committee will not be disbanded if it can demonstrate that its continued existence will improve recoveries to creditors, will assist in the prompt resolution of this case, and is necessary to provide effective oversight of the Debtors."¹⁷⁰

The other was *In re Wildwood Villages, LLC*.¹⁷¹ In rejecting a request for the filing of a class proof of claim, the *Wildwood Villages* court remarked, "While true that creditor committees are disfavored in Subchapter V cases, the statute permits a bankruptcy court to use its discretion and appoint a creditors' committee in an appropriate case."

After reviewing the provisions of § 1183(b)(2), which permits expansion of the trustee's duties to include investigatory duties for cause, and § 1185(a), which permits removal of the debtor from possession for cause, the *Cinemex Holdings* court quoted a leading treatise:¹⁷²

The provision authorizing the court to appoint a committee for cause allows the court to take into account all of the relevant facts and circumstances. The court will balance the potential cost of a committee against the need to protect the interests of creditors in the reorganization process, taking into account the enhanced role of the United States trustee or the appointment of a subchapter V trustee.

"In sum," the court reasoned, "in determining whether a committee should be appointed in a Subchapter V case a court should take into consideration factors that cannot, or logically

¹⁶⁵ *Id.* at *4.

¹⁶⁶ Case No. 21-11001, Tr. Of Aug. 9, 2021 H'rg, Doc. No. 150 at 61-63 (Bankr. D. Del. Aug. 10, 2021).

¹⁶⁷ *Id.*

¹⁶⁸ See *Cinemex Holdings*, 2025 WL 2489585 at * 4 (summarizing the record in *Sharity Ministries*).

¹⁶⁹ 619 B.R. 248 (Bankr. C.D. Cal. 2020).

¹⁷⁰ *Id.* at 254.

¹⁷¹ 2021 WL 1784408 (Bankr. M.D. Fla. 2021).

¹⁷² *Cinemex Holdings*, 2025 WL 2489585 at *5, quoting 7 COLLIER ON BANKRUPTCY ¶ 1102.04[1] (16th ed.).

should not, be addressed by the remedies provided by section 1183(b)(2) or factors which rise to the level of cause for removal of a debtor in possession under section 1185.”¹⁷³

In exercising its discretion, the court concluded, it must “consider balancing the potential cost of a committee against the need to protect the interests of creditors; in other words, whether the needs of moving the case forward and controlling costs is outweighed by the needs of creditors.”¹⁷⁴

Taking into account the “enhanced role” of the subchapter V trustee, the court listed seven non-exclusive factors that a court should consider in determining whether cause for appointment of a committee exists:¹⁷⁵

1. The size and complexity of the case (whether the case is one which more closely resembles a traditional chapter 11 case);
2. The number of creditors involved in the case and the nature of their debt;
3. The nature of the debtor's assets;
4. The nature of the debtor's business and how it is regulated;
5. The amount of secured debt, the number of secured creditors, and the nature of the collateral in which such creditors assert a lien;
6. Whether and to what extent any other creditor or other party in interest supports the relief requested; and
7. Whether any other factors are present in the case that, notwithstanding § 1183(b)(2), would interfere with the ability of the Subchapter V trustee to perform the trustee's normal statutory duties effectively.

Applying these factors, the court determined that the creditor had not established sufficient cause for appointment of a creditors' committee. The case was not complex, no other party had joined in the request, and the fact that the debts were “close to the debt ceiling” was “not persuasive” because the debtors would qualify for subchapter V under the debt limit Congress set even if they were “only one penny under the ceiling.”¹⁷⁶

The need to investigate the parent company's \$50 million claim was not cause because the subchapter V trustee could investigate the claim and object to its allowance if appropriate and, in any event, the debtor had not yet filed a plan, so “no one even knows how the Debtors propose to treat the insider claim.”¹⁷⁷ The trustee and the creditor could object to the plan.

¹⁷³ *Id.* at * 5.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at * 5-6.

¹⁷⁶ *Id.* at *6.

¹⁷⁷ *Id.*

The court rejected the argument that the unsecured creditors “needed a voice” in the case. The court observed that the creditors in the case were primarily landlords with some vendors that numbered in the hundreds at most, unlike the 10,000 members in *Sharity Ministries*.¹⁷⁸

B. Elimination of Requirement of Disclosure Statement

C. Required Status Conference and Debtor Report

D. Time for Filing of Plan

E. No U. S. Trustee Fees

F. Modification of Disinterestedness Requirement for Debtor’s Professionals

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

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

I. Filing of Proof of Claim; Bar Date

J. Extension of Deadlines for Status Conference and Debtor Report and For Filing of Plan

The debtor in a subchapter V case has the exclusive right to file a plan¹⁷⁹ and must do so within 90 days after the order for relief.¹⁸⁰ The court may extend the deadline if the need for the extension is “attributable to circumstances for which the debtor should not justly be held accountable.”¹⁸¹ Although confirmation of the plan in a small business case must occur within 45 days after filing of the plan unless the court extends the time,¹⁸² subchapter V does not have a deadline for confirmation.

A debtor’s failure to timely file a plan constitutes cause for conversion to chapter 7 or dismissal under § 1112(4)(J). Compliance with the deadline for filing a plan, therefore, is important for a debtor.

A debtor who is not prepared or able to file a plan that it expects the court to confirm by the deadline has two alternatives. Because subchapter V has no deadline for confirmation and permits preconfirmation modification of a plan,¹⁸³ one strategy is to file a plan by the deadline that the debtor will later amend, sometimes called a “placeholder plan.” The more conventional alternative is to seek an extension of the deadline.

Courts have criticized the filing of “placeholder plans” as “a waste of time and resources for all parties-in-interest [that] does not represent Congress’s intent in enacting subchapter

¹⁷⁸ *Id.*

¹⁷⁹ § 1189(a).

¹⁸⁰ § 1189(b).

¹⁸¹ § 1189(b).

¹⁸² § 1129(e). The deadline for the debtor in a small business case to file the plan is 300 days after the order for relief, unless the court extends it. § 1121(e)(2).

¹⁸³ § 1193(a).

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.”¹⁸⁴ One court concluded that the filing of a plan that promised the liquidation analysis and financial projections that § 1190(1) requires on or before 21 days before the confirmation hearing did not meet the requirement of § 1189(b) for filing a plan within 90 days and that cause therefore existed for conversion.¹⁸⁵

Courts have taken different approaches to the determination of whether the need for an extension is “attributable to circumstances for which the debtor should not justly be held accountable.”¹⁸⁶

*In re Signia, Ltd.*¹⁸⁷ illustrates the “beyond-the-debtor’s control” view. Under this interpretation, the debtor must establish external circumstances beyond the debtor’s control to obtain an extension of the plan deadline.¹⁸⁸ Under the plain meaning of the statutory language and the caselaw and legislative history of the identical language in chapter 12 for extension of the deadline for filing a plan,¹⁸⁹ the court concluded that § 1189(b) permits extension of the deadline only because of external events that the debtor did not cause.

The court began by stating that it had “little doubt” about the plain or ordinary meaning of the operative statutory language, “the debtor should not justly be held accountable.” The court stated, *id.* at *8:

It means simply that the debtor should not be responsible for external events that the debtor did not cause. And, the corollary is that the debtor is responsible for the debtor’s own conduct. This corresponds exactly with the Beyond-the-Debtor’s-Control Standard. Extensions may be warranted for external events beyond a debtor’s control which make it impossible for a debtor to file a timely plan.

The court checked its interpretation by consulting dictionary definitions of the two key statutory words, “justly” and “accountable.” Definitions of “accountable,” the court noted, included “expected or required to account for one’s actions: answerable” and “liable to be called to account, or to answer for responsibilities and conduct: answerable, responsible.” *Id.* at *9. The best meaning of “justly” in the context of the statute, the court said, is “in conformity with fact or reason: correctly, properly.” *Id.* The court concluded that a reasonable reader would

¹⁸⁴ *In re Baker*, 625 B.R. 27, 38 (Bankr. S.D. Tex. 2020); *accord, e.g. In re Waterville Redevelopment Co. IV, LLC*, 2024 WL 3658765 at *6 n.9 (Bankr. D. Me. 2024); *In re Signia, Ltd.*, 2024 WL 331967 at * 1 (Bankr. D. Colo. 2024) (Placeholder plans “seem to be filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement while obviously skirting the import of the statute.”).

¹⁸⁵ *In re United Safety and Alarms, Inc.*, 2024 WL 973674 (Bankr. S.D. Fla. 2024).

¹⁸⁶ Two cases, discussed in the text *infra*, review the different approaches and discuss and collect cases on the issue. *In re Signia*, 2024 WL 331967 (Bankr. D. Colo. 2024); *In re Trinity Legacy Consortium, LLC*, 656 B.R. 429 (Bankr. D.N.M. 2023).

¹⁸⁷ 2024 WL 331967 (Bankr. D. Colo. 2024).

¹⁸⁸ *Accord, e.g., In re Majestic Gardens Condo. C Ass’n, Inc.*, 637 B.R. 755, 756 (Bankr. S.D. Fla. 2022); *In re Keffer*, 628 B.R. 897, 910 (Bankr. S.D.W. Va. 2021); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 (Bankr. S.D. Fla. 2020).

¹⁸⁹ § 1221.

understand the words to have these meanings such that the statutory language “does mean that the debtor should not be responsible for external events that the debtor did not cause but is accountable for the debtor’s own conduct.” *Id.*

The *Signia* court then observed that, “[w]hile considering the constituent parts of the clause at issue – ‘accountable’ and ‘justly’ – might have some relevance, merely stringing the words together is not enough and could lead in the wrong direction.” *Id.* at *9. The court explained that “the entire clause (‘the debtor should not justly be held accountable’) must be considered as a single unit in the special context of the Bankruptcy Code.” *Id.* The court noted that, in the legal field, “terms of art” develop and that ordinary legal meaning may differ from common meaning. Specifically, the court referred to Justice Frankfurter’s statement on statutory interpretation, *id.* at *9:¹⁹⁰

[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

The *Signia* court concluded that, in addition to having plain or ordinary meaning, the clause also has “specialized meaning” and “old soil.” The “old soil,” the court explained, is § 1221 in chapter 12, which permits an extension of the debtor’s deadline for filing a plan with the same language as the subchapter V statute.

The court extensively reviewed the legislative history of § 1221 and the caselaw interpreting that section, concluding that § 1221 permits an extension only if the inability to file a plan is due to circumstances beyond the debtor’s control. *Id.* at *10-11. Accordingly, the court explained, *id.* at *12:

When Congress copied the exact same language used in Section 1221 into Section 1189(b), it must be presumed that Congress meant for the same Beyond-the-Debtor’s-Control Standard to apply given that that had been the law for decades. The Supreme Court has repeatedly invoked this “longstanding interpretive principle”: “[w]hen a statutory term [or phrase] is ‘obviously transplanted from another legal source,’ it brings the old soil with it.”¹⁹¹

The *Signia* court summarized its holding, *id.* at *11:

So, the meaning of Section 1189(b) already has been settled in the context of Section 1221. The Court reaffirms that the Beyond-the-Debtor’s-Control Standard (derived from Section 1221) is the right standard for evaluating requests for extension under Section 1189(b).

¹⁹⁰ The Court quoted Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 73 (Thomson West 2012) and Felix Frankfurter, *Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

¹⁹¹ Quoting *Taggart v. Lorenzen*, 587 U.S. 554, 560, 139 S.Ct. 1795, 1801 (2019) (construing bankruptcy statutes pertaining to injunctions), and citing *Hall v. Hall*, 584 U.S. 59, 73, 139 S.Ct. 1118, 1128 (2018).

The *Signia* court denied the debtor’s motion to extend the deadline because the only basis for the extension was an unresolved dispute concerning financing. This circumstance, the court concluded, was not beyond the debtor’s control because it could have filed its financing motion earlier, asked for an expedited hearing, reached some agreement with the objecting party, or drafted around the issue in a plan with differing provisions depending on whether the debtor prevailed.¹⁹²

The court in *In re Waterville Redevelopment Co. IV, LLC*, 2024 WL 3658765 (Bankr. D. Me. 2024), stated that it was persuaded by the *Signia* court’s “beyond the debtor’s control standard” but that the debtor had not met the requirements of any other standard.

The court had extended the deadline for filing for 45 days due to the need of the debtor to replace its attorney, whose employment had not been approved. On the date of the extended deadline, the debtor requested a further extension, which it asserted was preferable to filing a “placeholder plan.” The debtor asserted that it needed more time to secure refinancing because of concerns the potential lender had expressed about a pending motion to dismiss.

The court denied the request for an extension, *id.* at *6:

[At the hearing on the request for an extension], counsel to the Debtor plainly implied that no “confirmable” plan could be filed yet but did not shore up that insinuation with any specifics. He mentioned foregoing the option of filing a “placeholder plan” but did not explain what he meant by the term—that is, what the plan might be lacking. If one concern was that the plan’s feasibility could not be shown due to lenders’ wait-and-see approach, given the motion to dismiss, the confirmation process could have been paused accordingly, if needed. If the Debtor’s projected confidence in its ability to obtain financing upon surviving a motion to dismiss corresponds to reality, then any wait-and-see approach should not have prevented the Debtor from timely filing a plan.

As noted, subchapter V obligates debtors to pursue their plans expeditiously. If they cannot meet that obligation, they must show that the failure is due to circumstances beyond their control and that those circumstances warrant providing more time. Otherwise, they cannot be permitted to continue to benefit from the advantages of subchapter V.

In a footnote, the court added, *id.* at *6, n. 9:

To be clear, the Court is not suggesting in this decision that debtors should perfunctorily file plans. The Court strongly discourages debtors from “filing bogus placeholder plans of reorganization ... [that] are obviously deficient ([e.g.,]... containing blanks, inadequate information, and missing financials) and have no chance of confirmation ... [but rather are] filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement” *In re Signia*, 2024 WL 331967, at *1. The Court is, however, emphasizing the importance of supporting any motion for an extension of time under

¹⁹² 2024 WL 331967 at *12 (Bankr. D. Colo. 2024).

section 1189(b) with sufficient facts and, when necessary, evidence to meet the standard set forth therein.

Other courts have applied a more flexible standard in determining whether to extend the plan deadline.

*In re Baker*¹⁹³ identified four factors for a court 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.

The court in *In re Trinity Legacy Consortium, LLC*,¹⁹⁴ identified and applied a third approach that involves an equitable inquiry into whether the debtor is "fairly responsible for his inability" to file a plan by the deadline.¹⁹⁵ The court concluded that the determination of whether the need for an extension under § 1189(b) is "attributable to circumstances for which the debtor should not justly be held accountable" allows an equitable inquiry "to take into account all relevant circumstances surrounding the debtor's need for an extension of time to file a plan and to balance the interests of the affected parties."¹⁹⁶

Such an equitable inquiry, the court explained, seeks to "strike the correct balance of [subchapter V's] goals of speed and access to a realistic reorganization scheme." It takes into account "whether the debtor manipulated the timing of his bankruptcy case, potential prejudice to creditors, and whether the debtor [is complying] with his obligations under the Code."¹⁹⁷

In striking that balance, the *Trinity Legacy Consortium* court continued, "[T]he Court should be guided by the overarching goals of subchapter V to (i) provide a process by which debtors may reorganize and rehabilitate their financial affairs, (ii) provide a framework for an expeditious and economical resolution of the case under subchapter V, and (iii) facilitate the development of a consensual plan. In striking the proper balance, the Court should give due regard to the particularly important protection § 1189(b) affords creditors because subchapter V eliminates various creditor protections available to creditors in chapter 11 cases not governed by subchapter V."¹⁹⁸

¹⁹³ 625 B.R. 27 (Bankr. S.D. Tex. 2020).

¹⁹⁴ *Trinity Legacy Consortium*, 656 B.R. 429 (Bankr. D.N.M. 2023).

¹⁹⁵ *Id.* at 436-37, quoting *In re Trepetin*, 617 B.R. 841, 849 (Bankr. D. Md. 2020). The court also cited: *In re HBL SNF, LLC*, 635 B.R. 725, 730 (Bankr. S.D.N.Y. 2022) (considering prejudice to parties); *In re Greater Blessed Assurance Apostolic Temple, Inc.*, 624 B.R. 742, 746 (Bankr. M.D. Fla. 2020) (considering prejudice to creditors). The *Trinity Legacy Consortium* court observed that *Trepetin* stated that it was following the "circumstances beyond the control of the debtor" test but that the test *Trepetin* actually applied was an equitable one. 656 B.R. at 437.

¹⁹⁶ 656 B.R. at 437 (footnotes omitted).

¹⁹⁷ *Trinity Legacy Consortium*, 656 B.R. at 437, discussing *In re Trepetin*, 617 B.R. 841, 848-49 (Bankr. D. Md. 2020).

¹⁹⁸ *Trinity Legacy Consortium*, 656 B.R. at 440.

The court then identified specific factors to consider: (1) whether the need for the extension is within the debtor’s reasonable control; (2) the danger of prejudice by granting or refusing to grant the extension; (3) the length of the extension; (4) the debtor’s good faith; (5) the debtor’s progress in formulating a meaningful plan; and (6) the views of creditors as a whole and the subchapter V trustee.

The debtor in *Trinity Legacy Consortium* sought an extension because it was still engaged in mediation with creditors that showed promise of resulting in settlements that would permit the debtor to file a meaningful and confirmable plan. Applying the standards of the “equitable inquiry” approach, the court granted the extension, finding that the debtor was close to concluding its negotiations with creditors in the mediation and that the extension would not unduly prejudice creditors.¹⁹⁹

In re Mateos, 2023 WL 4842301 (Bankr. M.D. Fl. 2023), involved similar circumstances. The married debtors who had personally guaranteed debts of a company in chapter 11 sought an extension based on the need to resolve matters in the company’s chapter 11 case so that their plan could properly take account of that resolution. The court found that the ability to settle matters in the company’s case was important to their cases and granted the extension.

Under the “beyond-the-debtor’s control” interpretation, the debtors in *Trinity Legacy Consortium* and *Mateos* would not have qualified for an extension based on the prospective settlements and resolution of issues in the related case because, among other things, each debtor could have proposed a plan with differing provisions depending on the outcome of the settlements or related case.

In a case in which the bankruptcy judge has not indicated what standards for an extension of the plan deadline govern, the careful debtor’s lawyer in need of an extension for good reasons that are nevertheless within the debtor’s control under the *Signia* approach must file a motion for an extension of the plan deadline and request a hearing well in advance of the plan deadline so that, if the court denies the extension, the debtor will have sufficient time to meet the deadline.

The debtor in *In re S-Tek I, LLC*, 2023 WL 2529729 (Bankr. D. N.M. 2023), timely filed its original plan, followed by second and third plans that the court considered to be preconfirmation modifications of the original plan. After denial of confirmation of the third plan, the debtor filed a fourth plan.

The court ruled that, after denial of confirmation, no plan existed that the debtor could modify and that the fourth plan was not timely. *Id.* at *5. The court noted that chapter 12 cases had permitted modification after denial of confirmation. *Id.* at *5, n. 36 (citing *Novak v. DeRosa*, 934 F.2d 401, 403-04 (2d Cir. 1991) (providing that a chapter 12 plan may still be modified after denial of confirmation); *In re Mortellite*, 2018 WL 388966, at *1 n.3 (Bankr. D.N.J. Jan. 11, 2018) (same)).

The *S-Tek* court declined to give the debtor more time to file a plan based on the circumstances of the case, including the facts that the case had been pending for two years, was

¹⁹⁹ *Id.* at 442-43.

essentially a two-party dispute, and had involved contentious and expensive litigation. *Id.* at *8-9.

K. Debtor’s Postpetition Performance of Obligations Under Lease of Nonresidential Real Property – § 365(d)

L. Automatic Stay Issues in Subchapter V Cases*

Section 362(n) provides that the automatic stay does not apply in the case of a debtor who is in a small business case pending at the time of the filing of the petition or who was a debtor in a small business case that was dismissed, or in which a plan was confirmed, within the previous two years. A subchapter V case, however, is not a small business case. Accordingly, section 362(n) does not apply in the case of a debtor filed after dismissal of a subchapter V case or confirmation of a plan in a subchapter V case.

When the debtor’s first case is a small business case, however, § 362(n) applies in a second case under subchapter V. *In re Brendan Gowing, Inc.*, 661 B.R. 565 (Bankr. S.D. Tex. 2024).

In *In re Pacific Panorama, LLC*, 2024 WL 696226 (Bankr. D. Nev. 2024), the court granted the creditor’s motion in a subchapter V case for so-called *in rem* relief under § 362(c)(4), which provides that the automatic stay does not apply with regard to real property in any case filed within two years after entry of an order finding that the case was filed as part of a scheme to delay, hinder, or defraud a creditor.

VII. Contents of Subchapter V Plan

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

Section 1123 governs the content of a chapter 11 plan. In a subchapter V case, section 1190(1) states that a subchapter V plan “shall include” a history of the debtor, a liquidation analysis, and projections and must provide for the submission of future earnings or other incomes as necessary for the execution of the plan. Section 1190(1) does not reference § 1123, and it does not state whether § 1190’s plan content requirements are in addition to the requirements of § 1123 or replace them.

One court observed that it is arguable that the plan content requirements in § 1190 set forth an exclusive list in a chapter 11 case but declined to resolve the ambiguity because it concluded that the plan complied with the provisions of § 1123 applicable in subchapter V cases.²⁰⁰

As the court noted, and as the following section explains, § 1181(a) provides that two provisions of § 1123 (paragraph (a)(8) and subsection (c)) do not apply in subchapter V cases. The clear implication from the exclusion of certain provisions of § 1123 in subchapter V cases is that the rest of the provisions of § 1123 do apply.

²⁰⁰ *In re Dark Rhino Security, Inc.*, 26 WL 1020585 at *3 n. 24 (Bankr. S.D. Ohio 2026).

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

SBRA Guide § VII(B) discusses the provisions of § 1190(3), which provides an exception to the rule of § 1123(b)(5) that a plan in a chapter 11 case may not modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence. Section 1190(3) permits modification if the debtor received new value in connection with the granting of the security interest that was not used primarily to purchase or acquire the real property and the new value was used primarily in connection with the small business of the debtor.

Chapter 13 also contains a prohibition on modification of a residential mortgage in § 1322(b)(2). Section 1322(b)(5), however, permits a chapter 13 plan to provide for the cure of arrearages, maintenance of installment payments during the case, and reinstatement of the maturity of the mortgage.

If § 1190(3) is inapplicable, then the usual rule of § 1123(b)(5) governs. In a non-subchapter V case, the court in *In re Jacobs*, 644 B.R. 883, 894-95 (Bankr. D. N.M. 2022), *motion for reconsideration denied*, 2023 WL 124329 (Bankr. D. N.M. 2023), *aff'd sub nom. Jacobs v. United States Trustee (In re Jacobs)*, 2024 WL 2795800 (D. N.M. 2024), considered whether a chapter 11 plan, like a chapter 13 plan, can provide for the postconfirmation cure of arrearages and reinstatement of maturity. Noting that courts have disagreed on this issue, the court concluded that the only way for a chapter 11 plan to deal with defaults under a residential mortgage subject to § 1123(b)(5) is for the claim to be unimpaired under § 1124, which requires the cure of all arrearages prior to the effective date of the plan. The court discussed and rejected the view of some courts that permit the postconfirmation cure of arrearages under a residential mortgage in a chapter 11 case. *See generally* Nate Juster, *Not So Fast: Cure-and-Maintain Plans in Subchapter V*, XLIII ABI Journal 12, 22-23, 72-73, December 2024.

The court in *In re Koettters*, 2026 WL 1520587 (Bankr. C.D. Ill. 2026), represents the opposite view. There, the court permitted the cure of arrearages on a residential mortgage over five years. The *Koettters* court reasoned that the anti-modification provision does not prevent some changes to the contractual rights of the lender under provisions of the Bankruptcy Code. The court ruled that § 1124(a)(5)(G), which allows a plan to provide for the "curing or waiving of any default" without specifying a time for cure to occur, permitted a plan to pay arrears on a residential mortgage during the term of the plan.

When the debtor's real property that secures a debt has uses or characteristics other than use as a residence, a question is whether the anti-modification provision is inapplicable because the real property is not solely the debtor's residence.²⁰¹

One view is that the debtor must use the real property exclusively as a residence. *E.g., In re Scarborough*, 461 F.3d 406, 411 (3d Cir. 2006) (claim secured by real property that is, even in part, not the debtor's principal residence does not fall within the terms of the anti-modification provision.); *Lomas Mortgage, Inc. v. Louis (In re Louis)*, 82 F.3d 1, 4-7 (1st Cir. 1996) (anti-

²⁰¹ *See generally* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 5:42.

modification provision does not apply to multi-unit real property that is debtor's residential property but has other residential units that are not the debtor's property.).

The Eleventh Circuit rejected this view in *Lee v. U.S. Bank (In re Lee)*, 102 F.4th 1177 (11th Cir. 2024). The chapter 11 debtor sought to modify a claim secured by 43 acres. The debtor lived in a small rick house on 2.5 acres and leased the other 41.5 acres to a farming company. The court ruled that the anti-modification statute is unambiguous and applies to any real property that the debtor uses as a residence. The court concluded that real property that is the debtor's principal residence does not mean real property that is *only* or *exclusively* the debtor's residence.

In *In re Joiner*, 2025 WL 2810533 (Bankr. W.D.N.C. 2025), the court held that the provisions in § 1190(3) that permit a subchapter V plan to modify a claim secured by a principal residence under certain circumstances²⁰² do not prevent a secured creditor from making the § 1111(b) election.

C. Payment of Administrative Expenses Under the Plan

D. Injunction To Prevent Collection from Principal on Guaranty Pending Payments Under the Plan*

A common situation in a subchapter v Case is a guaranty by the principal of one or more debts. Some debtors have included provisions in plans that enjoin enforcement of a guaranty or other actions against the principals of the debtor during the term of the plan. The provisions typically provide for termination of the injunction if the debtor defaults under the plan and for tolling of the statute of limitations while the injunction is in effect.

Affected creditors have objected that such an injunction is impermissible under § 524(e), which states that the discharge of a debt does not affect the liability of any other entity on the debt and does not meet the "fair and equitable" requirement for cramdown confirmation in § 1191(b).

Courts have recognized that a bankruptcy court has the authority under § 105(a) to temporarily enjoin collection of debts of the debtor from third parties in "unusual circumstances"²⁰³ when necessary to facilitate reorganization. The circumstances include (1) an identity of interests between the nondebtor and debtor such that enforcement of the obligation against the nondebtor is essentially enforcement against the debtor and (2) an adverse impact of enforcement against the nondebtor on the debtor's ability to accomplish reorganization.

In *In re Global Travel International, Inc.*, 2022 WL 4690426 (Bankr. M.D. Fla. 2022), the debtor filed a subchapter V case to deal with financial distress arising from embezzlement of

²⁰² *SBRA Guide* § VII(B) discusses § 1190(3).

²⁰³ *E.g.*, *Queenie, Ltd. v. Nygard Int'l.*, 321 F.3d 282 (2d Cir. 2003); *In re Zale Corp.*, 62 F.3d 746, 761 (5th Cir. 1995); *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993); *S.E.C. v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992); *Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 601 (10th Cir. 1990); *A.H. Robins Co. v. Piccinin*, 788 F.2d 998, 1003-06 (4th Cir. 1986).

about \$1.2 million by an internal accountant and from the coronavirus pandemic that adversely affected the travel company's business.

At the time of filing, Qualpay, Inc., had filed an arbitration proceeding against the principal of the debtor on his alleged guaranty of the company's debt to Qualpay. The debtor obtained a preliminary injunction against the pursuit of litigation against the principal pending development of a reorganization plan.

The debtor proposed a plan that provided for payment of unsecured claims, including Qualpay, from quarterly payments of projected disposable income over three years and from proceeds from certain causes of action after payment of priority claims. The only two classes were equity interests and unsecured claims.

Other unsecured creditors holding allowed claims of \$732,745.95 voted to accept the plan; Qualpay, with a disputed claim of \$288,596.70 allowed for voting purposes only, was the only creditor to reject it. Because a majority of the creditors in the class holding 71.72 percent of the value of the voting claims accepted the plan, the class accepted the plan. § 1126(c).

The plan contained a "conditional temporal injunction" that protected the principal and a key employee from litigation by the debtor's creditors against them during the three-year payment period, provided that the debtor was performing under the plan. It tolled and abated statutes of limitation so that enjoined parties could pursue their claims if the plan did not result in full payment. The plan provided for the two beneficiaries of the injunction to contribute \$25,000 to the plan, to limit their compensation to 10% of the excess of actual income over projected income, and to continue to provide their time, resources, and industry knowledge towards the successful completion of the plan for the benefit of creditors.

The debtor asserted that the proposed injunction was fair in view of the contributions of the individuals and limitations on their compensation and that, absent the injunction, protracted litigation would jeopardize the debtor's restructuring by depleting its assets, primarily the principal.

Qualpay objected to confirmation on the ground that the injunction was an impermissible third-party release of claims against a non-debtor in violation of § 524(e).

The court concluded that the plan did not contain a third-party release or permanent bar to the assertion of claims on the guaranty. Although the injunction was not a permanent bar order, the court evaluated the requested injunction by evaluating the factors identified in *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002), with regard to a plan's bar order, in accordance with the Eleventh Circuit's decision in *In re Seaside Eng's & Surveying, Inc.*, 780 F.3d 1070, 1079 (11th Cir. 2015), *abrogated by Harrington v. Purdue Pharma L.P.*, 144 S.Ct. 2071 (2024). *Global Travel*, 2022 WL 4690426 at *3.

Thus, the court listed these factors, *id.*:

1. Whether an identity of interests exists between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
2. Whether the non-debtor has contributed substantial assets to the reorganization;
3. Whether the injunction is essential to the reorganization, namely whether the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
4. Whether the impacted class has overwhelmingly accepted the plan;
5. Whether the plan provides a mechanism to pay for all, or substantially all, of the class members affected by the injunction;
6. Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full.

The *Global Travel* court noted that (1) the list is nonexclusive and flexibly applied; (2) bar orders must be essential to a successful reorganization; and (3) the bankruptcy court must make specific factual findings to support entry of a bar order, with discretion to determine which *Dow Corning* factors are relevant in each case. *Global Travel*, 2022 WL 4690426 at 3, citing *Seaside*, 780 F.3d at 1078-79.

Addressing the factors, the court concluded that the facts merited the injunction.

First, with regard to identity of interests, the court noted that, although no indemnity obligation existed, the principal was the debtor's primary asset and that without him the business would suffer. The court credited his testimony that the arbitration was "massively consuming" and that he would have to be replaced at an annual cost of \$100,000 to \$150,000 while he defended the arbitration. The court concluded that "the proposed injunction is essential to the reorganization due to the identity of interests" between the debtor and the principal. 2022 WL 4690426 at *4.

Second, the court concluded that the cash contribution and the limitation on compensation was "substantial and sufficient consideration" for the temporary injunction. *Id.* at *4.

Third, the court concluded that the temporary injunction was essential to the reorganization. *Id.* at *4.

Fourth, the court concluded that the impacted class had overwhelmingly accepted the plan. The court rejected Qualpay's contention that it was receiving worse treatment than other creditors in the class because the plan forced it to give up rights to pursue the principal on a guaranty that other members of the class did not have. The court concluded that Qualpay was an unsecured creditor like all other members of the class based on its rights against the debtor. *Id.* at *5.

Fifth, the court concluded that the plan had a mechanism to pay Qualpay, which would receive payments in the same manner as other members of the class, and expressly preserved Qualpay's rights on the guaranty if it did not receive payment in full. *Id.* at *5.

Finally, the court concluded that the plan provided Qualpay with the opportunity to recover on its claim in full because it left Qualpay's rights intact by tolling and abating all statutes of limitations and deadlines during the three-year term. *Id.* at *5.

The court summarized its ruling, *id.* at *6, "In sum, the Court finds that the Plan does not contain a nonconsensual third-party release. Qualpay's Objection is overruled, and the Plan is confirmed."

See also In re Central Florida Civil, LLC, 649 B.R. 77 (Bankr. M.D. Fla. 2023). (Plan confirmed with injunction preventing pursuit of guaranty claims pending payments under plan).

Although the Supreme Court's ruling in *Harrington v. Purdue Pharma L.P.*²⁰⁴ that a plan cannot contain nonconsensual third party releases abrogated *Dow Corning* (and similar rulings of other courts), courts have concluded that *Purdue Pharma* does not address temporary injunctions against enforcement of claims against principals of a debtor pending payments under a plan and that they are permissible in appropriate circumstances.²⁰⁵

In *In re Hal Luftig Company*, 667 B.R. 638 (Bankr. S.D.N.Y. 2025), the court had granted the debtor's request in an adversary proceeding to extend the automatic stay to prohibit a creditor from enforcing its judgment against the principal of the debtor. The debtor's plan provided for continuation of the stay until the debtor received a discharge after completion of payments of projected disposable income for five years, which would not result in full payment of the creditor's claim. No creditors accepted the plan.

The creditor objected to confirmation on the ground that inclusion of the stay extension violated the fair and equitable requirement of 11 U.S.C. § 1191(b). The court noted that the language of the fair and equitable requirement for subchapter V cases in § 1191(c) states that it "includes" the specified requirements. Thus, the court observed, courts have held that § 1191(c) establishes baseline requirements and that courts have discretion to consider other factors when appropriate. *Id.* at 656-657. ²⁰⁶ Because the plan satisfied all other requirements for cramdown confirmation under § 1191(b), the only question before the court was whether the plan was fair and equitable under § 1191(c).

²⁰⁴ 144 S.Ct. 2071 (2024)

²⁰⁵ *In re Miracle Restaurant Group, LLC*, 2025 WL 1400915 (Bankr. E.D. La. 2025); *In re Hal Luftig Company*, 667 B.R. 638 (Bankr. S.D.N.Y. 2025).

²⁰⁶ The court cited *In re Curiel*, 651 B.R. 548, 561 n.7 (B.A.P. 9th Cir. 2023) (Section 1191(c) "states that whether the plan is fair and equitable includes those requirements. Because the term 'includes' is not limiting, a court may consider other relevant factors as well."); and *In re Trinity Fam. Prac. & Urgent Care PLLC*, 661 B.R. 793, 816 (Bankr. W.D. Tex. 2024) ("[M]eeting the baseline requirements of § 1191(c) is a *necessary* condition for the subchapter V plan to be fair and equitable, but does not assure that the plan is fair and equitable.") (emphasis in original).

The *Hal Luftig* court began by noting that extension of the automatic stay to non-debtors is permissible when "a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Id.* at 657.²⁰⁷ Determination of whether to extend the stay, the court continued, involves the four-factor analysis that governs issuance of a preliminary injunction, *id.* at 657-58:

- (1) likelihood of success on the merits;
- (2) likelihood of irreparable injury in the absence of an injunction;
- (3) balancing of hardships; and
- (4) the public interest.

The court concluded that non-consensual third party stay extensions survived the Supreme Court's ruling in *Purdue Pharma*²⁰⁸ that the Bankruptcy Code does not authorize non-consensual third-party releases.²⁰⁹ *Id.* at 658-59.

Nevertheless, the court explained that courts²¹⁰ had concluded that *Purdue Pharma* changed the "likelihood of success" factor from the likelihood that the plan process would result in a non-debtor release to the likelihood that the debtor would achieve alternative outcomes that could be viewed as "success on the merits." The alternative successful outcomes include providing a breathing spell from the distraction of litigation to permit the debtor to focus on the reorganization of its business or the court's belief that the parties may ultimately be able to negotiate a plan that includes a consensual resolution of the claims against the non-debtors. *Id.* at 659.

The *Luftig* court next considered whether a non-debtor stay extension could remain in place for the life of the plan. Acknowledging that many courts view stay extensions as temporary injunctive relief, the court noted that the duration of some non-debtor stay extensions, in the aggregate, had been comparable to the length of the extension under the debtor's plan. *Id.* at 659-60. The court concluded that the stay extension could last for the length of the plan, consistent with the provision of § 362(c)(2)(C) that continues the automatic stay in a chapter 11 case until the time a discharge is granted or denied. *Id.* at 660.

The *Luftig* court then analyzed whether the circumstances satisfied the requirements for extending the automatic stay to the principal under the standards it enunciated.

²⁰⁷ The court quoted *Queenie, Ltd. v. Nyugard Int'l*, 321 F.3d 282, 287-88 (2d Cir. 2003).

²⁰⁸ *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024).

²⁰⁹ The court cited: *In re Parlement Techs., Inc.*, 661 B.R. 722, 724 (Bankr. D. Del. 2024); *Purdue Pharma L.P. Massachusetts (In re Purdue Pharma, L.P.)*, 666 B.R. 461, 472-73 (Bankr. S.D.N.Y. 2024); and *Coast to Coast Leasing, LLC v. M & T Equip. Fin. Corp. (In re Coast to Coast Leasing, LLC)*, 661 B.R. 621, 624 (Bankr. N.D. Ill. 2024).

²¹⁰ *Massachusetts (In re Purdue Pharma, L.P.)*, 666 B.R. 461, 473 (Bankr. S.D.N.Y. 2024); *In re Parlement Techs., Inc.*, 661 B.R. 722, 724 (Bankr. D. Del. 2024).

The court first concluded that the creditor's enforcement of its judgment would have an immediate adverse economic effect on the estate. The court found that most of the debtor's business was generated through the principal's efforts, that successful reorganization depended that he be able to continue his efforts on current projects and new opportunities, and that collection efforts had affected the debtor's ability to generate revenue. *Id.* at 660.

The court then examined the four factors in the preliminary injunction analysis and concluded that all had been satisfied.

First, providing relief to the principal from the distractions of litigation was necessary for the success of the debtor's reorganization and thus satisfied the modified "likelihood of success on the merits" requirement. *Id.* at 660-61. Second, the debtor would suffer irreparable harm because it would be difficult or impossible for the debtor's business to carry out the plan and successfully reorganize if the principal could not focus on its business operations. *Id.* at 661. Third, the balance of hardships weighed in the debtor's favor. Whereas the creditor's collection efforts would undermine the debtor's reorganization, the harm to the creditor was minimal because extension of the stay was not permanent; upon the conclusion of plan payments, the creditor could proceed to pursue its claim. *Id.* at 661-62. Finally, the court found that the stay extension was not adverse to the public interest because promoting a successful reorganization serves the public interest. *Id.* at 662.

The court concluded that, in the circumstances of the case, the extension of the stay to the principal did not render the plan unfair and inequitable.

In *Ferrandino & Son, Inc. v. Sahene Construction, LLC (In re Sahene Constructions, LLC)*, 2023 WL 3010073 (Bankr. M.D. La. 2023), the debtor was a subcontractor on a construction project and indemnified the general contractor for any damages arising from its failure to perform the work properly. The property owner made demand on the general contractor for damages caused by the debtor's abandonment of work on the project and instituted an arbitration proceeding against the general contractor.

The general contractor sought a preliminary injunction to stay the arbitration on the theory that the owner's demand and prosecution of the arbitration were effectively actions against the debtor and property of the estate because the debtor was ultimately responsible for any arbitration award under its indemnity obligations to the general contractor.

The court denied the preliminary injunction, concluding that the general contractor was not likely to prevail on its claim because it had an adequate remedy at law, did not show irreparable injury, and did not establish harm to the estate.

The court in *In re Miracle Restaurant Group, LLC*,²¹¹ confirmed a subchapter V plan that contained an injunction prohibiting actions to collect debts treated through the plan from any guarantor, insider, officer, director, employee, or interest holder during the term of the plan. The plan provided for termination of the injunction upon an uncured default by the debtor and tolled the statute of limitations.

²¹¹ 2025 WL 1400915 (Bankr. E.D. La. 2025).

The plan provided for an unsecured creditor in its own class to receive monthly payments, with interest, during the three-year term of the plan and a balloon payment for the balance at the end of the term. The creditor and the U.S. Trustee objected to confirmation on the ground that *Purdue Pharma* prohibited the temporary injunction.

The court agreed with the *Hal Luftig* court that *Purdue Pharma* did not preclude a plan provision for a nonconsensual temporary injunction to prohibit enforcement of claims against nondebtor parties.²¹² A temporary injunction is permissible in the Fifth Circuit, the court ruled, in “unusual circumstances”²¹³ under *Feld v. Zale Corp. (In re Zale Corp.)*,²¹⁴ if the issuance of such an injunction under § 105(a) as part of a confirmed plan satisfies the four-prong test for issuance of a preliminary injunction, as earlier text discusses.²¹⁵

“Unusual circumstances,” the *Miracle Restaurant* court explained, include circumstances (1) when the debtor and nondebtor have such an identity of interests that enforcement of a claim against the nondebtor is essentially enforcement of a claim against the debtor or (2) when enforcement against a nondebtor will have an adverse impact on the debtor’s ability to accomplish reorganization.²¹⁶

The court found an identity of interest between the debtor and the guarantors and that the temporary injunction was necessary to the debtor’s successful reorganization.²¹⁷ The guarantors were vital to successful reorganization, the court explained, because they provided day-to-day management of the debtor. Enforcement of the guaranties would divert their time, attention, and resources from the debtor’s reorganization efforts.

Further, the court observed, the plan contemplated refinancing the balance of the debtor’s unpaid debts at the end of the term; enforcement of the guaranties could negatively affect the strength of any necessary guaranty for such refinancing and discourage any future infusion of capital or financing. The adverse impact on refinancing efforts could affect the debtor’s implementation of the plan and reduce creditor recoveries.

The court also concluded that the injunction satisfied the four-prong preliminary injunction test: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) the threatened injury in the absence of an

²¹² *Id.* at * 4.

²¹³ *Id.* at * 6-8.

²¹⁴ 62 F.3d 746, 760 (5th Cir. 1995).

²¹⁵ 2025 WL 1400915 at * 9.

²¹⁶ *Id.* at *7-8, quoting *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5th Cir. 1995). The *Miracle Restaurant* court, 2025 WL at * 8, noted other cases that *Zale Corp.* cited as examples of “unusual circumstances: *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993) (“Such circumstances usually include when the debtor and the non-bankrupt party are closely related or the stay contributes to the debtor’s reorganization.”); *S.E.C. v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) (“In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor’s reorganization plan.”); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1003–06 (4th Cir. 1986) (stating that a § 105 injunction may be appropriate where proceeding would have an adverse impact on the debtor’s ability to reorganize or deplete property of estate).

²¹⁷ 2025 WL at *9.

injunction outweighs the threatened harm the injunction may cause to the enjoined party; and (4) issuance of the injunction does not disserve the public interest.²¹⁸

In the context of a temporary plan injunction, the court explained, the “substantial likelihood of success on the merits” requirement is whether the reorganization is likely to succeed. The court observed that no party had objected to the feasibility of the plan and that the court had determined at the confirmation hearing that the plan was feasible, a finding that supported the conclusion that the plan is substantially likely to succeed.

The court found that the record showed that “the opportunity for this Debtor to successful reorganize is seriously jeopardized” in the absence of a temporary injunction, thus satisfying the “irreparable injury” requirement.²¹⁹

Under the terms of the confirmed plan, the court noted, the creditor would be paid in full within the plan’s three-year term, and the injunction would expire upon the debtor’s failure to timely cure any default. The only harm to the creditor, the court found, was that it had to accept payment terms that it did not like. “That harm is minimal,” the court reasoned, “compared to the harm the Debtor faces if the temporary injunction is not granted: the Debtor forfeits its ability to reorganize.”²²⁰

Issuance of an injunction would not disserve the public interest, the court ruled, because “[t]he public has an interest in allowing businesses to reorganize instead of liquidate.”²²¹ Moreover, the court continued, issuance of the injunction also protects “numerous other creditors and their rights to receive equitable distributions under the Plan.”²²²

The court in *In re Engineering Recruiting Experts, LLC*,²²³ applied the reasoning in *Hal Luftig* and *Miracle Restaurant* in concluding that a plan could in appropriate circumstances include a temporary injunction against enforcement of claims against co-debtors during the term of the plan. The court applied the *Zale* factors to conclude that a temporary injunction in the plan to protect the principal – its sole owner and the “linchpin”²²⁴ of its operations – was permissible. Although the plan provided for protection of “any co-debtor,” the court limited the injunction to the principal because the debtor had not presented evidence or argument with regard to any other co-debtors.²²⁵

See also In re Hisaw, 2026 WL 1640815 at *5-6 (Bankr. W.D. La. 2026) (Court overruled objection of U.S. Trustee to confirmation of a plan under § 1191(b) that included a temporary injunction, ruling that a temporary injunction is when it “is appropriately limited to non-bankrupt parties who are closely related to the Debtor, and the injunction is important to the Debtor’s reorganization.” The court observed that creditors who may be affected by the

²¹⁸ *Id.* at *9-10.

²¹⁹ *Id.* at *9.

²²⁰ *Id.* at *10.

²²¹ *Id.* at 10, quoting *Neutra, Ltd. v. Terry (In re Acis Capital Mgmt., L.P.)*, 604 B.R. 484, 529 (N.D. Tex. 2019)

²²² *Id.*

²²³ 673 B.R. 32 (Bankr. M.D. Fla. 2025).

²²⁴ *Id.* at 39.

²²⁵ *Id.* at 35.

injunction voted to accept the plan.); *In re Fortuna Auction LLC*, 2025 WL 3726083 (Bankr. S.D.N.Y. 2025) (Court confirmed consensual plan under § 1191(a) and overruled objection of United States Trustee to injunction during the plan period prohibiting actions against principal, concluding that the facts supported it under the *Hal Luftig* analysis. The objection of a creditor to the injunction was resolved and withdrawn.)

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**
- 2. Differences in requirements for and consequences of consensual and cramdown confirmation**
- 3. Benefits to debtor of consensual or cramdown confirmation**
- 4. Whether balloting on plan is necessary***

SBRA Guide § VIII(A)(4) considers whether balloting on a plan is necessary if the debtor wants to bypass the solicitation of acceptances and seek cramdown confirmation under § 1191(b).

In the course of dealing with the debtor's proposal that creditors who did not "opt out" of the plan's provisions for third-party releases would be bound by them, the court in *In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), addressed the need for balloting in the case, where the debtor intended to pursue cramdown confirmation without soliciting any acceptances. The court stated, *id.* at *2:

The typical practice in this Court has been for creditors' consent (or not) to a third-party release to be determined in connection with the vote on the plan. In subchapter V cases, however, § 1191(b) of the Bankruptcy Code eliminates § 1129(a)(10)'s requirement of an impaired accepting class. As a result, so long as the plan is nondiscriminatory and satisfies absolute priority, there is no requirement that creditor votes be solicited in a case under subchapter V.

Another court took a different approach in *In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 690-91 (Bankr. S.D. Tex. 2002). The court noted that the two subsections of § 1129(a) which impose the balloting duty—§ 1129(a)(8) and (a)(10)—do not apply in a cramdown situation. The court reasoned, however, that a good-faith effort to solicit ballots is still necessary on the debtor's part because, absent balloting, the court cannot determine whether the plan should be confirmed under § 1191(a) or (b).

5. Final decree and closing of case*

When cramdown confirmation occurs under § 1191(b), § 1194(b) provides for the trustee to make payments to creditors under the plan unless the plan or confirmation order provides otherwise and that § 1192 provides that discharge does not occur until the debtor completes payments under the plan for the specified period. *SBRA Guide* § VII (A)(5) notes that, after

cramdown confirmation, the trustee continues to serve in the case and that entry of a final decree and closing of the case must await competition of payments.

Plans or confirmation orders in cramdown situations often provide for the debtor, rather than the trustee, to make payments to creditors. Section IX(D) of this Update discusses termination of the trustee's services after substantial consummation of the plan, entry of a final decree, and closing of the case in these circumstances.

B. Cramdown Confirmation Under § 1191(b)

1. Changes in the cramdown rules and the “fair and equitable” test

2. Cramdown requirements for secured claims*

Section 1191(c) makes the cramdown requirements in § 1129(b)(2)(A) with regard to a secured claim applicable to cramdown confirmation under § 1191(b) in a subchapter V case.

The court in *In re James Pine & Son Trucking LLC*, 2024 WL 4343179 (Bankr. D. N. J. 2024), ruled that the method for determining the value of a secured creditor's collateral in a subchapter V case is the same as in a traditional chapter 11 case. Because the debtor proposed to retain a dump truck in the plan, the court held that § 506(a) requires its valuation at replacement value.

In *In re Creason*, 2023 WL 2190623 (Bankr. W.D. Mich. 2023), a creditor held a security interest in personal property, but it was avoidable under § 544(a) because the financing statement did not have the correct name for the debtor. The debtor's plan put the creditor in a separate class and treated the creditor as an unsecured creditor.

The creditor did not vote on the plan. The court held that, because the creditor had not voted, the class had rejected the plan so that consensual confirmation under § 1191(a) was not permissible.

The court concluded that the plan was, however, confirmable under the cramdown provisions of § 1191(b) because the plan provided for the creditor to receive the “indubitable equivalent” of the claim under § 1129(b)(2)(A)(iii). The court reasoned, *id.* at 3:

Suffice it to say that treating as unsecured the holder of an inevitably avoidable security interest offers the “indubitable equivalent” of its claim, as required for confirmation under § 1191(b). *See* 11 U.S.C. § 1191(c)(1) (incorporating § 1129(b)(2)(A)(iii) as rule of construction). On this point, [the creditor's] failure to participate in the confirmation process certainly backfired. The court finds that the plan is fair and equitable in its treatment of [the creditor], and § 1141(c) permits revesting of [the creditor's] supposed collateral in [the debtor], free and clear of [the creditor's] lien.

3. Components of the “fair and equitable” requirement in subchapter V cases; no absolute priority rule*

In re Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024), illustrates that the absence of the absolute priority rule means that the holders of equity interests may retain them under a cramdown plan in a subchapter V case. The *Edgewood Food Mart* court confirmed

a plan over the objection of a creditor who contended, among other things, that the plan was not proposed in good faith because it enabled the principal to retain his equity interest and earn future profits without providing for the payment of creditors in full. Noting that subchapter V does not have an absolute priority rule that prevents retention of equity without payment of creditors in full, the court concluded that the principal “may retain his equity interest in Debtor even if it has value without full payment of Debtor’s creditors.” *Id.* at 434.

The court ruled, *id.* at 434:

So long as a debtor complies with the other confirmation requirements unique to Subchapter V, a plan that takes advantage of this feature of Subchapter V is not proposed in bad faith.”

An individual who is not eligible for subchapter V faces the prospect that the absolute priority rule may prevent the debtor from retaining property unless all impaired classes accept the plan.²²⁶ The court in *In re Joseffy*, 654 B.R. 747 (S.D. Fla. 2023), ruled that the absolute priority rule applies in a traditional chapter 11 case of an individual and explains why the absolute priority rule does not prohibit the individual from retaining exempt property under the plan. “Because a debtor does not retain exempt property under a plan on account of his or her junior claim or interest, an individual chapter 11 debtor does not violate the absolute priority rule by receiving or retaining exempt property.” *Id.* at 760-61.

4. The projected disposable income (or “best efforts”) test*

i. Determination of projected disposable income*

Sections VIII(B)(4)(iii) through (x) further discuss projected disposable income issues.

When a debtor proposes to pay actual disposable income, the question is whether the court must nevertheless examine the debtor’s projections and determine whether they adequately project the debtor’s projected revenues and expenditures to establish a minimum amount the debtor must pay. Section VIII(B)(4)(iv) discusses the issue.

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

SBRA Guide § VIII(B)(4)(ii) discusses the “fair and equitable” requirement for cramdown confirmation in § 1191(c)(2) that the debtor commit projected disposable income for three years “or such longer period not to exceed 5 years as the court may fix.” Section VIII(B)(4)(ii) discusses *In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), in which the court reasoned that Congress’s recognition that small businesses typically have shorter lifespans “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.

²²⁶ 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 AM. 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 AM. BANKR. INST. J. 21 (2021).

In re Trinity Family Practice & Urgent Care PLLC, 661 B.R. 793 (Bankr. W.D. Tex. 2024), adopts a different approach. The *Trinity Family Practice* court ruled that a plan for payment of PDI for three years satisfied the good faith requirement of § 1129(a)(3) but that the debtor had not established that the three-year PDI period was fair and equitable under § 1191(b) and (c)(2)(A). Because the court concluded that the evidence was insufficient for it to determine if it should fix a longer plan payment period up to five years, the court denied confirmation and allowed the debtor an opportunity to propose an amended plan. The opinion analyzes the court’s role in considering the term of the plan and sets out the non-exclusive factors that guide a court in exercising its discretion to determine the term of the plan.

The debtor proposed to pay PDI for three years, resulting in a distribution to the unsecured class of \$ 38,761.29, an 8.2% distribution. A partially secured creditor voted its secured and unsecured claims to reject the plan and objected to cramdown confirmation on the grounds that the three-year period was not proposed in good faith as § 1129(a)(3) requires and that the plan was not fair and equitable under § 1191(b) and (c).

Taking a “totality of the circumstances” approach to the question of good faith, the court concluded that the plan satisfied the factors the courts have considered in evaluating the good faith requirement of § 1129(a)(3): (1) whether the plan provides a result consistent with the Bankruptcy Code’s objectives; (2) whether the proposed plan has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected; and (3) whether the debtor exhibited fundamental fairness in dealing with its creditors. 661 B.R. at 813.

Specifically, the court ruled that the proposal of a three-year plan, as § 1191(c)(2) expressly permits, “does not constitute lack of good faith solely because the Debtor could pay more if the proposed period of plan payments were longer. The Debtor’s proposal of a three-year plan payment period is not consistent with the type of misconduct, actions, and behavior often accompanying a finding of a bad faith plan proposal.” *Id.* at 815 (footnotes omitted).

The *Trinity Family Practice* court interpreted the “fair and equitable” requirement of § 1191(b) and the provision in § 1191(c)(2) for the court to fix the PDI period between three and five years as involving two inquiries when a plan provides for payment of PDI for three years. First, the court must determine whether the three-year plan is “fair and equitable.” Second, the court must determine whether it should fix a longer period not to exceed five years.²²⁷

²²⁷ The *Trinity Family Practice* court did not expressly state that the inquiry includes two separate components. It did, however, explain that its task was to determine “whether a subchapter V plan that provides for payment of all of the Debtor’s projected disposable income to creditors for a period of three years is fair and equitable under § 1191(b) and (c)(2), or if the Court should fix a longer payment period.” 661 B.R. at 812. Moreover, the court consistently noted that its determination involved both questions. *Id.* at 816, 823, 825, 827. Separate identification of both components is helpful for analytical purposes.

The court began by noting that the “fair and equitable” provision in § 1191(b) *includes* the requirement that it comply with § 1191(c). 661 B.R. at 815-16. The court explained, *id.*:

After the court determines that the proposed plan is in compliance with the baseline requirements of § 1191(c), the court has the “discretion to require more as a condition of finding [that the] plan is fair and equitable.”²²⁸ . . . In other words, meeting the baseline requirements of § 1191(c) is a *necessary* condition for the subchapter V plan to be fair and equitable, but does not assure that the plan is fair and equitable.

The *Trinity Family Practice* court noted the ruling in *In re Urgent Care Physicians*, 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021),²²⁹ that “a plan term of three years is more reasonable, generally speaking (or as a default) than a five-year term, absent unusual circumstances.” *Trinity Family Practice*, 661 B.R. at 818.

The *Trinity Family Practice* court agreed that the language of § 1191(c)(2)(A) creates a “baseline plan payment period” of three years but disagreed with *Urgent Care’s* statement that a three-year period is generally more reasonable absent “unusual circumstances.” 661 B.R. at 818. The court reasoned that requiring an objecting party to prove “unusual circumstances,” would “impermissibly shift the burden under § 1191(c)(2)(A) from the debtor to the creditor,” contrary to the general rule that the debtor has the burden of proof regarding confirmation of a plan. *Id.* Further, the court observed, *Urgent Care* did not consider what “unusual circumstances” might be or identify factors for a court to consider in deciding whether to approve a three-year payment period or, if necessary, fix a longer payment up to five years. *Id.*

The *Trinity Family Practice* court observed that § 1191(c)(2)(A) provides no guidance or standards on how the court should fix the plan payment period. Moreover, the court explained, provisions for determining the period for plan payments in chapter 12 and 13 cases and in individual chapter 11 cases likewise provide no guidance because the court does not fix the time in such cases. 661 B.R. at 820. The court concluded that “Congress intended to leave to the sound discretion of bankruptcy courts the sole authority to fix the plan payment period in subchapter V cases.” 661 B.R. at 819.

Based on this analysis, the court concluded that it had “broad discretion” in deciding whether the proposed three-year period was “fair and equitable” or whether it should fix a longer period not exceeding five years. 661 B.R. at 821. The court then discussed the confirmation process for addressing the payment period issue and identified the non-exclusive factors that guide the court’s determinations.

Because § 1189 provides that only the debtor may file a plan and because § 1191(c)(2)(A) establishes a three-year baseline payment period, the court reasoned, a bankruptcy court should give “appropriate deference” to the debtor’s business judgment when considering the debtor’s proposed period of payments. This is consistent, the court continued, with the intent of Congress to create a quick, efficient reorganization process that results in discharge as soon as possible. In

²²⁸ The court quoted *In re Orange Cnty. Bail Bonds, Inc.*, 638 B.R. 137, 146 (B.A.P. 9th Cir. 2022), discussed in *SBRA Guide* § VIII(B)(4)(ii).

²²⁹ *SBRA Guide* § VIII(B)(4)(ii) discusses the *Urgent Care* decision.

addition, it acknowledges the shorter life span of the average small business while properly balancing competing interests of debtors and creditors. 661 B.R. at 821. In the absence of an objection to a three-year period, therefore, the court would not likely raise the issue of a longer period *sua sponte*, although it has the discretion to do so.

If an objection is filed, however, the debtor's proposal is no longer entitled to deference, and the debtor bears the burden of showing that the proposed payment period is fair and equitable. 661 B.R. at 821-22.

At the conclusion of the hearing on whether the court should require a longer period, the court explained, it has these alternatives, 661 B.R. at 822:

1. Conclude that a three-year period is fair and equitable and confirm the plan;
2. Conclude that the three-year period is not fair and equitable and deny confirmation;
3. Fix a longer period up to five years and confirm the plan; or
4. Determine it has insufficient evidence to fix the payment period and deny confirmation.

The *Trinity Family Practice* court then identified five factors for a court to consider in determining whether a three-year payment period is fair and equitable and whether to fix a longer period, 661 B.R. at 822:

1. Capital reserves or capital expenditures during the period of plan payments;
2. Reasonableness of income and expenses set forth in the plan projections during the period of plan payments as compared to historical operations and operations during the postpetition, preconfirmation time period;
3. Salary and/or other payments to insiders during the period of plan payments;
4. Risks and consequences of a longer period of plan payments; and
5. Any other unique or extraordinary facts specific to the case.

The court emphasized that the debtor has the burden to prove that each of the factors support the proposed payment period, that the factors are not exclusive, and that no factor alone is dispositive or controlling with regard to fixing the payment period under § 1191(c)(2)(A). *Id.*

The *Trinity Family Practice* court concluded that the debtor had presented insufficient evidence relating to the first four factors for it to make a determination that the three-year payment period was fair and equitable or to fix a longer plan payment. 661 B.R. at 823-27. Neither the debtor nor the creditor offered any argument or evidence of unique or extraordinary

facts or circumstances. *Id.* at 827. Accordingly, the court denied confirmation without prejudice and allowed the debtor an opportunity to file an amended plan.

The court in *In re Dark Rhiino Security, Inc.*, 678 B.R. 402, 415 (Bankr. S.D. Ohio 2026), agreed with the *Trinity Family Practice* determination that the court has “broad discretion” in determining whether to require a longer period than three years but disagreed with the conclusion that the debtor has the burden of proof on whether the repayment period is fair and equitable.

The *Dark Rhiino* court reasoned, *id.* at 415 (emphasis in original):

The statute itself defaults to a three-year period *unless the court* – exercising its discretion – fixes otherwise; the statute does not say that if faced with objection, the debtor then must demonstrate that three years is fair and equitable.

The court observed that the fair and equitable requirements of § 1191(c) require the court to find either a reasonable likelihood that the debtor will be able to make all plan payments or that the debtor will be able to make the payments. Given uncertainties about the prospect of renewal of critical existing contracts, some of which expired in three years, the court was unable to find that the debtor had a reasonable likelihood of making payments for longer than three years. *Id.* at 415. Accordingly, the court declined “to exercise discretion to diverge from (and decide[d] to default to) a three-year commitment period.” *Id.* at 416.

Applying the *Trinity Family Practice* factors, the *Dark Rhiino* court reached the same result. *Id.* at 416-17. The court noted that the plan stretched out payments to secured creditors over ten years, thereby freeing up more disposable income for unsecured creditors during the three-year period. The debtor’s projections were reasonable compared to historical performance, taking into account developments in the marketplace, and included an appropriate cash reserve to pay salaries if customers delayed payment and projected salaries that were “low compared to market rate.” *Id.* The risks and consequences of a longer period of payments also supported a three-year period. *Id.* at 417. Thus, the court concluded, “In short, the *Trinity* non-exhaustive factors and the totality of the circumstances in this record show that any Debtor-burden in defense of a three-year commitment period is satisfied.” *Id.* at 417.

The court confirmed a plan providing for payment of projected disposable income for three years in *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024). Noting the different approaches of *Urgent Care* and *Trinity Family Practice*, the court concluded that, under both approaches, “courts have essentially applied a totality of the circumstances analysis, which considers the specific facts of the plan and the debtor’s financial situation, viewed against the backdrop of Congressional purpose in enacting Subchapter V – that Subchapter V be quicker and easier for small businesses.” *Id.* at 438. The court ruled that a three-year period was appropriate under either analysis. The court observed that the plan paid creditors over three years what they would have received in a five-year plan. The quicker payment was possible because the debtor’s principal had committed to fund professional fees and had caused an affiliated entity that was the debtor’s landlord to agree to assumption of the lease with its cure claim treated as a general unsecured claim. The court also observed that the debtor’s principal

would be providing postpetition management services without compensation, whereas he had previously received a salary.

In *In re Premier Glass Services, LLC*, 664 B.R. 465, 473-74 (Bankr. N.D. Ill. 2024), the court noted that the debtor's projections should be for five years, not the four years proposed in the plan, in view of the court's authority under § 1191(c)(2) to fix a commitment period of five years. The *Premier Glass* court did not expressly fix five years as the commitment period, but it analyzed the *Trinity Family Practice* factors in determining that the proposed plan was not "fair and equitable." Section VIII(B)(4)(x) *infra* further discusses the *Premier Glass* application of the "fair and equitable" requirement.

The court required a five-year plan term in *In re Honey Do Franchising Group, Inc.*, 2026 WL 1068748 (Bankr. E.D. Tenn. 2026). Undertaking the "totality of the circumstances" approach of *Edgewood Food Mart, supra*, 666 B.R. at 438, or "looking at the big picture, in other words," the *Honey Do* court recognized "five unusual factors that each weigh against the minimum 3-year term, whether presumptive or not, and that considered together conclusively require the maximum 5-year term." 2026 WL at * 30.

The first factor was that the debtor's projected expenditures in the first three years to grow the business that would not generate revenues until later years. "Unlike a 3-year term," the court observed, "a 5-year term may likely result in shifting some of the benefit [from the generation of new revenue] to unsecured creditors. 2026 WL at *30.

Second, the projections included an increase in compensation for the principals that occurred on the eve of the subchapter V filing. The court noted that the increase in compensation "even if well-deserved, was ill-timed. It shows that the debtor did not consider belt-tightening prior to its entry into bankruptcy." *Id.* at *30. The projections also contemplated raises for other employees and the addition of a new employee needed to increase revenue that would not occur in the first three years. "Again," the court concluded, "the unsecured creditors are being called on to bear an expense the debtor has not incurred in the past." *Id.*

Third, the projections include an increase in the rent that the debtor paid to the principals to lease the business premises that the principals owned. The court declined to interfere with the debtor's assumption of the lease or the increase in rent but again noted that "unsecured creditors are presented with greater expenditures over the plan than the debtor has incurred in the past." *Id.* at *31.

Fourth, the court reviewed the circumstances concerning the execution of an agreement with its secured lender shortly before the bankruptcy filing that might give rise to avoidance of its lien. The plan treated the claim as fully secured and provided for payments over the term of the plan that otherwise would have been significantly more net disposable income for unsecured creditors.

Finally, the court noted that "most if not all of the unsecured indebtedness of the debtor was incurred directly or indirectly in its dispute with [the objecting creditor that had obtained a substantial prepetition judgment against the debtor]. That fact matters when balancing the

debtor's need for a quick exit out of bankruptcy against the benefits of a longer term to those unsecured creditors that have borne the effects of the dispute." *Id.* at *32.

The debtor in *Honey Do* was a franchisor of businesses that provide residential and commercial handyman services under the "Honey Do" trade name. Its projections included increases in revenue from new franchisees. The court rejected the debtor's contention that delay in its exit from bankruptcy would negatively affect its business because it would lengthen the time for reporting the bankruptcy filing in the franchise disclosure document that a franchisor must furnish to prospective franchisees. "Operating under a confirmed plan should signal that the debtor is making positive strides in its financial reorganization. Whether it is [11 or 13 years] before the bankruptcy is no longer listed in the debtor's FDD, the court sees little difference the disclosure of the bankruptcy will have on the debtor's ability to market and sell new franchises." *Id.* at *32.

The debtor also argued that its projections included deferral of expenditures necessary for its business in order to make plan payments for three years and that a longer term would require further deferral. "Considering the factors in favor of a 5-year term," the court concluded, "the court does not agree that a further delay of two years concerning these extra expenditures disproportionately harms the debtor." *Id.* at *32.

Section VIII(B)(4)(iv) discusses the *Honey Do* court's conclusion that, in each of the fourth and fifth years of the plan, the debtor must pay the average of the debtor's projected disposable income over the first three years plus any actual net disposable income in excess of that average.

The debtor in *Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix)*, 2024 U.S. Dist. LEXIS 59741 (C.D. Cal. 2024), proposed a plan to pay projected disposable income to non-insider unsecured creditors in Class 3 for three years, resulting in 12.5 percent distribution. The claims of insiders in classes 2 and 4 would not receive any payments of PDI, but they retained their right to full payment after the payments to unsecured creditors. Multiple Energy Technologies, LLC ("MET"), an unsecured creditor in Class 3 holding a \$2.4 million claim, objected to the plan because, among other things, the plan favored insider unsecured creditors and, therefore, discriminated unfairly. *Id.* at *5.²³⁰

The bankruptcy court confirmed the plan, concluding that creditors could not demand more than payment of projected disposable income for the required period. The district court summarized the bankruptcy court's ruling, 2024 U.S. Dist. LEXIS 59741 at *5-6 (docket citations omitted):

With the "fair and equitable" treatment statutorily capped at three-to-five years of Disposable Income, creditors cannot demand anything more. . . . Congress enacted a structure where creditors like MET and Class 3 are entitled to nothing more than three-to-

²³⁰ The opinion does not include any discussion of whether the PDI commitment period should have been five years. Further, although the plan provided that the distribution to non-insider creditors could be reduced, at debtor's election, by 40 percent if paid within 90 days, the opinion does not discuss whether payment of the discounted amount would satisfy the PDI test.

five years' of projected Disposable Income. . . . After that three-to-five year period, the Debtor and its insiders can pay whatever they find agreeable. And, in the meantime, the voluntary subordination of the Class 2 and 4 claims so as not to dilute Class 3 recovery only benefits Class 3.

The district court reversed, concluding that the bankruptcy court's incorrect application of the law was an abuse of discretion. 2024 U.S. Dist. LEXIS 59741 at *6. The district court reasoned that the "fair and equitable" requirement in § 1191(c) *includes* the projected disposable income requirement in § 1191(c)(2) and that use of the word "includes" indicated that the list was not exhaustive.

The district court then concluded, *id.* at 7:

Thus, not only was the Bankruptcy Court required to consider whether MET's recovery was unfairly discriminatory in light of the disposition of assets beyond disposable income, it was also required to consider how MET's recovery compared to the recovery of other creditors during the entire duration of the Plan – not just the five years after confirmation.

The district court observed that, if subchapter V plans were "truly limited to disposable income and capped at five years, the Plan's provisions for Class 2 and 4 creditors would contravene both requirements." *Id.* at 7.

The district court reasoned that two other provisions of the Bankruptcy Code reinforced its interpretation.

First, the court examined the requirement in § 1129(c)(2)(A) that a debtor pay all of its projected disposable income within the commitment period. Emphasizing the requirement that a debtor pay *all* of its disposable income within the commitment period, the court concluded that the provision prohibited a plan from requiring that the debtor pay *all* of its PDI after the commitment period but did not prohibit a provision for the payment of less than all of the debtor's disposable income in years after year five. *Id.* at *8-9.

Second, the court noted that, although chapter 13 has a temporal limitation of five years for plan payments (§ 1322(d)(1)), chapter 11 does not. *Id.* at * 9-10.

The *Hologenix* district court summarized its holding, 2024 U.S. Dist. LEXIS 59741 at * 10-11 (C.D. Cal. 2024) (docket citation omitted):

In sum, the Bankruptcy Court erred in finding that MET was entitled to only "three-to-five years' of projected disposable income," which led the Bankruptcy Court to overlook a substantial part of the Plan, including the provisions entitling certain creditors to 100% recovery. Although the court makes no conclusion regarding whether the plan unfairly discriminates against Class 3 creditors as opposed to Class 2 and 4 creditors, it does note that the disparity between 12.5% (Class 3 recovery) for some creditors and 100% (Class 2 and 4) recovery for others is dramatic.

iii. Adequacy of projections of projected disposable income*

A subchapter V plan must include “projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.”²³¹ If the debtor’s projections of income and expenditures establish compliance with the projected disposable income requirement, no basis for a PDI objection exists unless the debtor’s projections are inadequate (because, for example, they are not credible, lack any factual basis, or are incomplete), or do not properly project disposable income. An objection may assert that the projections understate income, overstate expenditures, or include expenditures that are not permissible deductions.

Courts addressing the adequacy of a debtor’s financial projections have noted, “Nothing in the Code requires an audit or independent verification of a debtor’s financial projections. ‘The creation of a liquidation analysis and financial projections is not an exact science, so the Courts typically defer to the debtors’ projections, subject to cross-examination and/or a competing set of projections.’” *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), quoting *In re Lost Cajun Enters., LLC*, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

But the situation changes when a party challenges the projections.

In *In re Premier Glass Services, LLC*, 664 B.R. 465 (Bankr. N.D. Ill. 2024), the debtor’s calculation of projected disposable income for the four-year term of its plan included deductions for depreciation, reimbursement of its members for taxes they would incur based on the “pass-through” to them of the debtor’s income, and legal fees for ongoing litigation with its major creditor over its claim. The creditor objected to the inclusion of these deductions in the PDI calculation.

The court acknowledged that, although a small business debtor’s projections “deserve some deference, since looking into the future ‘is not an exact science,’” the court must “consider whether the estimate of projected disposable income is reliable and accurate based on the evidence presented” when an objection is filed. 664 B.R. at 471.²³² Further, the court explained, because the PDI requirements are a statutory minimum for determining whether a plan meets the “fair and equitable” requirement in § 1191(c) for cramdown confirmation under § 1191(b), the court may consider other relevant factors in determining whether to confirm a plan. *Id.* at 472.

The *Premier Glass* court concluded that, to meet the burden of showing that a plan is fair and equitable, a debtor must show a “sincere effort” regarding two things. First, a reasoned basis must exist for the debtor’s projections. Second, the debtor must show that the line items deducted from disposable income are “indeed ‘necessary for the continuation, preservation, and operation of the debtor’s business’ and therefore fair and equitable to the unsecured creditors.” § 1191(c) and (d).” 664 B.R. at 473.

The court acknowledged that the calculation of income on an after-tax basis could be necessary given the debtor’s status as a pass-through entity but ruled that the debtor had not demonstrated a reasoned basis for its projections. 664 B.R. at 474-75.

²³¹ § 1190(1)(B).

²³² The court quoted *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602 at *15 (Bankr. N.D. Ill. 2022), quoting *In re Lost Cajun Enters., LLC*, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

Similarly, the court observed that the depreciation deduction, which it found to be a reserve for replacement costs for broken or outdated equipment could be necessary, but the debtor had provided no credible evidence about what equipment it would have to replace or what other capital expenditures might be required. *Id.* at 475-76.

The *Premier Glass* court concluded that the debtor had failed to show that the legal fees were based on a reasoned projection and that they were necessary for the continuation, preservation, or operation of the debtor's business. Moreover, the court continued, the evidence did not show that the legal fees were fair and equitable. 664 B.R. at 476. Section XV(D) discusses this aspect of the court's ruling.

In *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024), the court found that the debtor's calculation of projected disposable income was credible based on the testimony of the debtor's accountant, an expert in forensic analysis and accounting with extensive experience in bankruptcy cases, who had been working with the debtor before the filing of the petition.

iv. Payment of PDI based on actual results*

A debtor might prefer to make payments to creditors based on actual results of its business operations. Such a provision permits a successful reorganization even if unexpected decreases in revenues or increases in expenses occur. Creditors who expect the debtor's business to thrive and grow, on the other hand, may want payments based on actual results so that they get more money if the debtor prospers.

Negotiations may result in the debtor's proposal of a plan that includes payments based on actual results and its confirmation as a consensual plan under § 1191(a) because creditors accept it. In the absence of a consensual plan, two issues concerning a debtor's payment of actual disposal income arise.

The first issue arises when the debtor proposes to pay disposable income based on actual results. Does such a proposal satisfy the PDI requirement of § 1191(c)(2)?

One view is that § 1191(c)(2) requires payment of a minimum amount that the debtor must pay based on its projections.²³³ The court must, therefore, determine whether the debtor's projections of revenues and permissible expenditures are accurate.²³⁴

²³³ Legal Serv. Bureau, Inc. v. Orange Cnty. Bail Bonds, Inc. (*In re Orange Cnty. Bail Bonds, Inc.*), 638 B.R. 137, 145-47 (B.A.P. 9th Cir. 2022) (Debtor's plan proposing to pay projected disposable income based on actual results does not meet requirements of paragraph (A) of section 1191(c)(2) but proceeds from liquidation of asset satisfies requirements of paragraph (B).); *In re Phil Kean Designs, Inc.*, 2026 WL 1884777 at *4-5 (Bankr. M.D. Fla. 2026) (Plan provision for payment based on actual results alone does not satisfy PDI requirement of § 1192(c)(2), but court confirms plan based on finding that debtor's projections were accurate.).

²³⁴ *In re Phil Kean Designs, Inc.*, 2026 WL 1884777 at *4-5 (Bankr. M.D. Fla. 2026).

The opposite view is that the inclusion of a provision for payment based on actual results may satisfy the PDI requirement.²³⁵ The inclusion of a provision for payment of actual disposable income may thus eliminate the need to decide uncertain questions about the debtor's future revenues and expenditures.²³⁶

The second issue arises when the debtor's plan provides for payments based on its projected disposable income and a creditor objects to its confirmation, asserting that the debtor must increase payments if actual results exceed projections – sometimes referred to as a “true-up.” The question is whether a debtor can be required to pay PDI based on actual, as opposed to projected results.

Section 1191(c)(2) states two alternative ways to satisfy the PDI test.

The first alternative, subparagraph (A), is familiar from chapter 13. It states that the PDI requirement is met if “the plan provides that all of the projected disposable income of the debtor to be received [during the three to five year period] will be applied to make payments under the plan.”

The second alternative, subparagraph (B), provides for satisfaction of the PDI requirement by payment of the *value* of the PDI. It thus permits a “cash-out” of PDI in a lump sum, something that chapter 13 does not permit. But it has other implications, which later text discusses.

The language in subparagraph (A) says: calculate PDI and pay it for the applicable period. In chapter 13 cases, under this same language, the plan proposes fixed payments (that sometimes “step up” over time), usually payable monthly, for the required time.

In chapter 13 cases, courts have ruled that the payments must be based on *projected* disposable income and that payments to creditors cannot be based on the debtor's actual income and expenditures. *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355 (9th Cir.1994). We come up with a fixed amount, monthly in chapter 13 cases, and pay it for the required time.

When chapter 12 was enacted as a temporary measure in 1986, it used the same language as the chapter 13 PDI test (and subparagraph (A) in subchapter V cases), which had come into the Bankruptcy Code in 1984. But in chapter 12 cases, courts began requiring that the debtor show, at the end of the case and in connection with an application for a discharge, that the debtor had paid all disposable income during the plan period to creditors. The court would then determine whether the debtor had paid all disposable income retroactively, and a debtor would have to either pay that amount or the case would be dismissed. *E.g., Rowley v. Yarnall (In re Rowley)*, 22 F.3d 190 (8th Cir. 1994).

²³⁵ Singh v. Reliable Roadside Services, Inc. (*In re Reliable Roadside Services, Inc.*), 2026 WL 980556 at *13-15 (D. Md. 2026); *In re Nelkin & Nelkin, P.C.*, 662 B.R. 550, 567 (Bankr. S.D. Tex. 2024).

²³⁶ Singh v. Reliable Roadside Services, Inc. (*In re Reliable Roadside Services, Inc.*), 2026 WL 980556 at *13-15 (D. Md. 2026).

The chapter 12 caselaw would support the proposition that PDI in a subchapter V case under paragraph (A) should be determined on an actual basis, not a projected one, and would pose the interesting issue of whether subchapter V PDI should be based on a chapter 13 approach – determination of PDI at confirmation on the basis of projected income and expenses – or a chapter 12 approach – determination of PDI at the end of the case as a discharge matter on the basis of actual disposable income.

This analysis, however, does not take paragraph (B) of § 1191(c)(2) into account.

Paragraph (B) has its origins in amendments to Chapter 12 in 2005 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. We mostly know about BAPCPA because of the changes it made in consumer bankruptcy, but it did at least two things for farmers.

First, it made chapter 12 permanent.

Second, it added an additional alternative for satisfaction of the chapter 12 PDI test. The language of the alternative is the same language that is in subparagraph (B) of the subchapter V test. At least one contemporary commentator stated that the purpose of the amendment was to eliminate the retroactive determination of PDI, which was a hardship for farmers. Susan A. Schneider, *Bankruptcy Reform and Family Farmers: Correcting the Disposable Income Problem*, 38 Tex. Tech. L. Rev. 309, 342-43 (2006).

If the language in the second chapter 12 alternative has the same meaning in subchapter V, then a subchapter V debtor can insist that PDI be determined at confirmation on a projected basis and that the statute does not permit a “true-up” during or at the end of the case.

Without consideration of any of the foregoing, two cases have ruled on the issue.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (B.A.P. 9th Cir. 2022), the debtor’s plan proposed to pay creditors from two sources. One was \$433,000 the debtor had realized from the liquidation of an estate asset. The other was its actual disposable income over five years. The debtor’s projections were that it would have disposable income of \$287,000 over three years and \$493,000 over five, but the plan provided that creditors might receive less, based on actual earnings.²³⁷

The Ninth Circuit Bankruptcy Appellate Panel concluded that the plan’s provision for payment of projected disposable income based on actual results did not meet the requirement of § 1191(c)(2)(A) that the plan provide for payment of *projected* disposable income because it did not commit the debtor to pay what it projected. *Orange County Bail Bonds* thus holds that a provision for payment of disposable income based on actual results is impermissible, even if the debtor proposes it.²³⁸

²³⁷ The facts are simplified. For a more detailed statement of the facts, amplified by reference to documents in the bankruptcy court’s record, see *SBRA Guide* at 154-55 & n. 406.

²³⁸ In *In re Engineering Recruiting Experts, LLC*, 673 B.R. 32 (Bankr. M.D. Fla. 2025), the court, in approving a provision in a cramdown plan confirmed under § 1191(b) for an injunction prohibiting actions against the principal

The court concluded, however, that the plan’s provision for the payment of the liquidation proceeds of \$433,000 met the requirement of § 1191(c)(2)(B) that the debtor pay the *value* of its projected disposable income for the commitment period. The \$433,000 payment exceeded the projected disposable income of \$287,000 for three years, which the court held was the proper period in the absence of the bankruptcy court’s fixing of a longer time.

In *In re Staples*, 2023 WL 119431 (M.D. Fla. 2023), the *pro se* debtor proposed to pay projected disposable income of \$150 per quarter for five years. The bankruptcy court confirmed the plan but changed the payment provision to require the debtor to pay actual disposable income as reflected on quarterly reports, with a minimum quarterly payment of \$150.00. *Id.* at *2.

On appeal, the district court stated that paragraph 2(A) of § 1191(c)(2) “simply requires that a plan provide that all projected disposable income be applied to make the distribution payments” and that paragraph 2(B) requires that “the value of property to be distributed is not less than the projected disposable income. *Id.* at *3.

The court then concluded that “requiring all the disposable income to be reported and distributed does not violate” these rules. *Id.* at *3. The court added that the bankruptcy court’s requirements were within its authority under the All Writs Act²³⁹ and § 105(a) because they “were clearly necessary and appropriate under the facts of this case.” *Id.* at *4.

In *In re Packet Construction, LLC*, 672 B.R. 905 (Bankr. W.D. Tex. 2024), the court conducted a thorough analysis of whether cramdown confirmation requires that a plan contain a “true-up” provision for the debtor pay more if actual disposable income exceeds projections. The court ruled that it does not, *id.* at 906:

[S]ubchapter V does not include a requirement that debtors true up their plan payments if actual income exceeds projected income. There may be circumstances under which a court could determine that the failure to provide actual disposable income, rather than projected disposable income, was not fair and equitable to a non-accepting impaired class of unsecured creditors. But in general, the Court does not believe that a true-up requirement can be imposed on subchapter V debtors.

The *Packet Construction* court first looked to the language of the statute and concluded that the ordinary meaning of “projected” is “estimated or forecast on the basis of current trends or data.” A true-up requirement, the court reasoned, would read the word “projected” out of the statute. A forward-looking approach, the court continued, was consistent with the approach of the Supreme Court in the chapter 13 context in *Hamilton v. Lanning*, 560 U.S. 505 (2010). *Packet Construction*, 672 B.R. at 908.

during the plan period, noted that the plan required quarterly reports to the subchapter V trustee and all creditors and permitted any creditor or the trustee to seek increased payments based on actual results. The reported opinion does not indicate that any party raised any objection to this provision or that the court addressed the issue. *Update* § VII(D) discusses the injunction issue.

²³⁹ 28 U.S.C. § 1651(a) provides, “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

The court declined to follow *In re Staples*, 2023 WL 119431 (M.D. Fla. 2023), discussed above, noting that *Staples* did not purport to announce a general rule and that the authorities it cited did not support imposition of a true-up requirement as a general rule. 672 B.R. at 909.

The court then discussed the chapter 12 and chapter 13 caselaw regarding projected disposable income, observing that the chapter 13 cases overwhelmingly adopt a prospective interpretation but that some chapter 12 cases required a true up. The court explained that the approach of the chapter 12 cases had been criticized and that the amendment of chapter 12's PDI test indicated that the chapter 12 approach should not be followed. Moreover, the court noted, the chapter 12 result was contrary to the Supreme Court's ruling in *Hamilton v. Lanning* in analyzing a closely analogous statute. 672 B.R. at 910-13.

Finally, the *Packet Construction* court noted that the inability of anyone other than the debtor to modify a plan after confirmation indicated that, "unless the debtor so chooses, no other party can force [the debtor] to increase projected payments to meet the actual income." *Id.* at 913-14.

The court acknowledged that a debtor after cramdown confirmation can modify a plan to reduce payments but concluded that "this result is not absurd." *Id.* at 914. The court explained, *id.* (footnote omitted):

[D]etermining projected disposable income is not a fanciful exercise; it must be established based on objective evidence, and it sets out a demanding standard for many debtors to meet. Vigilant creditors can and should evaluate and, if necessary, challenge projections before plans are confirmed. But construed properly, this aspect of subchapter V also provides incentive for debtors to exceed projections, because they get to keep the surplus. Perhaps Congress structured the statute this way precisely to induce small business growth and to provide yet another incentive for parties to bargain on consensual plans.

In any case, whether it is ideal policy is not for courts to say. Congress has spoken and, in this Court's view, it has done so clearly. The result is not absurd, and the Court has no hesitation enforcing it.

The court concluded with an observation about the possibility of requiring a true up in other circumstances, *id.* at 914-15 (footnotes omitted):

[S]ubchapter V includes no general rule imposing a true-up requirement on debtors confirming cramdown plans. It does not necessarily rule out the possibility that circumstances could arise under which a court would have the power to impose a true up. After all, section 1191 states that the "fair and equitable" test "includes" the requirement of meeting one of the alternative "project disposable income" tests; because "includes" is expressly non-limiting in the Bankruptcy Code, other elements could be added to the test, as circumstances warrant, beyond those actually present in the statute.

The Court is skeptical that circumstances exist in which it is appropriate to require a true up. It appears that Congress has spoken squarely on this issue, ordaining that it is future-looking projections and not subsequent realities that determine the income to be contributed to a plan. Courts should be very wary of altering this policy choice in a significant way by requiring the devotion of not just projected but also actual disposable income, as determined retrospectively, to the plan.

But this question need not be determined here. No special circumstances have been alleged, and therefore no true up is warranted.

The court in *In re Premier Glass Services, LLC*, 664 B.R. 465, 478 (Bankr. N.D. Ill. 2024), addressed the “true-up” issue in the context of a debtor’s calculation of projected disposable income that included deductions for reimbursements to the debtor’s members for taxes they would incur on “pass-through” income of the debtor, capital replacement costs, and attorney’s fees for ongoing litigation with a creditor. The court noted that the plan provided no upward adjustment in payments for creditors if these amounts were less than projected and observed, *id.* at 478 (footnote omitted):

While courts disagree about whether a bankruptcy judge can *require* a true-up, there is no binding precedent to prevent a court from confirming a plan where a debtor has included such a provision. A true-up may be especially appropriate where, as here, a debtor sets aside large reserves for projected capital expenditures that benefit its insiders at the expense of its creditors.

A true-up seems especially appropriate for the legal fees deduction, because it does not appear there is any real relationship between past legal expenses and projections.

In *In re Honey Do Franchising Group, Inc.*, 2026 WL 1068748 (Bankr. E.D. Tenn. 2026), the court determined that the plan provided for the payment of all projected disposable income for its three-year term but concluded the term had to be extended to five years.²⁴⁰ The dilemma for the court was that it had no evidence of the debtor’s PDI for the additional years. *Id.* at *32.

One way to solve this problem, the court decided, was “to fashion a provision for payments over years 4 and 5 satisfying the disposable income requirement of § 1191(c)(2)(A) that the debtor can choose to accept.” *Id.* at *33. The court reasoned that an average of the debtor’s projected disposable income for the first three years – which the court had ruled satisfied the PDI test for those years – would set a “baseline or minimum” projection of net disposable income for each of the final two years. In addition, the court continued, the plan must provide for distribution of actual net disposable income in excess of the baseline to unsecured creditors. *Id.*

The *Honey Do* court noted the *Packet Construction* conclusion (which earlier text discusses) that a court ordinarily cannot require a true-up in a subchapter V case but that the debtor may propose it. *Id.* at 33. The court gave the debtor 14 days to file a statement that it accepted or rejected the changes the court required for the plan to be confirmed. Acceptance

²⁴⁰ Section VIII(B)(4)(ii) discusses this aspect of the court’s ruling.

would result in confirmation of the plan whereas rejection would result in denial of confirmation. *Id.*²⁴¹

An alternative way to resolve the problem of disposable income for the fourth and fifth years would be to require the debtor to modify the plan to provide for payment of PDI for five years and to provide projections for the additional years. As Section VIII(B)(4)(ii) discusses, the court in *In re Premier Glass Services, LLC*, 664 B.R. 465, 473-74 (Bankr. N.D. Ill. 2024), noted that the debtor’s projections should be for five years, not the four years proposed in the plan, in view of the court’s authority under § 1191(c)(2) to fix a commitment period of five years.

If a debtor wants to provide for payment of actual net disposable income, or if a court, as in *Honey Do*, imposes a true-up as a practical matter, issues about the administration of such a provision arise. These include reporting requirements, details concerning the calculation of actual net disposable income, and procedures for resolution of any disputes.²⁴² For example, may the debtor deduct a capital expenditure from disposable income? Will prepayment of an obligation qualify as a permissible deduction? Debtors and creditors should consider plan provisions that address these and other issues that arise because of differences in the calculations of “disposable income” for plan purposes from calculation of income in accordance with generally accepted accounting principles and tax requirement.

v. Projected disposable income in individual cases*

An individual debtor has income from the debtor’s business, may have non-business income, and has both personal and business expenditures. Section VIII(B)(4)(vi) discusses business income and expenditures.

A logical source for guidance on PDI issues in an individual subchapter V case is caselaw in chapter 13 cases and in chapter 11 and 12 cases of individuals. Most of the PDI caselaw arises in chapter 13 cases, so it is important to understand how the current chapter 13 provisions differ from the ones prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) and how the subchapter V provisions are like the former chapter 13 provisions and different from the current ones.

BAPCPA amended the chapter 13 PDI requirement in two general ways.

First, BAPCPA changed the income component from “income that is received by the debtor” to “current monthly income.” Section § 101(10A) defines “current monthly income” by reference to a debtor’s historical income in the six months preceding the filing of the petition and

²⁴¹ The debtor accepted the court’s changes, and the court confirmed the plan. *In re Honey Do Franchising Group, Inc.*, Case No. 2:24-bk-50596, ECF Docket Nos. 336 (Debtor’s Acceptance of Modifications, April 27, 2026), 337 (Order Granting Motion to Assume Lease and Overruling Objections to confirmation, April 28, 2026) and 338 (Order Confirming Plan, April 28, 2026).

²⁴² See *In re Nelkin & Nelkin, P.C.*, 662 B.R. 550, 567 (Bankr. S.D. Tex. 2024); *In re Patel*, 621 B.R. 245 (Bankr. E.D. Cal. 2020) (discussing disputes concerning determination of actual disposable income in a traditional chapter 11 case). For a discussion of issues concerning calculation of actual disposable income in chapter 12 cases, see Susan A. Schneider, *Bankruptcy Reform and Family Farmers: Correcting the Disposable Income Problem*, 38 TEX. TECH. L. REV. 309, 333-39 (2006).

has specific exclusions.²⁴³ In a subchapter V case, income is the same as in a pre-BAPCPA chapter 13 case.

Second, BAPCPA changed the manner of determining expenditures that may be deducted as expenses reasonably necessary for the “maintenance or support” of the debtor and the debtor’s dependents that the debtor may deduct in determining disposable income. After BAPCPA, the so-called “means test” standards govern the deductions that an “above-median”²⁴⁴ debtor may take in calculating disposable income; they do not apply to a “below-median” debtor.²⁴⁵ (The means test rules also 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.²⁴⁶) The maintenance and support deduction provisions in subchapter V cases are the same as in all pre-BAPCPA cases and in post-BAPCPA cases of below-median debtors.²⁴⁷

A specific difference is that § 1325(b)(2)(A)(ii) permits the deduction of certain charitable contributions. The subchapter V and chapter 12 statutes do not contain this deduction.

Courts have concluded that caselaw in pre-BAPCPA chapter 13 cases and in cases of below-median debtors²⁴⁸ provides guidance in subchapter V cases for determining a debtor’s disposable income.²⁴⁹ Thus, for example, a debtor may not be entitled to deduct expenditures for “luxury items” in calculating PDI.²⁵⁰

²⁴³ For a discussion of current monthly income in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:26.

²⁴⁴ 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 CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:12. The rules for determining the debtor’s status are set forth in § 322(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 five years. See CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at §§ 4:9, 8:12.

²⁴⁵ § 1325(b)(3).

²⁴⁶ 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.

²⁴⁷ Given the lower income of above-median debtors, their cases do not generate much case law on the issue.

²⁴⁸ For a discussion of application of the “reasonably necessary” standard for expenditures for maintenance and support in chapter 13 cases, see *In re Cesaretti*, 2023 WL 3676888 at *14-16 (Bankr. D. Nev. 2023); CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:28.

²⁴⁹ *E.g.*, *In re Cesaretti*, 2023 WL 3676888 at *14 (Bankr. D. Nev. 2023); *In re Hyde*, 2022 WL 2015538 at *9 (Bankr. E.D. La. 2022).

²⁵⁰ *In re McBride*, 2023 WL 8446205 at *7 (Bankr. D. Me. 2023).

One of the specific exclusions from “current monthly income” in § 101(10A) is for Social Security benefits.²⁵¹ Because the income component in a subchapter V case is “income received by the debtor,” it is arguable that Social Security benefits must be included in a subchapter V case. Social Security income, however, is exempt from property of the estate.²⁵² One court has concluded that Social Security benefits are not taken into account in determining projected disposable income in a subchapter V case.²⁵³

An individual debtor in a subchapter V case must file Schedules I and J that report the debtor’s income and expenses. To establish compliance with the PDI requirement for cramdown confirmation, an individual debtor must produce projections of all personal income and expenses, not just net income from the operation of the debtor’s business. In some circumstances, the debtor may be required to disclose the income of a nonfiling spouse.²⁵⁴

In re McBride, 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), illustrates application of PDI requirements in an individual case. The court required the debtor to amend schedules I and J to separately show gross receipts, necessary business expenses and total monthly net income for the debtor’s business, as Line 8a of Schedule I requires; to show the debtor’s personal expenses; and to show the nonfiling spouse’s income if schedule J showed all of their household expenses. The court stated, “The decision to include or omit the non-filing spouse’s income and any corresponding allocation of household expenses should reflect the economic realities of the household.” *Id.* at 3.²⁵⁵

The debtor in *McBride* had personally guaranteed a debt secured by real estate owned by a limited liability company in which the debtor had a 90 percent interest and owned a camp jointly with the nonfiling spouse that was subject to a mortgage. The plan provided for payment of both debts in accordance with the applicable loan documents.

²⁵¹ § 101(10A)(B)(ii)(I).

²⁵² 42 U.S.C. § 407(a) (“The right of any person to any future payment under this subchapter [referring to subchapter II of Title 42] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”).

²⁵³ *In re Ghaffari*, 2025 WL 33352 at * 1 (Bankr. D.N.M. 2025) (An individual debtor is not required to contribute Social Security income to fund a subchapter V plan, although an individual debtor may choose to make plan payments with Social Security income), *citing In re Cranmer*, 697 F.3d 1314, 1319 (10th Cir. 2012) (holding that a debtor’s exclusion of exempt social security income from his chapter 13 plan cannot constitute a lack of good faith); see Alyssa Nelson, *Are Social Security Benefits “Disposable Income” for the Purposes of Subchapter V?*, 40-Sept AM. BANKR. INST. J. 30 (2021).

²⁵⁴ *In re McBride*, 2023 WL 8446205 at *3 (Bankr. D. Me. 2023). The court stated that the debtor must disclose the nonfiling spouse’s income if the household expenses on Schedule J included all their household expenses. The court stated, “The decision to include or omit the non-filing spouse’s income and any corresponding allocation of household expenses should reflect the economic realities of the household.” *Id.* For a discussion of inclusion of a nonfiling spouse’s income and expenditures in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:70.

²⁵⁵ For a discussion of inclusion of a nonfiling spouse’s income and expenditures in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 8:70.

The court stated that, if the guaranty claim was secured only by property of the LLC, the claim was a general unsecured one that should not be classified separately from the claims of other unsecured creditors.

The court also questioned whether the debtor’s proposal to pay the mortgage on the camp was “fair and equitable when general unsecured creditors are receiving so little on their claims.” *Id.* at *7. The court continued, *id.*:

The Court views a camp as a luxury rather than a necessary expenditure. If the Debtor must resort to the provision of § 1191(b) for confirmation of an amended plan, she should be prepared to explain why continued ownership of the camp does not weigh against a finding of fairness and equity.

The *McBride* court stated that failure to address issues regarding payments on a mortgage secured by property the debtor did not own and payments on the camp might result in a finding of bad faith under § 1129(a)(3). *Id.*

In *In re Hisaw*, 2026 WL 1640815 at *6-7 (Bankr. W.D. La. 2026), the court ruled that an individual debtor could not deduct deposits to a savings account that the debtor would retain at the end of the plan.

vi. Projected disposable income of a business*

Section 1191(d) defines “disposable income” as “the income that is received by the debtor that is not reasonably necessary to be expended” for purposes specified in paragraph (1) of § 1191(d), which governs personal expenditures, discussed in the previous section, and paragraph (2), which applies to business expenditures. Chapters 12²⁵⁶ and 13²⁵⁷ use the same language. The definition thus 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 the debtor anticipate (*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.

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.

²⁵⁶ § 1225(b)(2)(B).

²⁵⁷ § 1325(b)(2)(B).

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 income²⁵⁸ 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.

In re Premier Glass Services, LLC,²⁵⁹ addressed these issues. The court acknowledged that the calculation of income on an after-tax basis could be necessary given the debtor's status as a pass-through entity but ruled that the debtor had not demonstrated a reasoned basis for its projections.²⁶⁰ Similarly, the court observed that a reserve for replacement costs for broken or outdated equipment could be necessary, but concluded that the debtor had provided no credible evidence about what equipment it would have to replace or what capital expenditures might be required.²⁶¹ Another court concluded that the PDI calculation could include 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.²⁶²

In *In re Dark Rhino Security, Inc.*, 678 B.R. 402, 416-17 (Bankr. S.D. Ohio 2026), the court concluded the PDI calculation could include a \$75,000 cash reserve during the term of the plan to provide liquidity to pay salaries for at least a month in the event of an interruption in cash flow if a customer delayed payment. The court in *In re Hisaw*, 2026 WL 1640815 (Bankr. W.D. La. 2026), however, held that the debtor could not deduct deposits into a savings account that the debtor would retain at the end of the plan.

vii. Salary or other payments to owners or affiliates*

Expenditures of a business may include payments to owners or affiliates for salary or other items such as rent for the business premises that an affiliate owns.

In *In re J & J Pizza*, 2022 WL 4082059 (D.N.J. 2022), the bankruptcy court confirmed a plan over the objection of a creditor that the principal's salary should be reduced from \$100,000 to \$50,000. The district court affirmed, noting the subchapter V trustee had testified that the salary was reasonable. *Id.* at *4.

In *In re Twisted Oak Winery, LLC*, 2022 WL 5264708, at * 3 (Bankr. E.D. Cal. 2022), a creditor objected to the debtor's payment of rent to an insider, which appeared to be compensation to the debtor's principals for operating it. The debtor resolved the objection by terminating the payments during the plan period.

²⁵⁸ 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.

²⁵⁹ 664 B.R. 465, 474-76 (Bankr. N.D. Ill. 2024).

²⁶⁰ *Id.* at 474-75.

²⁶¹ *Id.* at 475-76.

²⁶² *In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985 at *10 (Bankr. E.D. Wisc. 2021).

In *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga. 2024), a creditor's objection to cramdown confirmation challenged the debtor's projections on the ground that they included improper and excessive expenses. The debtor provided management services to its customers, largely affiliated companies, who reimbursed the debtor for all its expenses and paid a fee calculated as a percentage of the debtor's expenses. Because customers paid the expenses and a reduction of expenses would reduce the amount of the fees, the court concluded that whether the expenses were excessive did not matter.

viii. Projected disposable income and payments on secured claims*

In re McBride, 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), addresses the relationship of payments on secured claims and projected disposable income.

In *McBride*, a partially secured creditor held a secured claim for \$ 214,000 (the value of its collateral) and an unsecured deficiency claim for approximately \$ 261,300. The debtor proposed to satisfy the secured claim with a promissory note in the principal amount of the value of the collateral, payable with interest at 8.5 percent over eight years in quarterly installments. Like other general unsecured creditors, the creditor would receive a pro rata share of \$ 105,000 on its unsecured deficiency claim. The plan also provided for issuance of a note payable over eight years to satisfy the fully secured claim of approximately \$ 200,300 held by another creditor.

The creditor voted its secured and unsecured deficiency claims to reject the plan and objected to confirmation. No other creditors voted. The court concluded that the plan was not confirmable because the debtor's calculation of projected disposable income was faulty, as Section VIII(B)(4)(v) of this Update discusses.

The court also addressed two issues regarding the operation of the alternative method in subparagraph (B) of § 1191(c)(2) for satisfying the projected disposable income test for cramdown confirmation.

Subparagraph (A) of § 1191(c)(2) requires that the debtor commit projected disposable income for a period of three to five years, as the court determines, "to make payments under the plan." § 1191(c)(2)(A). In *McBride*, however, the debtor contended that the plan satisfied the alternative in paragraph (B), which provides that the value of property to be distributed in the applicable period is not less than the debtor's PDI. *See McBride*, 2023 WL 8446205 at *3.

The first issue was the debtor's deduction of plan payments from the business's profits before determining projected disposable income. The court concluded that the deduction was improper. *Id.* at *5. (Note that the issue does not matter when confirmation involves payment of PDI under subparagraph (A) because PDI may be applied to make payments on the secured claim.)

The court stated, *id.*:

In comparing the value of property to be distributed under the Amended Plan to the Debtor's projected disposable income during the commitment period for the purposes of

§ 1191(c)(2)(B), it makes no sense to deduct from disposable income the payments made for the benefit of creditors under the terms of the Amended Plan.

In a plan confirmed under § 1191(c)(2)(A), the Debtor would pay all of her disposable income for the benefit of all classes, including [the two secured creditors]. In a plan confirmed under § 1191(c)(2)(B), the Debtor distributes property, not her disposable income.

Before confirming under this section, then, the Court must ensure that creditors are no worse off than they would be under a plan confirmed pursuant to § 1191(c)(2)(A). Therefore, in calculating the Debtor's disposable income for the purpose of comparing that value to the value of the property to be distributed, no payments paid for the benefit of creditors under the terms of the Amended Plan should be first deducted from projected disposable income. This approach is consistent with the wording of § 1191(d) which makes no mention of plan payments in listing the types of expenses to be deducted from a debtor's net income when determining disposable income. Since [the Debtor's PDI calculation] first deducts the plan payments before determining the Debtor's projected disposable income, the projections are inaccurate.

Second, the *McBride* court addressed the competing interpretations of subparagraph (B) of § 1191(c)(2) that the debtor and the creditor advanced. The debtor contended that the distribution of the notes to the two secured creditors met the PDI requirement because their present value exceeded its projected disposable income. The creditor argued that subparagraph (B) requires that each impaired class receive property with a value greater than or equal to the debtor's PDI. *Id.* at *7. (As noted earlier in the preceding excerpt from its opinion, the court had concluded that the subparagraph (A) alternative provides for application of PDI for payment of claims in all classes.)

The court reasoned that a debtor could not commit all its disposable income to more than one class and that "to require a debtor to distribute property equal to or greater in value than his or her disposable [income] to more than one class would be overly burdensome." *Id.* at *7. The only way the creditor's interpretation avoids an absurd result, the court continued, "is if a debtor only needs to satisfy the requirements of § 1191(c)(2) with respect to just one class of claims." *Id.*

The court posited an interpretation of § 1191(c)(1) as containing all the requirements for classes of secured claims such that § 1191(c)(2) applies to all other classes of claims or interests. In the case before it, therefore, the debtor would have to satisfy subparagraph (B) only with respect to the class of unsecured claims. *Id.* at 7.

The *McBride* court identified two problems with this approach.

The first problem is that § 1191(c)(2) is not expressly limited to a specific class of claims. The court noted that the cramdown provisions applicable in a traditional case (§ 1129(b)(2)) explicitly state different requirements for classes of secured claims, unsecured claims, and interests. The subchapter V cramdown requirements specifically provide for secured claims in paragraph (1) of § 1191(c), but paragraphs (2) (PDI) and (3) (feasibility) are not limited to

specific classes. The feasibility test in paragraph (3), the court observed, “does not address the treatment of claims at all and is obviously generally applied to a plan, as a whole.” *Id.* at *7. In the absence of limiting language in § 1191(c), the court reasoned, “the more reasonable interpretation is that § 1191(c)(2), like § 1191(c)(3), is more globally applicable to the entire structure of the plan.” *Id.*

Second, the court pointed out that, because § 1191(c) does not specifically address classes of interests, an interpretation applying § 1191(c)(2) to all other classes except classes of secured claims would require it to include classes of interests. In the unlikely event that both a class of unsecured claims and a class of interests rejected a plan, the court reasoned, the posited interpretation would require the commitment of all disposable income, or the distribution of property of equivalent value, to more than one class. *Id.* at *8.

The *McBride* court adopted, therefore, a “more reasoned approach,” *id.* at *8:

For a plan to be fair and equitable under § 1191(c), classes of secured claims that are impaired and do not accept the plan must be treated in accordance with § 1129(b)(2)(A) [pursuant to § 1191(c)(1)] and, in addition, a debtor must either pay all of [the debtor’s] disposable income into the plan, or distribute property equal in value to that disposable income. Finally, the plan must also provide adequate remedies unless the debtor can meet the more stringent feasibility analysis [in § 1191(c)(3)(A)].

The court acknowledged the possibility that, under its interpretation, a debtor by giving promissory notes with a present value equal to or greater than its projected disposable income could pay little to unsecured creditors while accruing disposable income. *Id.* at 8. The court noted its “explicit and implicit authority to implement further measures to ensure fairness and equity,” *id.*, such as increasing the applicable commitment period to five years. In addition, the court continued, because § 1191(c) states that the fair and equitable requirement *includes* the specific requirements in paragraphs (1) through (3), “a court might require something more to satisfy that condition.” *Id.*

The combined effect of the two rulings is that, although PDI does not include payments on a secured claim satisfied by the distribution of a note, payments on the secured claim are accounted for because the notes are taken into account in determining whether the property distributed under the plan (including the notes) has a value equal to or greater than PDI.

ix. Deduction of legal fees for defending dischargeability litigation*

The discharge of an individual in a subchapter V case is subject to the exceptions in § 523(a). When cramdown discharge of an entity occurs under § 1191(b), an entity’s discharge may also be subject to the § 523(a) exceptions under one interpretation of the subchapter V discharge provisions.²⁶³

The PDI question is whether the debtor’s legal fees for dischargeability litigation are reasonably necessary for the “continuation, preservation, or operation of the business of the

²⁶³ *SBRA Guide* § X(D)(2) discusses the issue.

debtor.”²⁶⁴ In an individual case, a further question is whether such fees are reasonably necessary for the “maintenance or support of the debtor or a dependent of the debtor.”²⁶⁵ A similar question is whether legal fees for dischargeability litigation prior to confirmation are not allowable as an administrative expense because dischargeability litigation does not benefit the estate.²⁶⁶

The court in *In re Premier Glass Services, LLC*,²⁶⁷ considered, but did not decide, the extent to which a debtor may deduct anticipated legal expenses for dischargeability litigation in calculating projected disposable income. The court concluded that the debtor had failed to show that the legal fees were based on a reasoned projection and that they were necessary for the continuation, preservation, or operation of the debtor’s business. Moreover, the court continued, the evidence did not show that the legal fees were fair and equitable.

x. The role of the “fair and equitable” requirement in the analysis of projected disposable income issues*

This section discusses cases in which courts have considered the fair and equitable requirement for cramdown confirmation in § 1191(b) in connection with determination of projected disposable income issues under § 1191(c)(2). Section 1191(c) states a “rule of construction” for the condition that a plan be “fair and equitable.” The PDI test in § 1191(c)(2) is one of three specific requirements for determining whether the plan is “fair and equitable.” (The other two requirements are that, with respect to secured claims, the plan meet the requirements of § 1129(b)(2)(A) for cramdown in a traditional case, § 1191(c)(1),²⁶⁸ and that it meet a feasibility requirement, § 1191(c)(3).²⁶⁹)

In general, the projected disposable income test in § 1191(c)(2) requires that the plan provide for the distribution of projected disposable income (or its value) for a three-year period “or such longer period not to exceed five years as the court may fix.”²⁷⁰ Section 1191(d) defines “disposable income.

Some courts have observed that a debtor’s proposed payments to creditors must meet the “fair and equitable” requirement in § 1191(b) in addition to the specific requirements of the PDI test in § 1191(c)(2) in their consideration of the following issues:

1. How to determine projected disposable income, including the adequacy of the debtor’s projections and the types of expenditures that the debtor may deduct in calculating PDI.

²⁶⁴ § 1191(d)(2).

²⁶⁵ § 1191(d)(1)(A).

²⁶⁶ See NORTON BANKRUPTCY LAW AND PRACTICE §§ 106.1, 106.6. See *Update* § X(E).

²⁶⁷ 664 B.R. 465, 476-77 (Bankr. N.D. Ill. 2024).

²⁶⁸ See *SBRA Guide* § VIII(B)(2).

²⁶⁹ The feasibility requirement in § 1191(c)(3) is that the court determine either that the debtor will be able to make payments under the plan (§ 1191(c)(3)(A)) or that a reasonable likelihood exists that the debtor will be able to make plan payments. (§ 1191(c)(3)(B)). In the latter situation, the court must also determine that the plan provides “appropriate remedies to protect the holders of claims or interests in the event that the payments are not made.” § 1191(c)(3)(B). See *SBRA Guide* § VIII(B)(5)

²⁷⁰ See *SBRA Guide* § VIII(B)(4).

2. Whether the debtor must make payments based on actual results instead of deductions, a so-called “true-up” requirement.
3. How to “fix” the length of the PDI commitment period as three years, five years, or something in between.

These courts note that the “rule of construction” in § 1191(c) provides that the condition that a plan be “fair and equitable” *includes* the three specific requirements in § 1191(c)(1), (2), and (3).²⁷¹

[Subsection (c)] states that whether the plan is fair and equitable **includes** those requirements. Because the term “includes” is not limiting, a court may consider other relevant factors as well. § 102(3).

The language of the PDI test in §§ 1191(c)(2) and 1191(d) itself addresses the first issue.

Section 1191(d) defines “disposable income” as income that is “received by the debtor” and “is not reasonably necessary to be expended” for specified purposes. For a business, the expenditures must be “necessary for the continuation, preservation, or operation of the business of the debtor.” § 1191(d)(2). An individual debtor may also deduct expenditures for the maintenance or support of the debtor or a dependent and for payment of postpetition domestic support obligations. § 1191(d)(1). The adequacy of the debtor’s projections raises evidentiary and burden of proof issues, but the statute provides sufficient guidance for determination of the adequacy of projections and what types of expenditures are deductible.

The court in *In re Premier Glass Services, LLC*, 664 B.R. 465 (Bankr. N.D. Ill. 2024), considered the adequacy of the debtor’s PDI projections and whether certain deductions in calculating it were permissible. The court phrased the issues as whether the debtor had established that the plan was fair and equitable rather than whether the plan met the PDI requirements in § 1191(c)(2).

The *Premier Glass* court stated, *id.* at 473:

[A] debtor seeking to confirm a nonconsensual plan under Sub. V bears the burden of showing that its plan is fair and equitable. To do that, it must show a “sincere effort” regarding two things: first, it must show that there is a reasoned basis for its projections, and second, it must show that line items deducted are indeed “necessary for the

²⁷¹ *Hamilton v. Curiel (In re Curiel)*, 651 B.R. 548, 561 n.7 (B.A.P. 9th Cir. 2023) (emphasis in original) (dicta; Part XII *supra* discusses the case), *appeal dismissed*, 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023); *accord, e.g.*, *Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix)*, 2024 U.S. Dist. LEXIS 59741 at *7 (C.D. Cal. 2024) (discussed in *Update* § VIII(B)(4)(ii)); *In re Premier Glass Services, LLC*, 664 B.R. 465, 472 (Bankr. N.D. Ill. 2024) (discussed in *Update* §§ VIII(B)(4)(ii), (iii), (iv), (vi), and (ix)); *In re Trinity Family Practice Urgent Care PLLC*, 661 B.R. 793, 815-16 (Bankr. W.D. Tex. 2024).

continuation, preservation, and operation of the debtor’s business” and therefore fair and equitable to creditors. § 1191(c) and (d).

In reaching this conclusion, the *Premier Glass* court relied on caselaw under chapter 12 applying the PDI test in the context of the good faith requirement. Thus, among other observations, the court noted that the disposable income provision exists “to prevent large expenditures by debtors for non-essential items which ultimately reduce the sum available to pay holders of unsecured claims.”²⁷²

The *Premier Glass* court found that the debtor had not shown that its projected expenditures for tax reimbursements to principals of the “pass-through” entity and for replacement costs and capital expenditures were credible and had not shown that projected legal fees for postconfirmation litigation with the objecting creditor were based on a reasoned projection and necessary. Accordingly, the court concluded that the debtor failed to establish that the plan was fair and equitable. *Id.* at 476.²⁷³

With regard to legal fees, the court examined the factors that *In re Trinity Family Practice & Urgent Care, PLLC*, 661 B.R. 793, 822-23 (Bankr. W.D. Tex. 2024), developed in determining whether to fix the PDI period for more than five years.²⁷⁴ The court concluded, “Ultimately, these factors help a court weigh whether plan provisions unreasonably benefit a debtor at the expense of the unsecured creditor class – and most of these weigh against finding this plan to be fair and equitable.” *Premier Glass*, 664 B.R. at 477.

The second issue is whether the projected disposable income test may require payments to creditors based on actual results if they are better than projected – a so-called “true-up.” As section VIII(B)(4)(iv) of this Update discusses, one court has concluded that the language of § 1191(c)(2) permits a court to require a true-up, but the better view is that the language does not permit a true-up.

In its thorough analysis of the issue, the court in *In re Packet Construction, LLC*, 672 B.R. 905 (Bankr. W.D. Tex. 2024), ruled that subchapter V does not generally require a true-up. But the court added, “There may be circumstances under which a court could determine that the failure to provide actual disposable income, rather than projected disposable income, was not fair and equitable to a non-accepting impaired class of unsecured creditors.” *Id.* at 906. The court held, *id.* at 914.²⁷⁵

[S]ubchapter V includes no general rule imposing a true-up requirement on debtors confirming cramdown plans. It does not necessarily rule out the possibility that circumstances could arise under which a court would have the power to impose a true up. After all, [section 1191](#) states that the “fair and equitable” test “includes” the requirement of meeting one of the alternative “project disposable income” tests; because “includes” is

²⁷² *Premier Glass*, 664 B.R. at 473, quoting *In re Fortney*, 36 F.3d 701, 705 (7th Cir. 1994) (quoting *In re Hedges*, 68 B.R. 18, 20-21 (Bankr. E.D. Va. 1986)).

²⁷³ Update § VIII(B)(4)(iii) discusses these aspects of the court’s ruling.

²⁷⁴ Update § VIII(B)(4)(iii) discusses *Trinity Family Practice* and the factors.

²⁷⁵ Update § VIII(B)(4)(iv) discusses the *Packet Construction* opinion.

expressly non-limiting in the Bankruptcy Code, other elements could be added to the test, as circumstances warrant, beyond those actually present in the statute.

The court in *In re Premier Glass Services, LLC*, 664 B.R. 465 (Bankr. N.D. Ill. 2024), in considered the possibility of a true-up in its analysis of permissible expenditures for purposes of the PDI test, as earlier text discusses. The court noted that the plan contained no true-up provision that would adjust payments to creditors if the projected expenditures were less than anticipated. The court acknowledged disagreement over whether a court can require a true up but noted that no binding precedent precluded confirmation of a plan that included such a provision. *Id.* at 478. A true up might be “especially appropriate,” the court observed, because the debtor’s plan “sets aside large reserves for projected capital expenditures that benefit its insiders at the expense of its creditors” and because of the apparent lack of “any real relationship between past legal expenses and projections.” *Id.* at 478.

The third PDI issue is the length of the period for payment of PDI. Section 1191(c)(2) permits the court to “fix” the PDI commitment period for more than three years, not to exceed five, but provides no guidance on whether, when, or how to do it. Courts have (perhaps predictably) concluded that the statute leaves the issue to their discretion and (also predictably) developed factors (non-exclusive, of course) to use in exercising it. Section VIII(B)(4)(ii) of this Update²⁷⁶

In re Trinity Family Practice & Urgent Care PLLC, 661 B.R. 793 (Bankr. W.D. Tex. 2024), the court interpreted the “fair and equitable” requirement of § 1191(b) and the provision in § 1191(c)(2) for the court to fix the PDI period between three and five years as involving two inquiries when a plan provides for payment of PDI for three years. First, the court must determine whether the three-year plan is “fair and equitable.” Second, the court must determine whether it should fix a longer period not to exceed five years.²⁷⁷

The court explained that the “fair and equitable” provision in § 1191(b) *includes* the requirement that it comply with § 1191(c). 661 B.R. at 815. The court explained, *id.* at 815-16:

After the court determines that the proposed plan is in compliance with the baseline requirements of § 1191(c), the court has the “discretion to require more as a condition of finding [that the] plan is fair and equitable.”²⁷⁸ . . . In other words, meeting the baseline requirements of § 1191(c) is a *necessary* condition for the subchapter V plan to be fair and equitable, but does not assure that the plan is fair and equitable.

²⁷⁶ See also *SBRA Guide* § VIII(B)(4)(ii).

²⁷⁷ The *Trinity Family Practice* court did not expressly state that the inquiry includes two separate components. It did, however, explain that its task was to determine “whether a subchapter V plan that provides for payment of all of the Debtor’s projected disposable income to creditors for a period of three years is fair and equitable under § 1191(b) and (c)(2), or if the Court should fix a longer payment period.” 661 B.R. at 812. Moreover, the court consistently noted that its determination involved both questions. *Id.* at 816, 821, 823, 825, 827. Separate identification of both components is helpful for analytical purposes.

²⁷⁸ The court quoted *In re Orange Cnty. Bail Bonds, Inc.*, 638 B.R. 137, 146 (B.A.P. 9th Cir. 2022), discussed in *SBRA Guide* § VIII(B)(4)(ii).

As § VIII(B)(4)(ii) discusses in detail, the court established procedures for a court to follow in determining the PDI period and the factors to consider in deciding what PDI period is necessary for the plan to be fair and equitable.

All these courts base their analyses of these PDI issues on the requirement that the plan be fair and equitable rather than the provisions of the PDI test in § 1191(c)(2) alone. It is axiomatic that interpretation and application of general standards like those in the PDI test should be "fair" in the common sense of the word. Likewise, a statutory interpretation should ordinarily produce a result that is "equitable" in the ordinary meaning of that word.

But those words have a different meaning when combined as a term of art in reorganization law – the "fair and equitable" requirement. The development of standards for determining PDI issues through the creation of additional requirements of the "fair and equitable" condition is inconsistent with the "fair and equitable" doctrine as it developed historically and was codified in Chapter 11 upon its enactment by the Bankruptcy Reform Act of 1978.

"Fair and equitable" is a term of art that describes a judicially-created doctrine. As Justice Douglas observed in *Case v. Los Angeles Lumber Products Co.*,²⁷⁹ the words "fair and equitable" are "words of art" that "acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations."

When the Bankruptcy Reform Act of 1978 enacted the current Bankruptcy Code as a comprehensive revision of bankruptcy law to replace the Bankruptcy Act of 1898, it included the requirement in § 1129(b) that a plan be "fair and equitable" with respect to a dissenting class for cramdown confirmation in Chapter 11, which combined the previous reorganization provisions in Chapter X, XI, and XII into that single chapter.

The fair and equitable doctrine had several components in addition to the absolute priority rule at the time of enactment of the Bankruptcy Code. The other primary one²⁸⁰ in addition to the absolute priority rule is the rule against premiums on claims, which prohibits payment of more than the allowed amount of a claim.²⁸¹ Other components were rules that: (1) permitted "step-ups" to compensate senior creditors for loss of priority when the plan provided for all classes to receive the same equity;²⁸² (2) permitted the issuance of better quality or more quickly amortizing securities to junior classes, provided that the senior class received property equal to the full amount of its claim;²⁸³ and (3) permitted the inclusion of postpetition interest in the claims of creditors who had contracted for it in their loan documents.²⁸⁴ In addition, the absolute priority rule was subject to the new value exception.²⁸⁵

²⁷⁹ 308 U.S. 106, 115 (1939).

²⁸⁰ See, e.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][a].

²⁸¹ See, e.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][a][ii].

²⁸² See, e.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][i][A]..

²⁸³ See, e.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][i][B].

²⁸⁴ See, e.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][i][C].

²⁸⁵ See, e.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][c].

Although some proposals for the new bankruptcy law codified other components of the fair and equitable doctrine, the final legislation did not.²⁸⁶ Legislative history indicates that the omission of other “fundamental” components of the fair and equitable rule in the codification was “to avoid complexity and because they would undoubtedly be found by a court to be fundamental to ‘fair and equitable’ treatment of a dissenting class.”²⁸⁷

The express inclusion of the absolute priority rule in § 1129(b) and the omission of other features has generated debate as to whether the other components survived enactment of the Bankruptcy Code or have been changed by other provisions of the Bankruptcy Code.²⁸⁸ The continued vitality of the other components, however, is immaterial for present purposes. Rather, the question is whether the “fair and equitable” requirement imposes additional confirmation requirements that the Bankruptcy Code does not specifically contain.

In traditional cases, § 1129(b)(2) expressly states that the fair and equitable condition “includes” the specific requirements that subparagraphs (A), (B), and (C) state. The rule of construction in § 101(3) is that “includes” is not limiting.

Courts have, therefore, concluded in traditional cases that a plan’s compliance with the specific standards in § 1129(b) does not necessarily satisfy the fair and equitable requirement.²⁸⁹ For example, the court in *Sandy Ridge Development Corp. v. Louisiana National Bank (In re Sandy Ridge Development Corp.)*,²⁹⁰ stated:

[S]imple technical compliance with the requirements of section 1129(b)(2) does not assure that the plan is fair and equitable. Instead, this section merely sets minimal standards that a plan must meet, and does not require that every plan not prohibited be approved.²⁹¹

²⁸⁶ See, e.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b].

²⁸⁷ Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L. J. 229, 231 (1989), quoting 124 Cong. Rec. 32407 (Sept. 28, 1978) (remarks of Rep. Don Edwards) and 124 Cong. Rec. 34006 (Oct. 5, 1978) (remarks of Sen. DeConcini). The nearly identical statements are by the “floor leaders managing the bankruptcy reform legislation; the statements were made in lieu of a conference report as the bankruptcy legislation did not go through a formal conference.” Klee, *supra*, at 231 n. 16. See Kenneth N. Klee, *Legislative History of the New Bankruptcy Code*, 28 DePaul L. Rev. 941, 953-56, 54 AM. BANKR. L. J. 275, 289-94 (1980).

²⁸⁸ E.g., 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b]; Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L. J. 229 (1989).

²⁸⁹ E.g., *Sandy Ridge Development Corp. v. Louisiana National Bank (In re Sandy Ridge Development Corp.)*, 881 F.2d 1346, 1352 (5th Cir. 1989); *Federal Sav. & Loan Ins. Corp. v. D & F Construction, Inc. (In re D & F Construction, Inc.)*, 865 F.2d 673, 675 (5th Cir. 1989); *Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII)*, 961 F.2d 496, 505 (4th Cir. 1992); *Aetna Realty Investors, Inc. v. Monarch Beach Venture, Ltd. (In re Monarch Beach Venture, Ltd.)*, 166 B.R. 428, 436 (C.D. Cal. 1993); *In re City of Detroit*, 524 B.R. 147, 260-61 (Bankr. E.D. Mich. 2014) (discussing § 1129(b) as applicable in Chapter 9 case); *In re Ponce de Leon 1403, Inc.* 523 B.R. 349, 389 (D. P.R. 2014) *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 498-99 (Bankr. S.D. Ohio 2011); *In re Kennedy*, 158 B.R. 589, 599-601 (Bankr. D.N.J. 1993) (citing and discussing cases); see 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][ii]; Jack Friedman, *What Courts Do to Secured Creditors in Chapter 11 Cramdown*, 14 Cardozo L. Rev. 1495, 1506-07 (1993).

²⁹⁰ 881 F.2d 1346 (5th Cir. 1989).

²⁹¹ *Id.* at 1352 (interior punctuation and citation and quotation of *Federal Sav. & Loan Ins. Corp. v. D & F Construction, Inc. (In re D & F Construction, Inc.)*, 865 F.2d 673, 675 (5th Cir. 1989) omitted).

The caselaw in traditional chapter 11 cases has developed an additional fair and equitable requirement in the context of the requirements in § 1129(b)(2)(B)(2)(A) for treatment of a secured claim, usually a real estate mortgage, involving lengthy payment periods, negative amortization, or both.²⁹² A leading treatise describes the additional feature of the fair and equitable rule as “a prohibition against the unfair and unreasonable shifting of risk relating to the operations and financial performance of the reorganized debtor” to a creditor.²⁹³ Another commentator concluded, “Fair and equitable as it applies to secured claims requires not only the satisfaction of one of the explicit requirements of clauses (i), (ii), or (iii) [of § 1129(b)(2)(A)], but also that the technical fulfillment of these three clauses should not impose an unreasonable risk of the plan's failure on the secured creditor.”²⁹⁴

The foregoing discussion leads to three general principles applicable to the question of whether the fair and equitable condition imposes additional requirements that expand the requirements of the PDI test.

First, fair and equitable requirements are not limited to the specific ones in the statute. The specific rules state minimum standards but do not preclude additional ones. The consensus is that the additional requirements include the unstated ones that courts developed in formulating the fair and equitable doctrine.

Second, an expansive view of the caselaw is that a plan is also not fair and equitable if it imposes an unreasonable risk on creditors. The caselaw specifically considers the risk of the debtor's failure, typically in the context of treatment of a secured claim.

Third, courts have not recognized any other requirement that the fair and equitable doctrine imposes for treatment of claims.

Perhaps bankruptcy judges should have the authority to impose new requirements for cramdown confirmation that they conclude are necessary for a plan to comply with their view of what is “fair and equitable.” But it is questionable whether such an approach is appropriate when the statute states a specific fair and equitable requirement, which the PDI test does.

With regard to the PDI test, the only applicable uncodified component of the fair and equitable doctrine is the prohibition of unreasonable risk, specifically, the risk of the debtor's default. In a subchapter V case, however, the fair and equitable condition specifically addresses risk in §1191(c)(3) with its requirement that the court find either that the debtor will make

²⁹² *E.g.*, Federal Savings & Loan Ins. Corp. v. D & F Construction, Inc. (*In re D & F Construction, Inc.*), 865 F.2d 673 (5th Cir. 1989); Aetna Realty Investors, Inc. v. Monarch Beach Venture, Ltd. (*In re Monarch Beach Venture, Ltd.*), 166 B.R. 428 (C.D. Cal. 1993); *In re Trenton Ridge Investors, LLC*, 461 B.R. 440 (Bankr. S.D. Ohio 2011); *In re Kennedy*, 158 B.R. 589 (Bankr. D. N.J. 1993) (collecting and discussing cases); *In re Miami Center Associates, Ltd.*, 144 B.R. 937 (Bankr. S.D. Fla. 1992); *In re Manion*, 127 B.R. 887, 889-90 (Bankr. N.D. Fla. 1991); *In re Mulberry Agr. Enterprises, Inc.*, 113 B.R. 30 (D. Kan. 1990); *In re Club Associates*, 107 B.R. 385 (Bankr. N.D. Ga. 1989); *In re EFH Grove Tower Associates*, 105 B.R. 310 (Bankr. E.D. N.C. 1989).

²⁹³ 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][ii].

²⁹⁴ Jack Friedman, *What Courts Do to Secured Creditors in Chapter 11 Cramdown*, 14 Cardozo L. Rev. 1495, 1506-07 (1993).

payments under the plan or that a reasonable likelihood exists that the debtor will make the payments and the plan contains adequate remedies to protect creditors in the event of default.

Cramdown confirmation in a subchapter V case, however, involves a different type of risk. Under the operation of the subchapter V PDI provisions, a risk in addition to default is that the debtor has understated its projected disposable income through overly conservative predictions of income and unduly generous predictions of expenditures. Because only the debtor may modify the plan, creditors risk the loss of disposable income to which they would be entitled based on accurate projections.

If the “unreasonable risk” component of the fair and equitable doctrine is stretched to include the risk of inaccurate projections, it has implications for two PDI issues: (1) the adequacy of the debtor’s projections and permissible deductions in the calculation of PDI; and (2) whether a court may require a “true-up” such that the debtor pays disposable income based on actual results.

With regard to the first issue, as a practical matter, it makes no difference whether standards for the adequacy of projections and the calculation of PDI arise from application of the PDI test or as an additional requirement of the fair and equitable condition. *Premier Glass* applies the PDI test in a “fair” way that is “equitable” in the usual sense of those words. The usual rules of statutory construction support the *Premier Glass* result based solely on interpretation of the text. It is not necessary to expand the fair and equitable condition to create a new requirement that is arguably beyond the scope of the doctrine.

The argument in favor of requiring a “true-up” provision so that PDI is determined by actual results is that it is necessary to provide fairness to creditors and to produce an equitable result because: (1) a true up eliminates the ability of the debtor to manipulate the calculation of disposable income because it largely controls the information that produces the projection; and (2) without a “true-up,” a debtor may modify the plan after confirmation if its performance does not meet its projections whereas creditors cannot modify if the debtor generates more money than projected.

The better view is that compliance with the PDI provision does not require a “true-up” under the terms of the statute.²⁹⁵ The “fair and equitable” argument for a different result proceeds as follows: (1) the PDI provision states a minimum requirement, but the fair and equitable condition may require more; (2) the fair and equitable condition prohibits cramdown confirmation of a plan that poses an “unreasonable risk” for creditors; (3) a “true-up” is essential to protect creditors from the risks of debtor manipulation and the assumption of “downside” risk without a corresponding “upside” opportunity.

Although the argument may be appealing on fairness grounds, it has several weaknesses.

²⁹⁵ See *In re Packet Construction, LLC*, 2024 WL 1926345 at *3 (Bankr. W.D. Tex. 2024) (“To require a ‘true up’ is to eliminate the future-looking element indicated by the word ‘projected.’”). *Update* § VIII(B)(4)(iv) discusses the issue.

A fundamental problem is that the conclusion directly contradicts the language of the subchapter V statute. Whether to require payment to creditors based on actual results is a policy question that Congress resolved by enacting language that precludes such a requirement. Congress's decision to limit postconfirmation modification to debtors, similarly, reflects a policy decision that does not properly give courts the authority in the name of "fairness" to create an additional requirement that Congress did not include.

In short, subchapter V specifically contemplates and permits the situation that the argument posits is an unreasonable risk that courts should address through expansion of the fair and equitable requirement. Courts properly decline to engage in judicial legislation of this nature.

A second problem is that the premise of the "unreasonable risk" argument arises from application of the fair and equitable rule in the context of *secured* claims where the risks are possible diminution of value of the creditor's collateral and the risk of nonpayment. The risk that the argument advances in the subchapter V situation is different.

Any plan for payment of claims over time necessarily involves the risk that the debtor will not make required payments. Subchapter V addresses this issue through the requirement for cramdown confirmation that the court determine that the debtor will be able to make payments under the plan or that there is a reasonable likelihood that it will.²⁹⁶

But the risk of nonpayment is not the type of risk that the "unreasonable risk" argument in favor of a "true-up" identifies. Rather, the risk that the argument advances is that creditors will not receive *as much* as the debtor could pay based on actual results. Indeed, the argument assumes that the debtor will make payments as proposed but seeks an increase in the amount of the payments.

Thus, the reasons for expansion of the fair and equitable requirement to protect secured creditors are not applicable in the subchapter V context. The caselaw expanding fair and equitable requirements to protect secured creditors from unreasonable risks in traditional chapter 11 cases does not provide a proper basis for adding a requirement to the fair and equitable rule in a subchapter V case based on a different type of risk.

As earlier text discusses, *Trinity Family Practice* develops a framework for determination of the length of the PDI commitment period, addressing both procedural aspects and the factors that a court properly considers in making that determination. The court reasoned that the fair and equitable condition required its conclusions. The framework is a sound one, but it is not necessary to create a new feature of the fair and equitable doctrine to construct it.

Section 1191(c)(2) states that, for a plan to be fair and equitable, the debtor must pay projected disposable income for three years, "or such longer period not to exceed 5 years as the court may fix." It provides no guidance about how the court determines whether the period should be three years, five years, or something in between.

²⁹⁶ § 1191(c)(3).

The statutory directive for the court to “fix” the commitment period without any guidance necessarily leaves the question to the discretion of the court and invites the bankruptcy court to develop appropriate procedures for making the determination and reasons for choosing the length. A court’s exercise of discretion must be “fair,” and it must be “equitable,” but the “fair and equitable” condition does not appear to add anything to help resolve the issue. Indeed, none of the components of the fair and equitable condition appear to relate to the length of the PDI commitment period.

In summary, invocation of the fair and equitable doctrine is not an appropriate way to resolve questions about the PDI requirement. The PDI requirement is a specific statutory part of the fair and equitable condition, but the fair and equitable doctrine does not provide a basis for applying that requirement or adding to it.

In the *Premier Glass* and *Trinity Family Practice* cases discussed above, this theoretical analysis makes no difference in the outcome. A reasonable question, therefore, is why bankruptcy professionals and judges should care about what appears to be an interesting academic issue.

The answer is that use of the fair and equitable analysis in determination of PDI issues invites the expansion of the fair and equitable doctrine to prohibit or require provisions in a plan that the statute does not require. For example, could the “fair and equitable” condition require a plan to pay creditors for more than five years?

Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix), 2024 U.S. Dist. LEXIS 59741 (C.D. Cal. 2024), provides support for the argument that it can.

The *Hologenix* court discussed the length of the PDI period in the context of an objection to confirmation based on unfair discrimination. The debtor’s plan proposed to pay projected disposable income to non-insider unsecured creditors in Class 3 for three years, resulting in a 12.5 percent distribution. The claims of insiders in classes 2 and 4 would not receive any payments of PDI, but they retained their right to full payment after the payments to unsecured creditors. Multiple Energy Technologies, LLC (“MET”), an unsecured creditor in Class 3 holding a \$2.4 million claim, objected to the plan on the ground that, among other things, the plan favored insider unsecured creditors and, therefore, discriminated unfairly. *Id.* at *5.

The bankruptcy court ruled that the plan did not unfairly discriminate and confirmed it. The bankruptcy court found that the payments to unsecured creditors were receiving payments the most to which they were entitled under the PDI test. After the debtor completed distribution of all of its PDI to unsecured creditors, the court concluded, the debtor was free to use its assets and earnings as it chose, including payments to the insiders. *Id.* at *6-7.

On appeal, the district court reversed. The district court ruled that the bankruptcy court incorrectly applied the law and that the bankruptcy court was required to consider how the creditor’s recovery compared to the recovery of other creditors during the entire duration of the plan. *Id.* at * 7-8.

The district court in *Hologenix* reasoned that the “fair and equitable” requirement is not limited to the specific requirements in §1191(c). The plan’s compliance with the PDI test in §1191(c)(2), therefore, was not sufficient. *Id.* at *7. Focusing on the word “all” in §1191(c)(2), the court concluded that the requirement for distribution of “all of the projected disposable income of the debtor” during the PDI commitment period did not prohibit “the provision of some amount of disposable income that is less than 100% after five years.” *Id.* at 8-9. Thus, the court said, “[A] plan could require 100% of a debtor’s disposable income in years one through five, 75% in years six through eight, and so on.” *Id.* at * 9.

The *Hologenix* court did not hold that the fair and equitable condition could require a debtor to pay some, but not all, of its disposable income beyond a five-year term. Nevertheless, that result is a logical implication of its analysis.

This aspect of the court’s reasoning was not necessary to its holding on unfair discrimination. The ruling is that a plan that provides for partial payment to some unsecured creditors and full payment to others does not pass the unfair discrimination test solely because payments to the partially paid creditors satisfy the PDI test. The only PDI point material to the ruling is that the commitment period specified in §1191(c)(2) does not prohibit a debtor from making payments for a longer time, an indisputable proposition.

Perhaps the *Hologenix* court would take a different approach in a case where all unsecured creditors are receiving the same treatment. In any event, limitation of the court’s analysis of the fair and equitable condition and its relationship to the PDI test to the context of an unfair discrimination objection is appropriate.

5. Requirements for feasibility and remedies for default*

The Bankruptcy Threshold Adjustments and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022), amended § 1191(c)(3) to provide that, as a condition for cramdown confirmation, the plan must provide “appropriate remedies” to protect creditors only if the court concludes that there is a reasonable likelihood that the debtor will make plan payments. Prior to the amendment, the remedies requirement arguably also applied if the court found that the debtor would be able to make all payments under the plan. The amendment applies to cases filed before its enactment. *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at *15 n. 12 (Bankr. N.D. Ill. 2022).

The plan in *Channel Clarity Holdings* provided that a creditor could “pursue its remedies as are available to it pursuant to applicable law” if the debtor did not make the plan payments. *Id.* at 16. The court concluded that it was “clear that the language proposed by Debtor is deficient.” *Id.* at 16. The court explained, *id.* at 16:

[I]t offers no specific protections for unsecured creditors who are forced to forgo some of the standard protections of a typical chapter 11 case when debtors elect to proceed under subchapter V. To assert that creditors can pursue remedies under applicable law if Debtor should default is a toothless remedy.

Noting that the debtor's limited assets would likely be depleted by the time of a default and that a "race to the courthouse" would be "contrary to the spirit and intent of the bankruptcy policy of orderly distribution of limited assets," the court suggested, *id.* at 16:

Under these circumstances where the objecting unsecured creditor bears a disproportionate amount of risk, Debtor could offer options such as expedited liquidation of nonexempt assets, or a truncated process for declaring a default and allowing collections to begin, or immediate conversion to allow a chapter 7 trustee to take over business operations and possibly conduct a winddown and liquidation.

In *In re McBride*, 2023 WL 8446205 (D. Maine 2023), the court observed that a provision in a plan for the court to retain jurisdiction to address postconfirmation issues did not provide an adequate remedy. The court noted that a remedy is insufficient "if it is not tailored to the specific circumstances of the plan" and that "providing creditors with the opportunity to pursue their state law rights or to seek enforcement of a plan is insufficient." 2023 WL 8446205 at * 6.

In contrast, other courts have concluded that the availability of relief in the bankruptcy court to enforce the plan or seek relief available under federal or applicable state law is an adequate remedy. *In re Honey Do Franchising Group, Inc.*, 2026 WL 10068748 at * 26 (Bankr. E.D. Tenn. 2026) (Provision permitting creditors to petition the court for relief from the automatic stay or to dismiss or convert to chapter 7 is an appropriate remedy.); *In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 691 (Bankr. S.D. Tex. 2022) (A provision in a plan permitting a creditor, upon the debtor's failure to cure a default after 30 days' notice, to proceed to collect "all amounts owed pursuant to state law without further recourse to the Bankruptcy Court" is a "marginally sufficient" remedy.); *In re Ellingsworth Residential Cmty. Ass'n, Inc.*, 2020 WL 6122645, at *2 (Bankr. M.D. Fla. 2020), *aff'd* 2021 WL 12324962, M.D. Fla. 2021), *aff'd* 125 F.4th 1365 (11th Cir. 2025); *In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985, at * 11 (Bankr. E.D. Wis. 2021).

Hamilton v. Curiel (In re Curiel), 651 B.R. 548 (B.A.P. 9th Cir. 2023), *appeal dismissed*, 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023), did not directly involve the issue of appropriate remedies. Rather, the Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's cramdown confirmation of the debtor's plan over the objection of a secured creditor because the BAP concluded that the evidence did not establish feasibility under § 1129(a)(11). Nevertheless, the court's remand to the bankruptcy court is relevant to the adequate remedies issue for two reasons.

First, in remanding for further proceedings regarding feasibility, the court specifically directed the bankruptcy court to determine whether the objecting secured creditor could invoke the subchapter V feasibility requirement for cramdown confirmation in § 1191(c)(3). *Id.* at 552. The same issue arises with regard to a secured creditor's objection to cramdown confirmation based on the adequate remedies requirement in § 1191(c)(3).

Second, the court commented on the question of whether the remedies in the plan were adequate, although that issue was not before it. The court stated, *id.* at 562, n. 11:

[The debtor’s] Plan provided that in the event of a default [the creditor] could serve a notice of default and give [the debtor] at least sixty days to cure the default. If the default was material, the creditor “may: (i) take any action permitted under bankruptcy or non-bankruptcy law to enforce the terms of the Plan; (ii) seek liquidation of nonexempt assets pursuant to § 1191(c)(3)(B); (iii) seek to remove the Debtor as a DIP; and/or (iv) move to dismiss this case or to convert this case to Chapter 7 pursuant to § 1112(b).” We note the dearth of cases discussing what are, or are not, appropriate remedies under § 1191(c)(3)(B)(ii). But we agree with the bankruptcy court’s observation in *In re Channel Clarity Holdings LLC*, [2022 WL 3710602 at *16](#) [(Bankr. N.D. Ill. 2022)], that merely allowing creditors to “pursue remedies under applicable law if Debtor should default is a toothless remedy.” The requirement under § 1191(c)(3)(B)(ii) that the remedies provided be “appropriate” suggests that they should be tailored to the situation. [The debtor] could bolster the default remedies to provide for a prompt auction of the Properties, a stipulated foreclosure, or an automatic deed in lieu of foreclosure. The prospect of an immediate, certain, and inexpensive remedy would increase [the debtor’s] incentive to obtain funding for the balloon payment and decrease the prejudice to [the creditor] if she is not successful.

Does the Bankruptcy Appellate Panel’s discussion of remedies for the secured creditor indicate that the Panel thinks the § 1191(c)(3) requirements should govern cramdown confirmation of a secured claim?

In re McBride, 2023 WL 8446205 (Bankr. D. Maine 2023), supports the proposition that a secured creditor may invoke § 1191(c)(3) in opposition to cramdown confirmation of a plan that it has rejected. The court noted (in connection with its discussion of the projected disposable income requirement of § 1191(c)(2)(B), discussed in Section VIII(B)(4)(viii) of this Update), that § 1191(c)(3) “does not address the treatment of claims at all and is obviously generally applied to a plan, as a whole” and that § 1191(c)(3) is “globally applicable to the entire structure of the plan.” *Id.* at *7.

The opposite view is that a secured creditor does not have the right to invoke § 1191(c)(3) in opposition to cramdown confirmation of its claim:

Because section 1191(b) states that the plan must be “fair and equitable” with regard to the class that has not accepted the plan, and because section 1191(c)(1) states specifically that the plan must meet the requirements of section 1129(b)(2)(A) “with respect to a class of secured claims, one argument is that a secured creditor may not invoke the other fair and equitable requirements in paragraphs (2) and (3) of section 1191(c).

8 COLLIER ON BANKRUPTCY ¶ 1191.04[1] at 1191-16.

The issue may be more theoretical than real because the fair and equitable requirement of § 1129(b)(2)(A) applicable to cramdown of secured claims includes consideration of feasibility. 8 COLLIER ON BANKRUPTCY ¶ 1191.04[1] at 1191-16; *see* 7 COLLIER ON BANKRUPTCY ¶¶ 1129.03[4][b][ii]; 1129.04[2][a][v].

6. Payment of administrative expenses under the plan

C. Postconfirmation Modification of Plan

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

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

Section 1193(b) addresses postconfirmation modification after consensual confirmation, and § 1193(c) deals with modification after cramdown confirmation.

Under both subsections, only the debtor can modify the confirmed plan, and the debtor must demonstrate that the “circumstances warrant such modification.” Both subsections also require that the plan as modified meet confirmation requirements of § 1191(a) or § 1191(b), as applicable.

The key difference between the subsections is one of timing. A debtor may modify a consensual plan only before the plan is “substantially consummated.”²⁹⁷ When cramdown confirmation occurs, however, a debtor may modify the plan at any time during the three-to-five-year period for the payment of projected disposable income.

In *In re Samurai Martial Sports*, 644 B.R. 667 (Bankr. S.D. Tex. 2022), the debtor sought to modify its plan after cramdown confirmation when its business suffered due to air conditioning problems—a significant problem for an athletic facility operating in the Texas summer—and after defaulting on a few payments. The modification proposed to pause payments for three months and cure the arrearage near the end of the plan. The primary creditor and the subchapter V trustee objected.

At the hearing on modification, it became apparent that the debtor’s principal had intentionally withheld plan payments on the advice of a group of potential investors, who had urged the debtor’s principal not to make payments in order to trigger foreclosure and permit the investors to acquire the assets at a lower price.

The court denied the modification. The court focused on two aspects of the requirements for postconfirmation modification: (1) whether the circumstances warranted modification, as § 1193(c) requires; and (2) whether the plan as modified satisfied § 1191(b).

In the absence of caselaw addressing when circumstances would warrant modification under § 1193, the court looked to cases analyzing similar language in § 1127.

²⁹⁷ *See* 11 U.S.C. § 1101(2); *SBRA Guide* § VIII(C)(1) at 161-64.

The court rejected the proposition, advanced by other courts, that a debtor's inability to pay, without more, was insufficient to warrant modification. Instead, it adopted a test that examined the *circumstances* surrounding that inability to pay.

The court thus concluded that postconfirmation modification is permissible when unforeseen circumstances render the originally confirmed plan unworkable. *Id.* at 681. The court noted that the inquiries regarding both foreseeability and workability are factual ones where, particularly for the foreseeability inquiry, the "debtor's good faith and business judgment are relevant." *Id.* at 681.

The court concluded that the failure of the air conditioning equipment was a circumstance that could warrant modification, rejecting the argument that the debtor knew or should have known that it would fail in the near future. *Id.* at 681-82.

But the court concluded that the debtor's intentional failure to make plan payments, rather than the air conditioning problems, was the cause of the need for modification. The derailing of the confirmed plan "could only be attributed to Debtor's deliberate and conscious decision to disregard this Court's order directing Debtor to make all payments under the Plan, and not [to] any unforeseen circumstance rendering the Plan unworkable." *Id.* at 683.

The court reached a similar conclusion regarding the debtor's failure to maintain an escrow fund for emergencies that the plan required. The failure to fund the reserve, the court said, was also the result of the debtor's "bad faith or poor business judgment," because its accounting records indicated that the debtor had been capable of making the requisite payments. *Id.* at 683.

Although the court ruled that the debtor's failure to demonstrate that circumstances warranted modification was sufficient to deny modification, the court also considered whether the debtor's proposed modification complied with the requirements of § 1191(b).

After examining the provisions of that section and the sections it incorporates by cross-reference, the court concluded that the plan as modified (1) would not have been feasible, as required by § 1129(a)(11), in view of the debtor's deficient performance; (2) had not been proposed in good faith, as required by § 1129(a)(3), for the reasons discussed above; and (3) did not satisfy § 1129(a)(1) because it did not include an updated liquidation analysis or adequate projections.

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

1. Classification of claims and interests; unfair discrimination*

Under § 1129(a)(1), confirmation requires that a plan comply with applicable provisions of the Bankruptcy Code. One of the applicable provisions is § 1123(a)(4), which requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."

In re Dark Rhino Security, Inc., 678 B.R. 402, 409-410 (Bankr. S.D. Ohio), the debtor's plan provided for two current employees to retain their shares while two former employees who held the other shares would be paid the value of their shares. A settlement with one former employee resolved that employee's confirmation objections; the other consented to the redemption provision. In these circumstances, the court concluded that the "same treatment" requirement had been satisfied.

The court noted that some courts have ruled that the "same treatment" requirement means that all members of the class receive equal value but in view of the former employee's consent to redemption did not address whether a plan that requires redemption of some, but not all, shares provides the "same" treatment of each member of the class. *Id.* at 409-10 & n. 28.

One of the requirements for cramdown confirmation in both traditional (§ 1129(b)) and subchapter V (§ 1191(b)) cases is that the plan must not "discriminate unfairly."

The court in *In re Lapeer Aviation, Inc.*, 2022 WL 7204871, at *8-9 (Bankr. E.D. Mich. 2022), addressed the requirement in connection with the plan's treatment of equity interests. The plan provided that one holder would retain his equity interest but that the other must accept \$15,000 for his.

The court adopted the so-called "Markell test," articulated in an article by Hon. Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L. J. 227 (1998) and adopted by the bankruptcy court in *In re Dow Corning Corp.*, 244 B.R. 705, 710 (Bankr. E.D. Mich. 1999), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd*, 280 F.3d 648 (6th Cir. 2002). *See also In re Mallinckrodt, PLC*, 639 B.R. 837, 898-99 (Bankr. D. Del. 2022) (applying the Markell test).

The court summarized the test as creating a "rebuttable presumption that a plan is unfairly discriminatory" when three conditions exist. *Lapeer Aviation* at *8. The first two are the presence of a dissenting class and of another class with the same priority.

The third condition is that the difference in the plan's treatment of the two classes result in either "(a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with the proposed distribution." *Id.* at *8.

The plan met the first two requirements. The plan put the two equity interests with the same priority in separate classes and one of them rejected the plan.

The plan met the third requirement because the cash-out provision had the potential to result in a materially lower recovery for the dissenting holder than the other would receive through retention of his interest in the reorganized debtor. *Id.* at *9. The court rejected the proposition that the discrimination was not unfair because of the dissenting holder's opposition to reorganization efforts, noting that he had no management or control rights. *Id.* at *9.

The court in *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga. 2024), concluded that the combination of a small distribution to unsecured creditors and the same pro rata treatment of claims of affiliates did not establish unfair discrimination.

The court in *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024), ruled that a plan did not discriminate unfairly against the unsecured claim of the objecting creditor because it provided the same treatment for the only other unsecured claim. The court observed, “When considering discrimination between classes of claims and whether the treatment is unfairly discriminatory the classes of claims must be of the same priority.” *Id.* at 437, quoting *In re 431 W. Ponce De Leon, LLC*, 515 B.R. 660, 681 (Bankr. N.D. Ga. 2014).

The court in *Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix)*, 2024 U.S. Dist. LEXIS 59741 (C.D. Cal. 2024), discussed more fully in Sections VIII(B)(ii) and (x) of this Update, expressed a different view. In *Hologenix*, the plan provided for a distribution of 12.5 percent to non-insider creditors from payment of all projected disposable income to them, whose claims would be discharged. The debtor would make no payments on unsecured claims of insiders, but their claims would not be discharged; the debtor could thus pay them in full following completion of the plan.

The bankruptcy court confirmed the plan, concluding that the non-insider creditors were not entitled to anything more than projected disposable income and that, thereafter, the debtor and insiders could pay “whatever they find agreeable.” *Id.* at *5-6.

On appeal, the district court reversed and remanded, ruling that the bankruptcy court erroneously ruled that the creditor’s receipt of all projected disposable income during the plan period precluded its unfair discrimination argument. (Sections §§ VIII(B)(ii) and (x) discuss the court’s ruling.) Without considering whether the plan provisions effectively subordinated the insider claims, the district court ruled that the bankruptcy court was “required to consider how [the creditor’s] recovery compared to the recovery of other creditors during the entire duration of the Plan – not just the five years after confirmation.” 2024 U.S. Dist. LEXIS 59741 at * 8-9.

The *Hologenix* court did not determine the unfair discrimination issue, *id.* at 10-11, but vacated the confirmation order and remanded for further proceedings. *Id.* at *17-18.

2. Acceptance by all classes and effect of failure to vote; untimely ballot*

SBRA Guide § VIII(D)(2) discusses the issue of whether a class is deemed to accept a plan when no members of the class vote or object to confirmation.

Following *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267-68 (10th Cir. 1988), bankruptcy courts in the Tenth Circuit have confirmed plans in subchapter V cases as consensual under § 1191(a) even though one or more impaired classes did not vote, ruling that a silent class is deemed to have accepted it for purposes of § 1129(a)(8).²⁹⁸ One court, however, concluded that the requirement in § 1129(a)(10) that one impaired class of claims accept the plan requires

²⁹⁸ *In re Jaramillo*, 2022 WL 4389292 (Bankr. D.N.M. 2022); *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).

affirmative acceptance.²⁹⁹ (Section 1129(a)(10) is somewhat superfluous for consensual confirmation because, by definition, all impaired classes have accepted the plan.)

The court in *In re Creason*, 2023 WL 2190623 (Bankr. W.D. Mich. 2023), concluded that *Ruti-Sweetwater* was wrongly decided and ruled that a class that had not voted had not accepted the plan. The court, therefore, confirmed the plan under the cramdown provision in § 1191(b).

Six other bankruptcy courts have concluded that a plan cannot be confirmed as a consensual plan under § 1191(a) but may be confirmed as a cramdown plan under § 1191(b), when an impaired class of creditors does not accept the plan.³⁰⁰

In *In re Vega Cruz*, 2022 WL 2309798 (Bankr. D. P.R. 2022), the court had confirmed a consensual plan but had deferred entry of a discharge order because the court wanted briefing regarding whether the cancellation of junior liens under the plan would occur upon discharge. The court concluded that the individual was entitled to discharge upon confirmation and to an order discharging and cancelling the junior liens. It appears that the junior lienholders had not objected to confirmation, but it is not clear whether they had affirmatively accepted the plan. The court did not address the issue of whether their acceptance would be required for consensual confirmation.

Two courts outside the Tenth Circuit have concluded that classes that do not vote are not counted for purposes of determining whether § 1129(a)(8) is satisfied. *In re Hotz Power Wash, Inc.*, 655 B.R. 107 (Bankr. S. D. Tex. 2023); *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023). The courts reasoned that section 1126(c) requires determination of acceptance by dividing the number of acceptances by the total votes in the class. When no creditor in an impaired class has voted, the computation requires division of zero by zero, which produces an indeterminate result that is absurd and could not have been intended by Congress.

Thus, the court in *Hotz Power Wash*, 655 B.R. at 188, concluded:

This Court concludes, similar to the court in *In re Franco's Paving LLC*, that the result of a § 1126(c) computation for a nonvoting class is absurd, unsolvable, and was not contemplated by Congress. Furthermore, as discussed *supra*, treating a nonvoting class as having implicitly accepted or rejected the plan is prohibited by the Code and applicable rules. Thus, since the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of

²⁹⁹ *In re Jaramillo*, 2022 WL 4389292 (Bankr. D.N.M. 2022).

³⁰⁰ *In re Hisaw*, 2026 WL 1640815 (Bankr. W.D. La. 2026); *In re 5 Star Home Care, Inc.*, 2026 WL 1127906 (D.S.C. 2026); *In re Sushi Zushi of Texas, LLC*, 2025 WL 957792 (Bankr. W.D. Tex. 2025); *In re Thomas Orthodontics, S.C.*, 2024 WL 4297032 at *6-7 (Bankr. E.D. Wisc. 2024); *In re Florist Atlanta, Inc.*, 2024 WL 3714512 (Bankr. N.D. Ga. 2024); *In re M.V.J. Auto World, Inc.*, 661 B.R. 186 (Bankr. S.D. Fla. 2024). The court in *In re 5 Star Home Care, Inc.*, 2026 WL 1127906 at *9-11 (D.S.C. 2026), rejected the debtor's argument that the absence of an acceptance or objection by the Small Business Administration should be treated as "deemed acceptance" of the plan or disregarded for purposes of § 1129(a)(8).

creditors fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied.

Six courts have rejected this approach.³⁰¹

In *M.V.J. Auto World*, the court concluded that the reasoning is “strained at best.” The court explained, 661 B.R. at 189-90:

The analysis in this case is quite simple. In order to be consensually confirmed under section 1191(a), the Plan must satisfy section 1129(a)(8). Section 1129(a)(8) requires that each impaired class accept the plan. Section 1126(c) provides that acceptance is calculated based on how many holders of allowed claims in the class have voted to accept the plan, not, as was required pre-Bankruptcy Code, based on the number of allowed claims. It is not absurd that no creditors in a class voting on a plan should be treated any differently than a situation where there is not a sufficient number of creditors voting in favor of a plan to satisfy section 1129(a)(8). Moreover, section 1129(a)(8) does not compel acceptance or rejection; section 1129(a)(8) looks to whether a class has accepted a plan, not whether a class has rejected a plan or stood silent.

In *In re Thomas Orthodontics, S.C.*, 2024 WL 4297032 (Bankr. E.D. Wisc. 2024), all classes had accepted the plan except a secured creditor in its own class, which had not objected to confirmation. The court conducted an evidentiary hearing on another creditor’s objection to cramdown confirmation on the ground that the debtors were not committing all their disposable income to the plan. Five days after the conclusion of the evidentiary hearing (and 95 days after the voting deadline), the secured creditor filed an acceptance of the plan.

The debtors requested that the court deem the secured creditor to have accepted the plan by its silence. Alternatively, they requested that the court count the untimely ballot as an acceptance of the plan. The court followed the majority view that acceptance requires an affirmative vote, *id.* at *6-7, and refused to count the untimely ballot under the “excusable neglect” standard of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380 (1993). *Thomas Orthodontics*, 2024 WL 4297032 at *3-6.

The first *Pioneer* factor is the danger of prejudice to nonmoving parties. The court explained that it had conducted a full evidentiary hearing on confirmation at which all participating parties had assumed that cramdown standards applied because the secured creditor had not voted. The objecting creditor and the U.S. Trustee had “spent time and effort preparing for and attending the hearing [and had] made strategic decisions regarding the evidence that would be presented at the hearing based on that assumption.” *Thomas Orthodontics*, 2024 WL 4297032 at *4.

³⁰¹ *In re Hisaw*, 2026 WL 1640815 (Bankr. W.D. La. 2026); *In re 5 Star Home Care, Inc.*, 2026 WL 1127906 (D.S.C. 2026); *In re Sushi Zushi of Texas, LLC*, 2025 WL 957792 (Bankr. W.D. Tex. 2025); *In re Thomas Orthodontics, S.C.*, 2024 WL 4297032 at *6-7 (Bankr. E.D. Wisc. 2024); *In re Florist Atlanta, Inc.*, 2024 WL 3714512 (Bankr. N.D. Ga. 2024); *In re M.V.J. Auto World, Inc.*, 661 B.R. 186 (Bankr. S.D. Fla. 2024).

The court noted that the objecting creditor might receive more if the court determined that the debtors were not committing all their disposable income to the plan. Although prejudice to the creditor was not clear since the court had not yet made that decision, the court concluded that the debtors had presented nothing to meet their burden of showing that nonmoving parties were not prejudiced. The court stated, “It seems unfair for the debtors to obtain a strategical advantage by taking action to change the facts after a full evidentiary hearing, particularly without explaining how their late submission did not prejudice the other parties.” *Id.* at *4.

The court then considered the second *Pioneer* factor – the length of the delay and its potential impact on the proceedings. Noting that the creditor had not voted until five days after conclusion of the hearing and 95 days after the ballot deadline and that the debtors had not filed a motion to deem the ballot timely for another 15 days, the court concluded, *id.* at *4:

The Court declines to incentivize such behavior by allowing the debtors to do the work of obtaining the necessary ballots only after the Court and the other parties in interest expended the time and effort of an evidentiary hearing. Moreover, allowing parties in interest to solicit (or return) ballots from non-participating creditors after an evidentiary hearing on plan confirmation could only invite mischief. For example, if the Court allowed debtors to solicit late acceptances, could creditors or other parties in interest solicit late rejections? Likely not, and the debtors have not explained why there should be a difference between allowing late acceptances and late rejections.

With regard to the third *Pioneer* factor – the reason for the delay, including whether the delay was within the reasonable control of the movant – the court observed that the secured creditor had made a conscious decision not to vote either for or against the plan and voted only after prompting by the debtors’ counsel. Under these circumstances, the court reasoned, it would not have granted a motion by the creditor because the failure to meet the deadline did not result from “carelessness or the like,” as the *Pioneer* inquiry requires. *Id.* at 5.

The fact that the debtors, rather than the secured creditor, requested counting of the untimely filing did not change the result, the court continued. The court concluded, *id.* at *5:

If the debtors wanted [the secured creditor] to return a ballot, the time for soliciting the ballot was before the deadline, or at the very least well in advance of the evidentiary hearing on plan confirmation.

The court concluded that the good faith of the debtors – *Pioneer*’s fourth factor – was “a neutral factor at best.” *Id.* Acknowledging that the debtors wanted consensual confirmation and that they had a right to it if they could satisfy its requirements, the court reasoned that “the time for satisfying those requirements was before the confirmation hearing, not after.” *Id.*

The court noted the debtors’ argument that if the court denied confirmation and the debtors sought confirmation of a modified plan to creditors with new ballots, the secured creditor would likely vote for the plan and that the debtors could seek consensual confirmation under § 1191(a) but with added administrative costs. The court rejected the argument, *id.* at 6:

That may be a practical reason to allow a late ballot in a different case, but in this case there are pending objections that the [debtors'] plan does not meet other requirements of § 1129(a), including the requirement that the plan be proposed in good faith. Therefore, the lack of creditor consent is not the only thing preventing confirmation under § 1129(a).

The court concluded that the circumstances of the case did not warrant extension of the deadline for the secured creditor's ballot. *Id.*

A common problem for debtors seeking consensual confirmation is that a governmental unit, often the Small Business Administration, supports confirmation but does not vote to accept it, apparently because of concerns that § 1129(a) provides for the Secretary of the Treasury to vote on a plan on behalf of the United States.³⁰²

In *In re Side Yard Public House, Inc.*, 2026 WL 1861569 (Bankr. S.D. Cal. 2026), the Assistant United States Attorney representing the SBA in the case had signed and submitted ballots on behalf of the SBA to accept the plan, after consultation with the Department of Justice and the SBA and their authorization of the votes. Satisfied that the AUSA had appropriate authority to vote on behalf of the SBA, and concluding that § 1126(a) is not mandatory and that other authorized representatives of the United States may vote on a plan, the court confirmed the plan as a consensual plan under § 1191(a).

The *ABI Subchapter V Task Force Final Report* addressed the problem of a “silent class.”³⁰³ The Report concluded that the existence of a silent class should not prevent consensual confirmation under § 1191(a), but that the absence of affirmative acceptance by a class should not result in confirmation without compliance with the cramdown standards in § 1191(b).³⁰⁴ The Report proposed a statutory amendment to permit confirmation under § 1191(a) if no impaired class rejects the plan, no creditor within a silent class objects to confirmation, and the plan meets the cramdown requirements in § 1191(b).³⁰⁵

³⁰² See *In re Side Yard Public House, Inc.*, 2026 WL 1861569 at * 3 (Bankr. S.D. Cal. 2026) (“[T]he SBA has taken the position generally that it does not vote on chapter 11 plans as a matter of internal ‘policy’ or practice, ... in light of § 1126(a) which provides that the Secretary of Treasury may vote on behalf of the United States.”) (internal quotation and citation omitted); *In re 5 Star Home Care, Inc.*, 2026 WL 1127906, at *9 (Bankr. D.S.C. Apr. 24, 2026).

³⁰³ *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 56-61.

³⁰⁴ *Id.* at 60.

³⁰⁵ *Id.* at 61. The Task Force recommended amendment of § 1191(a) to insert the italicized language:

§ 1191. Confirmation of plan

(a) Terms. – The court shall confirm a plan under this subchapter only if *either* –

(1) all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met; *or*

(2) (A) *all of the requirements of section 1129(a), other than paragraphs (8), (10), and (15) of that section, of this title are met;*

(B) *all of the requirements of section 1191(b) are met; and*

(C) *no class of claims or interests that is impaired under the plan votes to reject the plan and no creditor within such class objects to confirmation of the plan.*

3. Classification and voting issues relating to priority tax claims

4. Timely assumption of lease of nonresidential real estate

5. The “best interests” or “liquidation” test of § 1129(a)(7)*

The court in *In re Boteilho Hawaii Enterprises, Inc.*, 2023 WL 7117223 (Bankr. D. Haw. 2023), *aff'd* 2024 WL 4143933 (B.A.P. 9th Cir. 2024) (unpublished), considered whether the debtor’s subchapter V plan satisfied the “best interest of creditors” test of § 1129(a)(7), which requires that the plan provide for creditors who have not accepted it to receive not less than they would receive if the debtor were liquidated under chapter 7.

The court concluded that the debtor’s plan met the test because a hypothetical liquidation of the debtor’s assets by a trustee in a chapter 7 case would produce less than what the plan provided for creditors. In its analysis, the court took into account the facts and circumstances that exist when a chapter 7 trustee liquidates assets.

In its discussion of the hypothetical chapter 7 liquidation of the debtor, the bankruptcy court noted that a trustee must liquidate assets “as expeditiously as is compatible with the best interests of parties in interest” under § 704(a)(1). Accordingly, a trustee must “always dispose of the property quickly (although not necessarily at ‘fire sale’ prices).” 2023 WL 7117223 at * 2.

The bankruptcy court rejected the valuations proposed by the objecting creditors based on its assessment of what the trustee’s disposition of the assets would likely realize and concluded that the trustee’s liquidation would not produce any funds for distribution to unsecured creditors after satisfaction of secured, administrative, and priority claims, including a postpetition loan made by the debtor’s principal. Accordingly, the court concluded that the plan that provided for no payments to unsecured creditors complied with § 1129(a)(7). The court in a separate order concluded that the plan met all other requirements for cramdown confirmation under § 1191(b). *In re Boteilho Hawaii Enterprises, Inc.*, 2023 WL 7411176 (Bankr. D. Haw. 2023), *aff'd* 2024 WL 4143933 (B.A.P. 9th Cir. 2024).

If potentially valuable avoidance or other claims exist that could be prosecuted for the benefit of the estate, the “best interests of creditors” test of § 1129(a)(7) requires that a plan provide for their prosecution or grant derivative standing to other interested parties to pursue them if the debtor does not. *In re Lapeer Aviation, Inc.*, 2022 WL 7204871 (Bankr. E.D. Mich. 2022). But a court at confirmation may review the claims, conclude that they have no merit, and confirm a plan that does not provide for their prosecution. *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024).

A creditor objecting to cramdown confirmation in *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga. 2024), asserted that the plan did not comply with the best interest of creditors test because the debtor had valued accounts receivable in substantial amounts owed by affiliates of the debtor at zero. Based on its review of the financial conditions of the affiliates, the court concluded that the receivables had no realizable value.

In *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 at 434-35 (Bankr. N.D. Ga. 2024), the court rejected the objecting creditor’s argument that the plan did not meet the liquidation test

because it did not take account of claims against the principal and affiliates. The court analyzed each potential claim and determined that none were viable. The court also concluded that the creditor's offer to purchase the debtor's assets would not result in a greater recovery for the creditor than the plan in view of the fact that the debtor's principal assumed responsibility for subchapter V professional fees under the plan that would have to be paid in a chapter 7 liquidation.

In *The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (In re Alecto Healthcare Services, LLC)*, 2025 WL 961482 at * 10-11 (D. Del. 2025), *aff'd* ___ F.4th ___, 2026 WL 2165844 (3d Cir. 2026), the court affirmed the bankruptcy court's confirmation of a plan that included the settlement of potential fraudulent conveyance and breach of fiduciary duty claims against the debtor's insiders. Evidence before the bankruptcy court included testimony of the debtor's independent director that supported the bankruptcy court's determination that the proposed settlement fell above the lowest point in the range of reasonableness.

6. Voting by holder of disputed claim

7. Individual must be current on postpetition domestic support obligations

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

9. The good faith requirement of § 1129(a)(3)*

In re Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024), discusses a number of objections of a creditor based on the good faith requirement of 11 U.S.C. § 1129(a)(3) in the context of cramdown confirmation of a subchapter V plan. The court concluded that the debtor had filed its liquidation plan in good faith where the plan would pay more to creditors than a chapter 7 liquidation because it involved concessions from insiders, including waiver of salary of the principal, operation of the business for a limited time to pay more to creditors, and had provided reliable financial projections.

The court also rejected the creditor's arguments that the plan was not in good faith because it did not provide for the pursuit of claims against the principal. The court noted that the plan provided for meaningful distributions to creditors and that the evidence did not support a finding that the debtor had viable claims or that the debtor violated the business judgment rule by not pursuing them.

Finally, the court rejected the contention that the fact that the principal would retain his equity interest that could enable him to retain future profits without paying creditors in full showed the absence of good faith. Because subchapter V has no absolute priority rule, the court explained, the principal could retain his equity interest even if it had value without full payment to creditors. The court stated, 666 B.R. at 434:

So long as a debtor complies with the other confirmation requirements unique to Subchapter V, a plan that takes advantage of this feature of Subchapter V is not proposed in bad faith.

In *In re Trinity Family Practice & Urgent Care PLLC*, 661 B.R. 793 (Bankr. W.D. Tex. 2024), the court ruled that a plan for payment of projected disposable income for three years satisfied the good faith requirement of § 1129(a)(3) but that the debtor had not established that the three-year PDI period was fair and equitable under § 1191(b) and (c)(2)(A). Section VIII(B)(4)(ii) of this Update discusses the issue of the length of the period for payment of PDI.

SBRA Guide § VIII(D)(8) discusses the good faith requirement in the context of a consensual plan when a creditor objects because the debtor is not paying enough disposable income.

A subchapter V plan providing for minimal distributions to unsecured creditors may establish lack of good faith that § 1129(a)(3) requires for confirmation. *In re Hao*, 644 B.R. 339, 348. (Bankr. E.D. Va. 2022).

10. The “feasibility” requirement of § 1129(a)(11)*

SBRA Guide § VIII(B)(5) discusses feasibility issues under § 1191(c)(3), applicable in connection with cramdown confirmation under § 1191(b).

Section 1129(a)(11) also imposes a feasibility requirement by providing that confirmation “is not likely to be followed by the liquidation, or the need for further reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.”

Several courts have addressed feasibility under § 1129(a)(11) in subchapter V cases.

In *Hamilton v. Curiel (In re Curiel)*, 651 B.R. 548 (B.A.P. 9th Cir. 2023), *appeal dismissed*, 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023), the bankruptcy court had confirmed the debtor’s plan over the objection of a secured creditor that the plan was not feasible. Concluding that the debtor had not established feasibility under the requirement of § 1129(a)(11), the BAP remanded for further proceedings.

In the course of its opinion, the court summarized the feasibility standard as follows, *id.* at 562-63:

It is [the debtor’s] burden, as the Plan proponent, to present concrete evidence to establish that she has sufficient cash flow to maintain her ongoing personal expenses while funding all Plan payments. *See In re Pizza of Haw., Inc.*, 761 F.2d 1374, 1382 [(9th Cir. 1985)]; 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2023). And while feasibility under § 1129(a) presents a relatively low threshold, it still depends on adequate evidence. *Legal Serv. Bureau, Inc. v. Orange Cnty. Bail Bonds, Inc.*, (*In re Orange Cnty. Bail Bonds, Inc.*), 638 B.R. 137, 148 (9th Cir. BAP 2022) (citing *In re Brothy*, 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003)). To this end, “[f]actual support must be shown for the Debtor’s projections.” *In re Hobble-Diamond Cattle Co.*, 89 B.R. 856, 858 (Bankr. D. Mont. 1988). “The use of the word ‘likely’ in Section 1129(a)(11) requires the Court to assess whether the plan offers a reasonable ‘probability of success, rather than a mere possibility.’ ” *In re Sanam Conyers Lodging, LLC*, 619 B.R. 784, 789 (Bankr. N.D. Ga. 2020) (quoting *In re Aspen Vill. at Lost Mountain Memory Care, LLC*, 609 B.R. 536, 543 (Bankr. N.D. Ga. 2019)).

Thus, “[t]he mere fact that the bare numbers in the income and expense projections provided in the plan demonstrate an apparent surplus to adequately fund the plan is not enough to meet the burden on feasibility.” *In re Kowalzyk*, 2006 WL 3032145, at *5 (Bankr. D. Minn. 2006).

The court concluded that the debtor had not met her burden, *id.* at 565-66:

We agree with the bankruptcy court that if one were to accept [the debtor's] projected income and expenses, feasibility would be a very close question. We also understand that we must give due deference to the bankruptcy court's findings. *See Cardenas v. Shannon (In re Shannon)*, 553 B.R. 380, 387 (9th Cir. BAP 2016). But “sheer optimism and hopefulness, without more, is not sufficient to support a finding of feasibility.” *In re Om Shivai, Inc.*, 447 B.R. 459, 463 (Bankr. D. S.C. 2011); *see also In re Walker*, 165 B.R. 994, 1004 (E.D. Va. 1994) (“sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are visionary promises” (cleaned up)). [The debtor's monthly operating reports] undermine her projections. They similarly undermine the bankruptcy court's inference based on the projections that Curiel's income was reasonably sufficient to support performance of her Plan. Her calculations suggest that if everything were to go as projected, she initially would have just enough to perform her Plan obligations. However, her monthly reporting cannot be reconciled with the projections or the bankruptcy court's feasibility findings. More specifically, there is no reliable, concrete evidence to support that [her business venture] will be able to fund the necessary income—that [the debtor] will be able to contribute \$4,500 in gross monthly income from her wages and receive \$3,000 from [a third party]. *See In re Aurora Memory Care, LLC*, 589 B.R. [631,] 642 [(Bankr. N.D. Ill. 2018)] (“Optimistic but hollow declarations from a debtor's principal about hopes for funding do not do the job.” (cleaned up)).

The debtor in *In re Saturno Design, LLC*, 2023 WL 5962573 (Bankr. D. Or. 2023), sought cramdown confirmation of a plan that provided for interim monthly payments to the objecting secured creditor and a balloon payment in three years to be made through refinancing. Based on the testimony of the principal who had refinanced other businesses and the debtor's accountant, the court found that the plan was feasible and confirmed it.

The court noted that the feasibility requirement in § 1191(c)(3)(B)(i) (that the court find a “reasonable likelihood” that the debtor will make plan payments) is indistinguishable from the feasibility standard in § 1129(a), which the court defined as a “reasonable probability of success.” The court stated, *id.* at * 2 (footnotes in original renumbered):

The Ninth Circuit Bankruptcy Appellate Panel has held that, when a plan turns on sale or refinancing of collateral, satisfaction of the “reasonable probability” standard requires that the bankruptcy court “determine whether a sufficient refinancing or sale is

reasonably likely to occur”³⁰⁶ The BAP has also held that a debtor need not “prove that success is inevitable.”³⁰⁷

See also In re S-Tek 1, LLC, 2023 WL 2529729, at * 3 (Bankr. D.N.M. 2023) (discussing adequacy of financial projections in concluding that the plan was not feasible under § 1129(a)(11) or § 1191(c)(3)).

Based in part on testimony from officers of the objecting creditor and an accountant and forensic accountant who testified as experts in the areas of financial forensics, statistics, and business valuations, the court in *Who Dat?, Inc.*, 2024 WL 13337453 (Bankr. E.D. La. Mar. 27, 2024), concluded that the plan was not feasible and converted the case to chapter 7.

In re Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024), illustrates the obvious point that a principal’s escrow of cash in the amount of all payments due under the plan to unsecured creditors effectively resolves feasibility issues under § 1129(a)(11). The objecting creditor asserted that the plan was not feasible because it contemplated the liquidation of the debtor after completion of plan payments and that the debtor had failed to provide adequate financial projections to show that the debtor could operate after confirmation.

The court concluded that the later liquidation of the debtor did not affect its feasibility. The court noted that § 1129(a)(11) recognizes that some plans may result in liquidation. In any event, the court continued, “The feasibility requirement is about whether the plan can be completed as laid out, not about the long-term future of the business after bankruptcy.” *Id.* at 437.

With regard to the adequacy of financial projections, the court found that they were adequate and that, even if they were optimistic, the principal’s escrow of funds established feasibility. *Id.* at 437.

SBRA Guide § VIII(B)(5) discusses the bankruptcy court’s ruling in *In re Ellingsworth Residential Community Association, Inc.*, 2020 WL 6122645 (Bankr. M.D. Fla. 2020), that confirmed the plan of the homeowner’s association over the objection (among others) of a homeowner that it was not feasible because it depended on assessment of homeowners for funding. The Eleventh Circuit affirmed. *Guan v. Ellingsworth Residential Community Association, Inc.*, (*In re Ellingsworth Residential Community Association, Inc.*), 125 F.4th 1365 (11th Cir. 2025).

In re Cleary Packaging, LLC, 657 B.R. 780 (Bankr. D. Md. 2023), denied confirmation of a creditor’s plan in a traditional case that began as a subchapter V case³⁰⁸ because the plan did

³⁰⁶ *Hamilton v. Curiel (In re Curiel)*, 651 B.R. 548, 567 (9th Cir. B.A.P. 2023), *appeal dismissed*, 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023).

³⁰⁷ *Comput. Task Grp., Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003).

³⁰⁸ The debtor elected application of subchapter V upon the filing of its petition but amended the election so that the case proceeded as a traditional case after the Fourth Circuit ruled that the § 523(a) exceptions to discharge were applicable to a cramdown discharge in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022). *SBRA Guide* § X(C)(2) discusses the case in detail. *Update* § X(C)(2) discusses proceedings in the bankruptcy court after the Fourth Circuit’s decision.

not meet the requirements of paragraphs (a)(5) (dealing with postconfirmation management of the debtor) and (a)(11) (feasibility) of § 1129(a). The court noted the testimony of three key employees of the debtor that they would not continue to work for the debtor under the creditor's management.

With regard to postconfirmation management, the court concluded that the plan contained “no definite structure proposed or any plausible strategy to address potential employee and customer retention issues and other operational challenges that a reorganized Debtor under the Creditor's Plan might encounter.” *Id.* at *22. The court noted that the creditor's principal had testified about his hopes of what would happen to allow the debtor's business to continue under the creditor's plan, but the court found “no evidence of the details of that strategy or the likelihood of its success.” *Id.* The court ruled, therefore, that the creditor had not met its burden to establish feasibility of its plan under § 1129(a)(11).

In *In re Absolute Dimensions, LLC*, 2026 WL 93834 (Bankr. D. Kan. 2026), the debtor amended its timely filed plan some 16 months after the filing of its petition. During the postconfirmation period, the debtor's business rarely had positive cash flow, and it failed to timely pay all of its postpetition obligations (primarily rent and postpetition taxes). Nevertheless, the debtor was able to make agreements with parties that postponed the court's consideration of issues in the case, and creditors in all voting classes accepted the plan.

The U.S. Trustee, however, objected to confirmation on the ground that the plan was not feasible in view of the consistent negative income during the postpetition period, unpaid postpetition debt, and negative monthly cash flow projections for several months after confirmation.

After an evidentiary hearing, the court found that the debtor's business was improving, that it anticipated new business that would increase its cash flow, that its projections were conservative, that the liquidation of collateral would reduce the monthly payment to the secured lender, and that variable costs were likely to decrease. Accordingly, the court concluded that confirmation was not likely to be followed by liquidation of the debtor or a need for further financial reorganization and confirmed the plan.

11. Compliance with provisions of the Bankruptcy Code (§ 1129(a)(2))*

In *In re Cesaretti*, 2023 WL 3676888 (Bankr. D. Nev. 2023), the debtor had paid prepetition credit card and tax debts without court approval. The court concluded that the unauthorized postpetition payment of prepetition debt violated § 363 and that the violation of this provision of the Bankruptcy Code precluded confirmation under § 1129(a)(2). The court also concluded that the plan was not confirmable for several other reasons. The court did not address whether the payments, made from postpetition earnings, did not violate § 363 because an individual's postpetition earnings are not property of the estate. *See SBRA Guide* § XI(B)(2).

12. Postconfirmation management (§ 1129(a)(5))*

The confirmation requirement in § 1129(a)(5) requires the plan to disclose the identities of directors and officers and that their appointment to, or continuance in, office is “consistent with the interests of creditors and equity security holders and with public policy.”

This requirement rarely receives much attention in confirmation disputes, but two cases have addressed the issue.

In *In re Channel Clarity Holdings, LLC*, 2022 WL 3710602, at * 11-12 (Bankr. N.D. Ill. 2022), the court noted concerns about the lack of a “defined management structure” for the debtor that involved someone other than the principal, who was also the majority shareholder. The debtor’s management structure lacked someone “who can hold him accountable” in light of the principal’s conduct in securing preferred member majority status, his conflicts of interest as the principal of affiliates doing business with the debtor, a number of high-level vacancies, and the fact that the debtor might not have anyone in charge of accounting functions.

The court noted that the subchapter V trustee had made proposals for management that involved appointment of a plan administrator with authority ranging from full control over all debtor bank accounts and sole signing authority to no signing authority but responsibility for making disbursements. *Id.* at *12.

The court concluded that the debtor continuing its operation with only the principal in charge was inconsistent with the interests of creditors and equity security holders and public policy, stating, *id.* at *12:

No evidence was presented at the hearing as to the propriety or legality of one proposal over another. The Court encourages Debtor to explore them all with the Objecting Parties and the SBRA Trustee in hopes of identifying an acceptable solution to allay the Court’s legitimate concerns about Debtor putting all its eggs in [the principal’s] basket at a time when he will be dealing with other pressing obligations. But to be clear, to satisfy section 1129(a)(5), any amended plan will need to specifically address Debtor’s management structure, including but not limited to [the principal’s] potentially conflicting roles and the provision of accounting services and financial controls.

In re Cleary Packaging, LLC, 657 B.R. 780 (Bankr. D. Md. 2023), began as a subchapter V case, but the debtor amended its subchapter V election so that the case proceeded as a traditional case after the Fourth Circuit ruled that the § 523(a) exceptions to discharge were applicable to a cramdown discharge.³⁰⁹ Section X(C)(2) of this Update discusses proceedings in the bankruptcy court after the Fourth Circuit’s decision.

The debtor and the judgment creditor that had brought the dischargeability action filed competing plans. The judgment creditor voted to accept its plan and to reject the debtor’s; three unsecured creditors voted to reject the creditor’s plan and to accept the debtor’s. The court denied confirmation of both plans.

The court concluded that the creditor’s plan did not meet the requirements of paragraphs (a)(5) (dealing with postconfirmation management of the debtor) and (a)(11) (feasibility) of

³⁰⁹ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509 (4th Cir. 2022). *SBRA Guide* § X(C)(2) discusses the case in detail.

§ 1129(a). The court noted the testimony of three key employees of the debtor that they would not continue to work for the debtor under the creditor’s management.

With regard to postconfirmation management, the court concluded that the plan contained “no definite structure proposed or any plausible strategy to address potential employee and customer retention issues and other operational challenges that a reorganized Debtor under the Creditor’s Plan might encounter.” *Id.* at *22. The court noted that the creditor’s principal had testified about his hopes for the debtor’s business to continue under the creditor’s plan, but the court found “no evidence of the details of that strategy or the likelihood of its success.” *Id.* The court ruled, therefore, that the creditor had failed to meet its burden to establish feasibility under § 1129(a)(11).

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

1. The § 1111(b)(2) election*

Undersecured creditors in traditional chapter 11 cases are reluctant to make the § 1111(b) election for strategic reasons. Subchapter V eliminates the strategic advantages that an undersecured creditor may have if it does not make the election. For a discussion of the issues, see Paul W. Bonapfel, *To 1111(B) or Not to 1111(B): Whether ‘Tis Nobler to Elect in Subchapter V Cases*, 34 No. 2 NORTON JOURNAL OF BANKR. LAW AND PRACTICE, Art. 2 (May 2025) [Westlaw: 34 No. 2 JBKRLP-NL Art. 2].

In *In re Joiner*, 2025 WL 281053 (Bankr. W.D.N.C. 2025), the court held that the provisions in § 1190(3) that permit a subchapter V plan to modify a claim secured by a principal residence under certain circumstances³¹⁰ do not prevent a secured creditor from making the § 1111(b) election.

2. Realization of the “indubitable equivalent” of a secured claim – § 1129(b)(2)(A)(iii)

F. Illustrative Confirmation Orders*

A number of confirmation orders have been reported that do not resolve objections but address confirmation requirements. Some include other provisions (such as releases and exculpations). *In re PM Management – Kileen I NC LLC*, 2024 WL 1882915 (Bankr. N.D. Tex. 2024) (Plan providing for appointment of liquidation trustee selected in consultation with U.S. Trustee and subchapter V trustee, appointment of liquidation committee to supervise, vesting of all causes of action of debtors and estates in liquidation trustee; plan and Liquidation Trust Agreement attached to order); *In re Gilbert*, 2023 WL 5123245 (Bankr. D. Utah 2023) (consensual confirmation; all impaired classes have accepted or did not vote or object to confirmation); *In re Raspberry Creek Fabrics, LLC*, 2023 WL 8606662 (Bankr. D. Utah. 2023) (same); *In re Little Road Co., LLC*, 2023 WL 7008981 (D. Utah 2023) (same); *In re KW Excavation, Inc.*, 2023 WL 7381529 (Bankr. D. Utah (same) *In re Gage’s Granite LLC*, 2023 WL 5422253 (Bankr. N.D. Tex. 2023) (consensual confirmation); *In re Mulvadi Corp.*, 2023 WL 6798625 (Bankr. D. Hawaii 2023) (cramdown confirmation); *In re Matthews*, 2023 WL 6280219 (Bankr. E.D. Wash. 2023); *In re ATH Sports Nutrition, LLC*, 2023 WL 6284544 (Bankr.

³¹⁰ *SBRA Guide* § VIII(E)(1) discusses § 1111(b).

D. Haw. 2023). *In re Bitter Creek Water Supply Corp.*, 2023 WL 2962206 (Bankr. N.D. Tex. 2023) (consensual plan confirmation; order provides that, if case is converted, all property will automatically vest in chapter 7 estate); *In re Jess Hall's Serendipity, LLC*, 2023 WL 3635068 (Bankr. N.D. Tex. 2023) (consensual plan confirmation order including provisions for third party releases and approval of insider settlement); *In re SRAK Corp.*, 2023 WL 2589252 (Bankr. N.D. Tex. 2023) (consensual confirmation); *In re Associated Fixture Manufacturing, Inc.*, 2023 WL 1931301 (Bankr. D. Utah 2023) (consensual confirmation); *In re Higgins AG, LLC*, 2023 WL 3745100 (Bankr. N.D. Tex. 2023) (consensual plan confirmation; includes provisions for third party releases); *In re iVidex*, 2022 WL 5264710 (Bankr. W.D.N.Y. 2022) (cramdown confirmation; trustee to make payments); *In re ActiTech, L.P.*, 2022 WL 6271936 (Bankr. N.D. Tex. 2022) (plan attached to order; order provides for approval of settlement, releases, and exculpation); *In re North Richland Hills Alamo, LLC*, 2022 WL 2975121 (Bankr. N.D. Tex. 2022); *In re Logistics Giving Resources, LLC*, 2022 WL 2760126 (Bankr. D. Utah 2022).

Some confirmation orders appear to confirm plans with provisions that are inconsistent with statutory requirements.

Section 1193(b) does not permit modification of a plan after consensual confirmation under § 1191(a) once “substantial consummation” has occurred. In *In re North Richland Hills Alamo, LLC*, 2022 WL 2975121 (Bankr. N.D. Tex. 2022), all impaired classes accepted the plan, *id.* at *9, and the debtor received a discharge upon the plan’s effective date because the plan was confirmed under § 1191(a), *id.* at 15. Nevertheless, the confirmation order permitted postconfirmation modification at any time within the “Commitment Period,” *id.* at 15.

If cramdown confirmation occurs under § 1191(b): (1) property of the estate includes postpetition assets and earnings, § 1186(a); and (2) the subchapter V trustee remains in place until completion of PDI payments. In *In re ActiTech, L.P.*, 2022 WL 6271936 (Bankr. N.D. Tex. 2022), the court confirmed the plan under § 1191(b) because all impaired classes did not accept it. *Id.* at *3. Nevertheless, the confirmation order provided for (1) the revesting of property in the reorganized debtor, *id.* at *9; and (2) termination of the trustee’s services as of the effective date of the plan, *id.* at *14, which under the plan occurred upon entry of a final confirmation order, certain governmental and material third-party approvals, execution of required documents, and approval of settlements. *Id.* at *22, 42-43.

See also *In re Smallhold, Inc.*, 2025 WL 2395029 at * 8-9 (Bankr. D. Del. 2025) (In dealing with jurisdictional issues after confirmation of a cramdown plan under § 1191(b), the court noted that the confirmation order provided for vesting of all property of the estate in the debtor pursuant to § 1141. Thus, arguments based on the property of the estate remaining in the estate under § 1186 did “little to advance the debtor’s position,” and the confirmation order’s provisions were “effectively the end of that matter.” *Id.* at *9.); *In re Bronson*, 2022 WL 3637566, at *2 (Bankr. D. Or. 2022) (In resolving postconfirmation issues, the court noted that the plan confirmed under § 1191(b) had revested all property “except property required to perform obligations under the Plan” in the reorganized debtor.).

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

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

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

Plans or confirmation orders in cramdown situations often provide for the debtor, rather than the trustee, to make payments to creditors, as § 1194(b) permits.

Section IX(D) of this Update discusses termination of the trustee's services after substantial consummation of the plan and entry of a final decree in these circumstances.

C. Unclaimed Funds

D. Termination of Trustee's Service, Final Decree, and Closing of Case After Cramdown Confirmation When Debtor Makes Plan Payments*

As *SBRA Guide* § IV(D)(1) discusses, the time for termination of the trustee's service depends on whether the court confirms a consensual plan under §1191(a) or a cramdown plan under § 1191(b), when one or more impaired classes of creditors have not accepted it.

When the court confirms a consensual plan under §1191(a), the trustee's service terminates under § 1183(c)(1) upon substantial consummation,³¹¹ which ordinarily occurs when distribution commences.

Subchapter V does not specify a termination date for the trustee's service when confirmation of a plan occurs under the cramdown provisions of §1191(b). The statute contemplates that the trustee continue to serve and make payments under the plan as §1194(b) ordinarily requires. Thus, the appropriate time for termination of the trustee's service is when the debtor has completed the required payments. See *SBRA Guide* § IX(B).

Section 1194(b) permits the debtor, rather than the trustee, to make plan payments if the plan or order confirming the plan so provides. See *SBRA Guide* § IX(B). The practice is common because, in many cases, no one, including the subchapter V trustee, wants the added expense of paying the trustee for making distributions.

Four bankruptcy courts have concluded that, when the debtor will make payments under a plan after cramdown confirmation, the court may order the termination of the subchapter V trustee's service upon substantial consummation of the plan and the trustee's filing of a final report shortly after substantial consummation.

In *In re DynoTec Industries, Inc.*, 2024 WL 2003065 (Bankr. D. Minn. 2024), the court confirmed a liquidation plan for the debtor under the cramdown provisions of § 1191(b). After confirmation, the subchapter V trustee sought compensation for postconfirmation services in connection with the collection of accounts receivable and sought to "surcharge" the final plan

³¹¹ Section 1101(2) defines "substantial consummation." *SBRA Guide* § VIII(C)(1) at 161-64 discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

payment due to the creditor secured by the accounts. After ruling that the trustee was not entitled to compensation because he had no duties to perform after confirmation and because the application was time-barred under the terms of the confirmation order, *id.* at 2-3, the court addressed termination of the subchapter V trustee's services.

The court summarized subchapter V's provisions for termination of a subchapter V trustee's services, *id.* at 3 (footnote omitted):

If the Plan in this case had been confirmed under § 1191(a), the Trustee's appointment would have terminated automatically, by operation of law, upon substantial consummation. 11 U.S.C. § 1183(c)(1). Termination is more fluid when a plan is confirmed under § 1191(b). For nonconsensual plans, the "default" role of the trustee is to administer all plan payments for the life of the plan. 11 U.S.C. § 1194(b). The plan commitment period in a nonconsensual plan can vary from 3 to 5 years, due to the rule of construction set forth in § 1191(c). Alternatively, a debtor can opt out of the default and administer its own plan payments after confirmation. 11 U.S.C. § 1194(b). It is quickly apparent why the Code does not include a parallel provision for cases confirmed under § 1191(b): a trustee could have a duty to handle plan payments for 3 years, 5 years, or not at all, depending on the specific terms of the plan and confirmation order in each nonconsensual case.

This is not a drafting error. Flexibility improves success rates in small business cases. A contentious case may justify the ongoing administrative expense of maintaining the trustee's appointment for the entire plan commitment period. By contrast, some Subchapter V cases are confirmed under § 1191(b) solely due to the "apathetic creditor problem." Apathetic creditors do not warrant the expense of a trustee for the entire post-confirmation period. Similarly, a cash-strapped debtor may want to administer its own plan payments because it is an inexpensive option permitted by § 1194(b). To eliminate administrative expense entirely, frugal debtors can request a confirmation order that terminates the Trustee's appointment upon substantial consummation of their nonconsensual plan. And, there is scant risk to doing so. The Code permits trustees to be re-appointed in consensual cases, notwithstanding the automatic termination described in § 1183(c) (1). A fortiori, a trustee who is terminated after substantial consummation of a nonconsensual plan can also be reappointed, or the U.S. Trustee can serve as trustee, "as necessary," per § 1183(a). Alternatively, the debtor can reduce the scope of the trustee's post-confirmation duties without actually terminating its appointment, thereby reducing post-confirmation expense. Ultimately, a trustee's role should be "right sized" to suit the needs of each case.

The court speculated that, because the confirmation order "all but eliminated" the trustee's role after confirmation, the trustee's services should have been terminated upon substantial consummation of the plan. *Id.* at 3. The court then ordered termination of the trustee's services because he had filed a final report and had no further duties in the case, subject to reappointment if needed. *Id.*

The court in *In re Florist Atlanta, Inc.*, 2024 WL 3714512 (Bankr. N.D. Ga. 2024), applied the approach of *DynoTec* to terminate the services of the subchapter V trustee upon substantial consummation of a cramdown plan providing for the debtor to make plan payments and the trustee's filing of a final report within 14 days thereafter.

The court observed that, when the debtor made its first payment under the plan, substantial consummation would occur and that, thereafter, the subchapter V trustee would have only four duties: (1) the filing of a final report and account of the administration of the estate; (2) the filing of postconfirmation reports as the court orders; (3) appearance at any hearing concerning postconfirmation modification or sale of property of the estate; and (4) the performance of certain duties if the court removed the debtor from possession. *Id.* at *2.

The confirmed plan did not contemplate that the trustee perform any duties after its substantial consummation, and no one had requested that the trustee file postconfirmation reports. Thus, the court reasoned, *id.* at *2:

Because the Debtor will make plan payments in this case, the Subchapter V Trustee will have nothing to do after filing the final report, subject to the possible occurrence of future events that would require trustee services.

The court then considered whether, in these circumstances, it was appropriate to terminate the subchapter V trustee's services upon substantial consummation and the filing of the trustee's final report. The court concluded that it was. The court explained, *id.* at *3:

Section 1183(c)(1) of the Bankruptcy Code provides for termination of the service of a subchapter V trustee upon substantial consummation of a consensual plan confirmed under § 1191(a). Subchapter V has no provision for termination of a subchapter V trustee's services after cramdown confirmation under § 1191(b). But nothing in subchapter V limits the court's authority to similarly terminate the services of a trustee upon substantial consummation of a cramdown plan confirmed under § 1191(b) when a subchapter V trustee will not be making payments to creditors and will have no postconfirmation duties to perform. None of the parties at the confirmation hearing objected to such termination of the Subchapter V Trustee's services in this case.

In these circumstances, it is appropriate for the Court to order the termination of the services of the Subchapter V Trustee upon substantial consummation of the plan (which will occur when the debtor commences plan payments) and the filing of the Subchapter V Trustee's final report. *See In re DynoTec Industries, Inc.*, 2024 WL 2003065 (Bankr. D. Minn. 2024).

The *Florist Atlanta* court recognized that the subchapter V trustee's services would be necessary if the debtor sought postconfirmation modification of the plan, wanted to sell property of the estate, or was removed from possession. Accordingly, the court ordered that the termination of the trustee's services be without prejudice to the reappointment of a subchapter V trustee if any of these events occurred. 2024 WL 3714152 at * 3.

The debtors in *In re Lager*, 2024 WL 3928157 (Bankr. N.D. Tex. 2024), sought entry of a final decree after substantial consummation of a cramdown plan providing for the debtor to make plan payments and resolution of the subchapter V trustee's compensation. Bankruptcy Rule 3022 provides for entry of a final decree "after an estate has been fully administered."

The court noted that the Advisory Committee Note to Bankruptcy Rule 3022 identifies the factors a court should consider in determining whether an estate has been administered:

- (1) whether the order confirming the plan has become final;
- (2) whether deposits required by the plan have been distributed;
- (3) whether the property proposed by the plan to be transferred has been transferred;
- (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan;
- (5) whether payments under the plan have commenced; and
- (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

The *Lager* court explained that the first and sixth factors were satisfied because a confirmation order had become final, and nothing was pending before the court; the second factor did not apply because the plan did not require any deposits. All the remaining factors, the court noted, related to the occurrence of substantial consummation of the plan. *Id.* at *9.

Because substantial consummation had occurred upon the commencement of payments, the court concluded that the case had been fully administered under a traditional analysis. *Id.* at *10.

The subchapter V trustee, however, objected to entry of a final decree because she still had duties to fulfill under the Bankruptcy Code, primarily the duty to file a final report as § 1183(b)(1) (incorporating § 704(a)(9)) requires. In the circumstances of the case, however, the court concluded that it was appropriate to order the termination of the trustee's services after substantial consummation. *Id.* at * 10.

The court reasoned that, if the need for the trustee's services other than the filing of a final report arose, the case could be reopened, and the trustee could be reappointed. Further, the court continued, because the trustee had not administered any assets and was not responsible for making plan payments, leaving the case open for the filing of a final report was not sufficient cause for keeping the case open. *Id.* at *11.

The court nevertheless concluded that entry of a final decree would be inappropriate because the debtor intended to reopen it after completion of plan payments to obtain a discharge.

A logical alternative, the court concluded, was to administratively close the case, subject to reopening when the case is ripe for discharge.

The court, therefore, ordered that the trustee file a final report within 14 days and that the case be administratively closed after payment of the trustee's compensation for postpetition services, subject to reopening after completion of plan payments in order for the debtors to request a final decree, a discharge order, and the trustee's filing of a final report. *Id.* at * 12.

Although *Florist Atlanta* and *Lager* have the same practical result – effective termination of the trustee's services upon substantial consummation of a cramdown plan where the debtor makes plan payments – they employ different procedures.

The *Florist Atlanta* court terminated the trustee's services but did not address closing of the case. The *Lager* court administratively closed the case, subject to reopening, but did not terminate the trustee's services. Although the *Lager* court stated that termination of the trustee's services would be appropriate, its order provided for the trustee to file a final report in connection with reopening of the case for entry of a final decree and for discharge of the trustee upon completion of plan payments.

The court in *In re Carolina Sleep Shoppe*, 2025 WL 1122411 (Bankr. E.D.N.C. 2025), entered a final decree and closed the case after cramdown confirmation upon substantial consummation where the plan provided for the debtor to make payments under the plan and the confirmation order provided for termination of services of the subchapter V trustee upon substantial consummation.

The court concluded that the provision of the confirmation order discharged the trustee upon substantial consummation and that the case had been fully administered under the factors in the Advisory Committee Note to Bankruptcy Rule 3022, discussed above. Section 350(a) states, "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." Similarly, Bankruptcy Rule 3022 instructs, "After the estate is fully administered in a Chapter 11 case, the court must, on its own or on a party in interest's motion, enter a final decree closing the case." Accordingly, the court ruled, section 350(a) and Bankruptcy Rule 3022 required it to enter a final decree and close the case.

The *Carolina Sleep Shoppe* court addressed two procedural matters. First, the court directed the subchapter V trustee to file a report of no distribution as a simple docket entry to inform the court and parties of the discharge of the trustee. Second, the court noted that the appropriate way to request to close the case is through a motion rather than including such a request in a final report. 2025 WL 1122411 at *9.

Although *Florist Atlanta*, *Lager*, and *Carolina Sleep Shoppe* have the same practical result – effective termination of the trustee's services upon substantial consummation of a cramdown plan where the debtor makes plan payments – they employ different approaches to closing of the case.

The *Florist Atlanta* court terminated the trustee's services but did not address closing of the case. The *Lager* court administratively closed the case, subject to reopening, but did not terminate the trustee's services. Although the *Lager* court stated that termination of the trustee's services would be appropriate, its order provided for the trustee to file a final report in connection with the reopening of the case for entry of a final decree and for discharge of the trustee upon completion of plan payments. In *Carolina Sleep Shoppe*, the court closed the case.

X. Discharge*

In *In re Lucido*, 655 B.R. 355 (Bankr. N.D. Cal. 2023), a creditor objected to the subchapter V discharge of an individual who had proposed a liquidating plan. In a traditional chapter 11 case, § 1141(d)(3) provides for denial of discharge upon confirmation of a plan providing for the liquidation of all or substantially all the debtor's assets if the debtor does not engage in business after confirmation.

The court stated that § 1141(d)(3) could deprive the debtor of a discharge regardless of whether consensual or cramdown confirmation occurred. The court concluded, however, that the provision was not applicable because the evidence showed that the debtor would have income from employment, consulting, and Social Security benefits after confirmation. The court ruled that the debtor's business after confirmation did not have to be the same as the debtor's prepetition business and that income from engaging in business did not have to be sole source of funds for a debtor to be engaged in business in order to be engaged in business for purposes of § 1141(d)(3).

It is uncertain whether § 1141(d)(3) applies after cramdown confirmation. See 8 COLLIER ON BANKRUPTCY ¶ 1192.03[3].

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

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

Section 1192 provides for a discharge after cramdown confirmation under § 1191(b) "as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix." In *In re Hishaw*, 2026 WL 1640815 (Bankr. W.D. La. 2026), the debtor's plan provided for payments for five years and for entry of discharge after payments for three years. On objection of the United States Trustee, the court required the debtor to amend the plan to provide for discharge until the end of the five year period. *Id.* at *7

C. Exceptions to Discharge in Subchapter V Cases

1. Exceptions to discharge after consensual confirmation*

The exceptions to discharge in § 523(a) do not apply to the discharge that an entity receives under § 1141(d). This is the discharge that a debtor receives in a subchapter V case after confirmation of a consensual plan. In dismissing a complaint to determine dischargeability of a debt of a corporation in a traditional chapter 11 case, the court in *Cota Yellow Brick Road, LLC v. 741, Inc., d/b/a Wisdom Rides of America 741, Inc.*, (*In re 741 !nc., d/b/a Wisdom Rides of*

America), 2026 WL 1166913 (Bankr. D. Colo. 2026), the court collected authorities and extensively discussed the issue.

2. Exceptions to discharge after cramdown confirmation

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

In *Agra v. Dolci (In re Major Model Management Inc.)*, 2023 WL 5338580 at *7 (Bankr. S.D.N.Y. 2023), *aff'd* 2024 WL 3442964 (S.D.N.Y. 2024), the court ruled that it need not consider the creditor's request for determination that its debt was excepted from discharge after confirmation of a cramdown plan because the creditor had not filed a timely proof of claim. Because the creditor had not filed a timely proof of claim, the court reasoned that the creditor was barred from asserting any prepetition claim against the debtor and thus had no debt to be discharged. The ruling seems inconsistent with the principle that disallowance of a claim is a separate matter from dischargeability.³¹²

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

1. Statutory language and background

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

In a subchapter V case, consensual confirmation under § 1191(a) results in a discharge under § 1141(d)(1). A corporation's discharge under § 1141(d)(1) after consensual confirmation is not subject to the § 523(a) exceptions.³¹³ When confirmation occurs under the cramdown provisions of § 1191(b), however, § 1141(d) does not apply. § 1181(c). Instead, § 1192 governs the discharge.

Section 1192(2) provides that the discharge does not discharge any debt "of the kind" specified in § 523(a). Section 523(a) provides that a discharge under § 1192 does not discharge an *individual* debtor from the 21 categories of debt § 523(a) lists.

SBRA Guide § X(D)(2) discusses whether the § 523(a) exceptions apply to the discharge under § 1192 of an entity after cramdown confirmation under § 1191(b). It explains the

³¹² See, e.g., *State of Florida Dept. of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073, 1090 (11th Cir. 2011); *Grynberg v. United States (In re Grynberg)*, 986 F.2d 367, 370-71 (10th Cir. 1993).

³¹³ *Halo Human Resources, LLC v. American Dental of LaGrange (In re American Dental of LaGrange)*, 2025 WL 384536 (Bankr. M.D. Ga. 2025); *Autotech Technologies, LP v. Palmer Drives Controls and Systems, Inc. (In re Palmer Drives Controls and Systems, Inc.)*, 657 B.R. 650 (Bankr. D. Col. 2024); *Sun City Truck Sales v. Tonka Int'l. Corp. (In re Tonka Int'l. Corp.)*, 2020 WL 13881425 (Bankr. E.D. Tex. 2020).

In *Halo Human Resources, LLC v. American Dental of LaGrange (In re American Dental of LaGrange)*, 2025 WL 384536 (Bankr. M.D. Ga. 2025), a creditor filed a complaint to except its debt from discharge and objected to confirmation of the debtor's plan. A stipulation between the debtor and creditor resolved the objection to confirmation, and the court confirmed the plan under § 1191(a). The stipulation provided that the withdrawal of the objection to confirmation "shall not be construed as waiving any claims or defenses by either party" in the dischargeability action. *Id.* at *2 & n. 8. After confirmation, the debtor moved to dismiss the complaint for failure to state a claim on which relief could be granted on the same day the court entered the confirmation order. The court granted the motion to dismiss because § 523(a) exceptions do not apply to the discharge of a corporation under § 1141(d), which is the discharge a debtor receives in a subchapter V case upon confirmation of a plan under § 1191(a). *Id.* at * 6-7.

decisions of bankruptcy courts that had concluded that the exceptions do not apply³¹⁴ and the Fourth Circuit's opinion in *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), ruling that the exceptions are applicable.

Six more bankruptcy courts³¹⁵ and the Bankruptcy Appellate Panel for the Ninth Circuit³¹⁶ have ruled that the § 523(a) exceptions do not apply to the discharge of an entity, rejecting the Fourth Circuit's interpretation. The Ninth Circuit dismissed the creditor's appeal from the BAP's decision at the request of the parties.³¹⁷

The Fifth Circuit in *Avion Funding, L.L.C. v. GFS Industries, L.L.C. (In re GFS Industries, L.L.C.)*, 99 F.4th 223 (5th Cir. 2024), and the Eleventh Circuit in *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, 142 F.4th 1323 (11th Cir. 2025), agreed with the Fourth Circuit's conclusion in *Cleary Packaging*. Three bankruptcy courts and one district court have also agreed with *Cleary Packaging's* textual analysis that the language of the

³¹⁴ Jennings v. Lapeer Aviation, Inc. (*In re LaPeer Aviation, Inc.*), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re Rtech Fabrications LLC*), 635 B.R. 559 (Bankr. D. Idaho 2021); Cantwell-Cleary Co. v. Cleary Packaging, LLC (*In re Cleary Packaging, LLC*), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc., Crabcake Factory USA (*In re Satellite Restaurants, Inc., Crabcake Factory USA*), 626 B.R. 871, 876 (Bankr. D. Md. 2021). Two bankruptcy courts have reached the opposite conclusion. *In re Duntov Motor Co., LLC*. Docket No. 21-40348-MXM-11, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021); Sun City Truck Sales v. Tonka Int'l. Corp. (*In re Tonka Int'l. Corp.*), 2020 WL 13881422 (Bankr. E.D. Tex. 2020) (denying motion to dismiss complaint to except debt from discharge). The court in *Duntov Motor Co.* later concluded that the creditor had not meet its burden of establishing nondischargeability. *In re Duntov Motor Company, LLC*, 2023 WL 8252914 at *29-31, n. 265 (Bankr. N.D. Tex. 2023). The court in *Tonka* later dismissed the complaint after confirmation of a consensual plan. *Sun City Truck Sales v. Tonka Int'l. Corp. (In re Tonka Int'l. Corp.)*, 2020 WL 13881425 (Bankr. E.D. Tex. 2020). Another bankruptcy court ruled that a judgment for patent infringement against a corporation in a subchapter V case was excepted from discharge under § 523(a)(6) as a willful and malicious injury without addressing whether § 523(a) exceptions apply to the discharge of a corporation or citing the applicable subchapter V discharge provision, 11 U.S.C. § 1192(2). *Concrete Log Systems, Inc. v. Better Than Logs, Inc. (In re Better Than Logs, Inc.)*, 631 B.R. 670, 688–89 (Bankr. D. Mont. 2021).

In Synergetic Oil Tools, Inc. v. Relevant Holdings LLC (In re Relevant Holdings, LLC), 2023 U.S. Dist. LEXIS 53042 (D. Colo. 2023), the bankruptcy court had denied the creditor's motion to extend the time to object to the dischargeability of its debt on the ground that no exceptions to discharge existed. The District Court reversed and remanded for further consideration in light of the Fourth Circuit's decision in *Cleary Packaging*.

³¹⁵ Spring v. Davidson (*In re Davidson*), 2025 WL 51126 (Bankr. N.D. Fla. 2025); Primary Investments Group, Inc., v. RA Custom Design, Inc. (*In re RA Custom Design, Inc.*), 2024 WL 607716 (Bankr. N.D. Ga. 2024); Chicago & Vicinity Laborers' District Pension Plan v. R & W Clark Construction, Inc. (*In re R & W Clark Construction, Inc.*), 656 B.R. 628 (Bankr. N.D. Ill.); *rev'd* 2024 WL 4789403 (N.D. Ill. 2024); BenShot, LLC v. 2 Monkey Trading, LLC (*In re 2 Monkey Trading, LLC*). 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, Eleventh Circuit Case No. 23-90009 (July 19, 2023), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023); Nutrien Ag Solutions v. Hall (*In re Hall*), 651 B.R. 62 (Bankr. M.D. Fla. 2023); Avion Funding LLC v. GFS Industries, LLC (*In re GFS Industries, LLC*), 647 B.R. 337 (Bankr. W.D. Tex. 2022), *rev'd*, 99 F.4th 223 (5th Cir. 2024).

³¹⁶ Lafferty v. Off-Spec Solutions, LLC (*In re Off-Spec Solutions, LLC*), 647 B.R. 337 (B.A.P. 9th Cir. 2023), notice of appeal filed, Ninth Circuit Case No. 23-60034 (July 20, 2023), appeal dismissed on stipulation of the parties, 2023 WL 9291577 (Nov. 2. 2023).

³¹⁷ Lafferty v. Off-Spec Solutions, LLC (*In re Off-Spec Solutions, LLC*), 651 B.R. 862 (B.A.P. 9th Cir. 2023), notice of appeal filed, Ninth Circuit Case No. 23-60034 (July 20, 2023), appeal dismissed on stipulation of the parties, 2023 WL 9291577 (Nov. 2. 2023).

statutes means that the § 523(a) exceptions apply to a corporate discharge after cramdown confirmation.³¹⁸

In addition to the text of the two statutes, the debate involves analysis of the context of the statutes, chapter 11 policy, and legislative history. For a detailed discussion of the reasons that support each of the competing interpretations and why the interpretation of the bankruptcy courts is the better one, see Paul W. Bonapfel and Robert Schaaf, *Do § 523(a) Exceptions to Discharge Apply to The Discharge of a Corporation in a Subchapter V Case After “Cramdown” Confirmation Under § 1191(b)?*, 32 No. 4 NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE Art.1 (Dec. 2023) [Westlaw: 32 No. 4 JBKRLP-NL Art. 1]. See also 8 COLLIER ON BANKRUPTCY ¶ 1192.03[2] (16th ed.); *SBRA Guide* § X(D)(2).

As earlier text notes, the Fourth Circuit in the *Cleary Packaging* case ruled that the discharge exceptions applied to the limited liability company that was the debtor in the case. An interesting epilogue is that, upon remand, the bankruptcy court eventually confirmed a consensual plan.

After the Fourth Circuit’s ruling, the debtor amended its subchapter V election to remove it and to proceed in a traditional chapter 11 case. The withdrawal of the election effectively mooted the dischargeability action because exceptions to the discharge of an entity do not exist in a traditional chapter 11 case.

The debtor and the creditor filed separate plans, and the bankruptcy court considered their confirmation in *In re Cleary Packaging, LLC*, 657 B.R. 780 (Bankr. D. Md. 2023).

The debtor’s plan provided for payment of its projected disposable income to creditors for five years, which would have resulted in an estimated 27 percent dividend to unsecured creditors, including the judgment creditor. The plan proposed that the owner retain the ownership interest and that the principal contribute \$ 25,000 in cash, waive his prepetition claims of \$ 49,000 (some of which were entitled to priority), and waive an administrative claim for a postpetition loan of \$ 35,000.

The creditor’s plan proposed to acquire all equity interests in the debtor for \$ 250,000, for operation of the business under the creditor’s ownership, and for additional payments to unsecured creditors (including its claim) for nine years. It also proposed to preserve and pursue avoidance actions that the debtor would not pursue under the debtor’s plan. The plan subordinated payment on the creditor’s claim to the claims of other unsecured creditors. Unsecured creditors would receive a greater percentage of their claims under the creditor’s plan.

The judgment creditor and three general unsecured creditors voted on each plan. The judgment creditor, whose claim was separately classified in the debtor’s plan, rejected the

³¹⁸ Chicago & Vicinity Laborers’ District Pension Plan v. R & W Clark Construction, Inc. (*In re R & W Clark Construction, Inc.*), 2024 WL 4789403 (N.D. Ill. 2024); *rev’g* 656 B.R. 628 (Bankr. N.D. Ill. 2024); Marmic Fire & Safety Co., Inc. v ETG Fire, LLC (*In re ETG Fire, LLC*), 2025 WL 915381 (Bankr. D. Co. 2025); Christopher Glass & Aluminum, Inc. v. Premier Glass Services, LLC (*In re Premier Glass Services, LLC*), 2024 WL 3808696 (Bankr. N.D. Ill. 2024); Ivanov v. Van’s Aircraft, Inc. (*In re Van’s Aircraft, Inc.*), 2024 WL 2947601 (Bankr. D. Ore. 2024).

debtor's plan. The other creditors accepted it. The judgment creditor accepted its plan, but the other three creditors rejected it.

The court denied confirmation of both plans. The court concluded that the contribution of the principal did not satisfy the "new value" exception to the absolute priority rule, which applied in view of the judgment creditor's rejection of the plan.

The court concluded that the creditor's plan did not meet the requirements of paragraphs (a)(5) (dealing with postconfirmation management of the debtor) and (a)(11) (feasibility) of § 1129(a). The court noted the testimony of three key employees of the debtor that they would not continue to work for the debtor under the creditor's management.

With regard to postconfirmation management, the court concluded that the plan contained "no definite structure proposed or any plausible strategy to address potential employee and customer retention issues and other operational challenges that a reorganized Debtor under the Creditor's Plan might encounter." *Id.* at *22. The court noted that the creditor's principal had testified about his hopes of what would happen to allow the debtor's business to continue under the creditor's plan, but the court found "no evidence of the details of that strategy or the likelihood of its success." *Id.* The court ruled, therefore, that the creditor had failed to meet its burden to establish feasibility under § 1129(a)(11).

The court later confirmed a consensual plan of reorganization.

E. Attorney's Fees of Debtor's Counsel for Dischargeability Litigation*

An individual may face claims from one or more creditors that certain debts are excepted from discharge under § 523(a). A corporation (or other entity) has the same problem if cramdown consensual confirmation occurs and the court applies the interpretation of the cramdown discharge provisions in § 1192(2) that the § 523(a) exceptions apply to its discharge.³¹⁹

When a lawyer defends dischargeability litigation, a question is whether the services are on behalf of the *debtor in possession* rather than the *debtor*. Put another way, the question is whether the services benefit the *estate*.

The answer is important for two reasons.

The first is whether the fees are allowable as an administrative expense, payable by the estate. As § V(E) of this Update explains, § 330(a) provides for compensation of a lawyer for the debtor in possession and does not permit compensation of the debtor's lawyer. Moreover, § 330(a)(4)(A)(ii) prohibits allowance of compensation for services that are not "reasonably likely to benefit the estate" or "necessary in the administration of the case" (except for services of counsel for a chapter 13 debtor or an individual chapter 12 debtor).

The second is whether the fees are a permissible deduction for purposes of the projected disposable income test in § 1191(c)(2). Permissible deductions from disposable income under

³¹⁹ See *SBRA Guide* § X(D)(2).

§ 1191(d) are reasonably necessary expenditures for “the maintenance or support of the debtor or a dependent of the debtor”³²⁰ or for “the payment of expenditures necessary for the continuation, preservation, or operation of the debtor.”

*In re Schlomer*³²¹ considers the first issue. The court had approved the retention of special counsel to represent the individual debtor in dischargeability litigation in a traditional chapter 11 case. In this opinion, the court scheduled a hearing *sua sponte* on whether to reconsider the retention order to “clarify that [the lawyer] need not and does not represent the interests of the bankruptcy estate but rather the debtor personally and, accordingly, that [the lawyer] need neither be retained under section 327 nor have its compensation governed by sections 328 or 330.”³²²

Noting the distinction between the debtor and debtor in possession in an individual chapter 11 case, the court stated the general rule that “if the professional services do not benefit the estate, then they cannot be paid from estate assets.”³²³ The court cited cases in which other courts had ruled that a lawyer’s fees for services on behalf of the debtor personally did not benefit the estate.³²⁴

The court then turned to the retention and compensation of what it called counsel for the “actual debtor” in a chapter 11 case. The term is a useful one that refers to a debtor when the debtor’s personal interests, as opposed to the estate’s, are at stake and the debtor hires counsel for representation on the debtor’s own behalf.

The court explained how provisions of the Bankruptcy Code govern the retention and compensation of an “actual debtor’s” attorney.

Debtors have the right to “vigorously litigate any proceedings in which they are personally entangled”³²⁵ and may retain counsel to represent their personal interests. But because a debtor in possession has a fiduciary duty to the estate, debtors and their counsel must “remain vigilant to make sure that they do not act contrary to the interests of the estate, including

³²⁰ § 1191(d)(1)(A). Subparagraph (B) permits deduction for a domestic support obligation, which is inapplicable to this issue.

³²¹ 672 B.R. 915 (Bankr. W.D. Tex. 2025).

³²² *Id.* at 918.

³²³ *Id.* at 919.

³²⁴ *Keate v. Miller (In re Kohl)*, 95 F.3d 713 (8th Cir. 1996) (holding that debtor’s efforts to protect exempt homestead from foreclosure and to reaffirm and negotiate tax debts do not benefit chapter 11 estate); *In re Young*, 2021 WL 6091102 at *6 (Bankr. D.N.M. 2012) (“Fees that benefit only the Debtors as individuals and not in their capacities as debtors in possession provide no benefit to the estate in a Chapter 11 case and are not compensable from assets of the estate.”).

The court also cited two cases involving employment of divorce counsel. *In re Goldstein*, 383 B.R. 496, 502 (Bankr. C.D. Cal. 2007) (“In this case, authorizing each joint debtor to employ respective divorce counsel is in the best interest of the two estates involved in this case.”); *In re Colin*, 27 B.R. 89 (Bankr. S.D.N.Y. 1983) (permitting chapter 11 individual debtor-in-possession to retain special counsel to pursue divorce action.). Finally, the court cited one case in which the court examined the fee application to determine what benefited the estate and what did not. *In re Polishuk*, 258 B.R. 238 (Bankr. N.D. Okla. 2001).

³²⁵ 672 B.R. 915 at 922.

in their litigation decisions.”³²⁶ When a debtor’s personal interests conflict with those of the estate, “debtors must remove themselves (or be removed) from their role as trustee/debtor-in-possession.”³²⁷

“[S]o long as the debtor’s interests do not conflict with the estate’s,” the court continued, “the debtor can take actions to benefit itself, including by hiring lawyers to represent its interests. Nor does the Code specifically limit the debtor’s ability to pay compensation out of non-estate assets, aside from the requirements of section 329 of the Bankruptcy Code.”³²⁸ Section 329 requires disclosure of compensation paid or agreed to be paid by a debtor and authorizes the court to cancel any retention agreement and to require the return of any payment to the extent the payment exceeds the reasonable value of services rendered.

In the context of representation in a nondischargeability action, the court noted, “Nondischargeability proceedings primarily impact not the bankruptcy but whether the debts at issue will be discharged and thus removed from the debtor’s post-bankruptcy life.”³²⁹ The court cited cases ruling that dischargeability litigation does not benefit the estate and that a debtor’s attorney’s fees cannot be paid from estate assets.³³⁰

The *Schlomer* court entered the order for reconsideration of its earlier order approving retention of the debtor’s lawyer because the court doubted that it had been necessary for it to approve the debtor’s retention of counsel to defend a dischargeability action or to allow counsel’s compensation. The court, therefore, scheduled a hearing to reconsider the retention order. The court proposed to hold that the lawyer need not be retained under § 327(e), that compensation was not approved under § 328 or subject to review under § 330, and that compensation was subject only to the court’s review under § 329.³³¹

If the Bankruptcy Code does not permit payment of attorney’s fees for dischargeability litigation from estate assets, the debtor’s problem is finding non-estate assets to pay the fees.

In a traditional chapter 11 case, an individual debtor has no non-estate assets other than exempt property under § 1115(a). Section 1115(a) provides that, in the case of an individual, property of the estate includes postpetition earnings and any property acquired after the

³²⁶ *Id.* at 922.

³²⁷ *Id.* at 922. The court did not discuss, as an alternative to removal of the debtor from possession, the expansion of the trustee’s duties to manage the conflict, as Section V(D) of this Update discusses.

³²⁸ *Id.* at 921.

³²⁹ *Id.* at 921.

³³⁰ *Id.* at 921 n. 19. The court cited: *Stewart v. Law Offices of Dennis Olson*, 93 B.R. 91, 95 (N.D. Tex. 1988); *In re Jones*, 665 F.2d 60 (5th Cir. 1982) (adopting rule, under pre-Bankruptcy Code law, that “attorneys’ fees related to defending against objections to the discharge are not payable out of the estate”); *In re Polishuk*, 258 B.R. 238, 249-50 (Bankr. N.D. Okla. 2001) (finding, in Chapter 11 case in which debtor was in possession, that nondischargeability litigation with ex-spouse did not benefit the estate and therefore the fees could not be paid from estate assets). *See also In re Kadiric*, 670 B.R. 307, n. 10 (Bankr. W.D. Mich. 2025), *citing In re Schlomer*, 672 B.R. 915 at *4 (Bankr. W.D. Tex. Feb. 19, 2025) (“For the sake of transparency, the court expresses concern about the estate’s retaining counsel to defend the Debtors’ discharge, a matter of peculiar importance to the Debtors but seemingly of no value to the estate or their creditors generally.”); NORTON BANKRUPTCY LAW AND PRACTICE §§ 106.1, 106.6.

³³¹ *Id.* at 924..

commencement of the case. Section 1115(a), however, does not apply in a subchapter V case,³³² so an individual debtor in a subchapter V case could pay dischargeability counsel from postpetition earnings. But if cramdown confirmation under § 1191(b) occurs, property of the estate includes postpetition earnings and postpetition property.³³³

An individual in a subchapter V case, therefore, can pay for dischargeability counsel at least until confirmation of a plan. The individual may do so thereafter if consensual confirmation occurs under § 1191(a) with money from earnings that the individual does not need for payment of personal expenses, business expenses, and obligations under the plan. After cramdown confirmation, however, that option does not seem to be available, although it is arguable that a debtor should be able to pay a personal expense with money that is not required to make the payments under the plan.

In the case of a corporation or other entity, property of the estate under § 541(a)(1) includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” Property of the estate includes “proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after commencement of the case” under § 541(a)(6) and “any interest that the estate acquires after commencement of the case” under § 541(a)(7). A corporation or other entity, therefore, has no earnings or assets that do not constitute estate property.

It is arguable in the case of a corporation or other entity that representation in dischargeability litigation provides a benefit to the estate or is necessary to administration of the case because the debtor must have counsel to defend the litigation³³⁴ and no other source for payment of attorney’s fees exists. Further, the estate of an entity has an interest in the nondischargeability litigation because a ruling that a debt is nondischargeable may negatively affect the ability or willingness of the debtor to proceed with a plan. If the debtor will be saddled with nondischargeable debt, owners may conclude that it is not worth their time and effort to try to reorganize the debtor.

The debtor in *Schlomer* had anticipated dischargeability litigation and paid the dischargeability lawyer a \$60,000 prepetition retainer. A prepetition retainer may provide a non-estate source for payment of dischargeability counsel. Nevertheless, as the *Schlomer* court noted, “Transfers of the debtor’s assets immediately prior to a bankruptcy proceeding may also be subject to avoidance under various provisions of bankruptcy law, and retainers in which the debtor still has an equitable interest as of the petition date may become property of the estate and complicate non-estate counsel’s ability to be paid.”³³⁵

³³² § 1181.

³³³ § 1186(a).

³³⁴ A corporation cannot appear in a bankruptcy court without counsel. *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.”).

³³⁵ *In re Schlomer*, 672 B.R. 921, n. 18 (Bankr. W.D. Tex. 2025). The court cited: §§ 541–51; *Arens v. Boughton (In re Prudhomme)*, 43 F.3d 1000, 1004 (5th Cir. 1995); *Barron v. Countryman*, 432 F.3d 590 (5th Cir. 2005); *Wootton v. Ravkind (In re Dixon)*, 143 B.R. 671 (Bankr. N.D. Tex. 1992); *In re Miell*, 2009 WL 2253256, at *1–4 (Bankr. N.D. Iowa 2009).

The court in *Schlomer* stated that the issues of potential avoidability or recovery of any prepetition transfers for a retainer, or whether a retainer is property of the estate, were beyond the scope of its opinion, and that applies to the discussion here. Note, however, that the same judge in *In re Von Backstrom*, 2026 WL 59377 (Bankr. W.D. Tex. 2026), ruled that an attorney's \$15,000 prepetition security retainer for anticipated services in defending adversary proceedings was property of the estate and required the attorney to turn the retainer over to chapter 7 trustee. The court explained that, under Texas law, the attorney had not earned the security retainer at the time of filing of the case, the attorney held it in trust such that it was property of the estate, and estate property cannot be used to defend dischargeability actions or to protect exemptions.

The second issue is whether the expenses of dischargeability litigation are deductible in determining a debtor's projected disposable income.

If a debtor cannot use estate property to pay expenses of dischargeability litigation, one argument is that litigation expenses cannot be deducted from projected disposable income because, due to the cramdown discharge that gives rise to the PDI requirement, all assets and earnings of the debtor are property of the estate. Because the debtor cannot use property of the estate to pay the expenses, no deduction is permissible.

The second argument is that dischargeability litigation expenses are not expenditures that the definition of disposable income permits. The question is whether they are expenditures for the "maintenance and support" of the debtor or necessary for the "continuation, preservation, or operation of the business of the debtor."

In *In re Premier Glass Services, LLC*,³³⁶ the court considered whether the debtor could deduct anticipated legal fees for appealing from an arbitration award against the debtor and its principal jointly and for defending the dischargeability litigation the creditor filed.³³⁷ The litigation thus involved the merits of the creditor's claim as well as its dischargeability. The court ruled that the debtor had not established that the amount of the fees was based on a reasoned projection and had not shown that the fees were necessary for the continuation, preservation, or operation of the debtor's business. Further, the court ruled that the evidence did not show that the deduction for legal fees was "fair and equitable."³³⁸ (The court did not consider whether fees for dischargeability litigation could not be deducted because the debtor could not pay them from estate assets.)

The court expressed concern that payment of the legal fees provided "considerable benefit" to the debtor's owners and the principal at the expense of creditors. If the creditor prevailed, the court said, "the deduction for legal fees will be a total loss, and will be, in effect, a transfer from [the creditors] to the [Debtor's] counsel."³³⁹

³³⁶ 664 B.R. 465 (Bankr. N.D. Ill. 2024).

³³⁷ The court had ruled that the § 523(a) exceptions applied to the debtor's discharge if cramdown confirmation occurred. *Christopher Glass & Aluminum, Inc. v. Premier Glass Services, LLC (In re Premier Glass Services, LLC)*, 2024 WL 3808696 (Bankr. N.D. Ill. 2024).

³³⁸ *Id.* at 476.

³³⁹ *Id.* at 477.

The court denied confirmation because the debtor did not meet its burden of proof and permitted the debtor to file a new plan.³⁴⁰ It did not make a definitive ruling on the deductibility of the litigation expenses. Nevertheless, the opinion illustrates the difficulties debtors face in paying for litigation against creditors with money that would otherwise be available to pay them.

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

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

B. Postpetition Property and Earnings in Subchapter V Cases

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

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

C. Property of the Estate and Automatic Stay After Cramdown Confirmation*

Section 1186(a) provides that, after cramdown confirmation under § 1191(b), property of the estate includes, in addition to property specified in § 541, postpetition earnings and property that the debtor acquires postpetition. See *SBRA Guide* § XI(B).

In *In re Chesney*, 2023 WL 8855242 (Bankr. W.D.N.C. 2023), the court considered the request of a creditor with a nondischargeable debt for relief from the automatic stay after confirmation of a cramdown plan. The creditor wanted to collect its judgment from a substantial commission that the debtor could become entitled to as the personal representative of the estate of a friend who had died about four months after the filing of the subchapter V case. (The court rejected the creditor’s contention that the commission was a bequest or devise within six months after the filing of the case that was property of the estate under § 541(a)(1) that the debtor failed to disclose.)

The court noted that the debtor’s receipt of a commission during the plan term would be property of the estate under § 1186(a) that she would have to disclose on an amendment to her schedules.³⁴¹ But the court observed that only the debtor may seek postconfirmation modification of a plan and that it was “doubtful” that she would have an obligation to modify her plan to increase plan payments. *Id.* at *4. (The court observed that § 363(b) continued to apply so that “any out of the ordinary uses of estate property” would require notice to creditors and court approval. *Id.* at *6 n. 3.)

Because the commission would be property of the estate and the debtor would not receive her discharge until completion of payments under the plan under § 1192, the court explained, the

³⁴⁰ *Id.* at 469.

³⁴¹ Courts consistently state that a debtor must file an amendment to disclose postpetition assets or income despite the fact that no such requirement exists in the Bankruptcy Code or Bankruptcy Rules. Bankruptcy Rule 1007(h), which requires a debtor to disclose the postpetition acquisition of an interest in property, applies only to interests in property under § 541(a)(6). See generally CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 16:7 at 362-63.

automatic stay continued to apply to protect the commission. *Id.* at *6. The court declined to lift the stay to permit the creditor to enforce its claim against the commission, concluding that it would be inequitable to do so because it would give the creditor “an unfair advantage over other creditors.”

The court reasoned, *id.* at *6:

One might reasonably ask why, if the plan cannot be modified to claim the newly received asset, what is the harm in permitting a creditor with a nondischargeable debt to seek it outside of bankruptcy? Certainly, it is not to permit the Debtor a windfall. Rather, it has to do with the success of the Confirmed Plan. For creditors with dischargeable debts, payment is dependent on the success of [the Debtor’s] plan. And while these prospective monies were not in prospect at the time of confirmation, before that three-year plan is completed, these monies may be necessary to fund plan payments.

[The Debtor] is currently 71 years old. At her age, one cannot gainsay that she will be able to continue to work for the entire plan term, nor that her employer . . . will continue to be able to pay her. If not, [the Debtor] may need the decedent’s estate commission to pay living expenses and to fund plan payments. Many individual debtors fund plan payments out of monies which are exempt and otherwise unreachable by creditors. Given this possibility, it would be improvident at this point in time to afford one unsecured creditor exclusive rights to these potential funds.

The court stated that its order was without prejudice to renewal of the request for stay relief if and when the debtor received the commission.

XII. Default and Remedies After Confirmation

A. Remedies for Default in the Confirmed Plan*

In re Ace Holding, LLC, 2023 WL 4412184 (Bankr. N.D.N.Y. 2023), considered whether the debtor’s default under a confirmed plan was material.

The confirmed plan, extensively negotiated with the creditor, provided for the debtor to make payments electronically by a date certain. The debtor missed the first plan payment, and the creditor declared a default, which the debtor attempted to cure with a check. The subchapter V trustee and the debtor filed a motion for the court to require the creditor to accept the payment. The creditor stated it would agree to accept the payment if it received prompt payment of its attorney’s fees. The debtor contended that attorney’s fees should not be required because the default was not material.

The court determined that the default was material and awarded attorney’s fees. The court reasoned, *id.* at * 3:

Based upon the prior defaulted payment agreements, unending state court litigation and multiple bankruptcy filings, the Debtor should have been ready, willing and able to

commence both plan payments as well as maintain the ongoing monthly fees to this Creditor. Moreover, as previously noted, Schedule A's terms are the result of extensive negotiations and their attendant costs. Thus, any default based upon a late payment or a payment not made in the proper manner is material.

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

C. Postconfirmation Dismissal or Conversion to Chapter 7

1. Postconfirmation dismissal

2. Postconfirmation conversion

XIII. Effective Dates and Retroactive Application of Subchapter V

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 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).

Rule 1020(a) – Provides for the debtor to state in a voluntary petition whether the debtor is a small business debtor and, if so, whether the debtor elects application of subchapter V. election of subchapter V to be included in voluntary petition. In an involuntary case, the debtor must provide the same information in a statement filed within 14 days of the order for relief.

Former Rule 1020(c), providing for a small business 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, is deleted.

Former Rule 1020(d) is 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 on a creditor's committee (unless a committee has been appointed) and instead requires service on the 20 largest unsecured creditors.

Rule 2009(c) – Permits appointment of one trustee in jointly administered case under subchapter V as well as in cases under chapters 7 and 11.

Rule 2012 – Makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter inapplicable 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 3011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

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.

**APPENDIX C Summary Comparison of 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 Ruben)**

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

A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

Revised June 2022

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

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

<https://www.ganb.uscourts.gov/sbraguide>

The Update is available at:

<https://www.ganb.uscourts.gov/subvupdate>

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A Guide to the Small Business Reorganization Act of 2019

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I. Introduction

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

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

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

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

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

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

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

³ SBRA § 4(1)(A)-(B).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Because SBRA did not repeal SBRA’s provisions relating to a “small business debtor,” a small business debtor that does not elect subchapter V is in a small business case and subject to the provisions that BAPCPA added.

⁷ H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. Blackmon, *Revising the Debt Limit for “Small Business Debtors”: The Legislative Half-Measure of the Small Business Reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339, 344-45 (2020).

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

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

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

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

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

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

Id.

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

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

The authors concluded, *id.* at 60:

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

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

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

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

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

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

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

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

¹⁴ Part IX discusses disbursements in subchapter V cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Overview of Subchapter V

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

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

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

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

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

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

A. Changes in Confirmation Requirements

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

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

B. Subchapter V Trustee and the Debtor in Possession

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

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

C. Case Administration and Procedures

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

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

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

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

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

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

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

D. Discharge and Property of the Estate

1. Discharge – consensual plan

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

2. Discharge – cramdown plan

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

²⁰ § 1141(d)(2).

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

3. Property of the estate

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

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

A. Debtor's Election of Subchapter V

The provisions of subchapter V apply in cases in which an eligible debtor elects them.²³ If an eligible debtor does not make the election, the traditional provisions of Chapter 11 apply. If

²¹ § 1181(a).

²² § 1186(a).

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

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

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

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

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

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

²⁴ § 109(e) governs chapter 13 eligibility.

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

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

²⁷ FED. R. BANK. P. 1020(a).

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

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

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

²⁸ INTERIM RULE 1020.

²⁹ See Section III(B).

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

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

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

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

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

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

³² *NetJets Aviation, Inc. v. RS Air, LLC* (*In re RS Air, LLC*), 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 conference³⁸ and for filing a plan³⁹ run from the date of the order for relief. The Advisory Committee in its Report observed, “Should a court exercise authority to allow a delayed election, it is likely that one of the court’s prime considerations in ruling on a request to make a delayed election would be the time restriction imposed by subchapter V. . . .”⁴⁰ Section VI(J) and Part XIII discuss extension of the time limits and their effect on the ability of a debtor to amend the petition to make an election after their expiration.

³⁸ See Section VI(C).

³⁹ See Section VI(D).

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

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

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

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

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

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

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

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

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

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

⁴³ SBRA § 2(a).

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

⁴⁵ CARES Act § 1113(a)(1).

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

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

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

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

⁴⁶ CARES Act § 113(a)(5).

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

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

⁴⁹ See Sections III(F), (G).

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

⁵⁰ BTATCA § 2(i)(1)(B).

⁵¹ BTATCA § 2(h)(1).

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

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

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

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

2. Overview of eligibility for subchapter V

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

⁵² BTATCA § 2(h)(2).

⁵³ BTATCA § 2(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁰ § 101(51D)(B)(ii).

⁶¹ 11 U.S.C. § 109(e).

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁵ *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁹ The situation in *Sullivan* suggests two questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. What Debts Are Included in Determination of Debt Limit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Debtor. -- The term “debtor”—

(B) does not include —

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

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

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

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

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

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

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

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

⁹² See Section III(B).

⁹³ See Section III(B).

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

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

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

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

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

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

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

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

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

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

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

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

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

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

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

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

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

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

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

The trustee must be a “disinterested person. § 1183(a). Section 101(14) defines a disinterested person as a person that, among other things, “does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.” § 101(14)(C).

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

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

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

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

B. Role and Duties of the Subchapter V Trustee

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

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

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

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

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

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

¹⁰¹ § 1181(a).

¹⁰² § 1183(b)(5).

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

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

impartial fiduciary with monitoring and supervisory duties and the duty to facilitate a consensual plan, courts are likely to request that the subchapter V 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.”

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

¹¹⁹ § 1183(b)(4).

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

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

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

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

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

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

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

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

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

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

C. Trustee's Disbursement of Payments to Creditors

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

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

¹²⁵ § 1106(a)(1).

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

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

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

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

¹²⁶ § 1194(a).

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

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

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

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

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

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

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

2. Disbursement of plan payments by the trustee

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

¹²⁸ § 1326(a).

¹²⁹ § 1194(c).

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

D. Termination of Service of the Trustee and Reappointment

1. Termination of service of the trustee

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

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

Part IX further discusses these provisions.

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

¹³⁰ §1194(b).

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

¹³² § 1191(a).

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

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

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

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

2. Reappointment of trustee

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

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

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

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

¹³⁶ § 1183(c)(1).

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

¹³⁸ § 1185(a).

E. Compensation of Subchapter V Trustee

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

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

1. Compensation of standing subchapter V trustee

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

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

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

¹⁴⁰ SBRA § 4(a)(4).

¹⁴¹ SBRA § 4(b)(1)(D).

¹⁴² 28 U.S.C. § 586(e).

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

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

2. Compensation of non-standing subchapter V trustee

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

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

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

¹⁴⁴ 28 U.S.C. § 586(e)(5).

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

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

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

¹⁴⁵ See *supra* note 139.

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

¹⁴⁷ A full understanding of the issue requires further elaboration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In re Slidebelts, Inc., 2020 WL 3816290 (Bankr. E.D. Cal. 2020), supports this proposition. There, the debtor in a traditional chapter 11 case sought its dismissal for the purpose of obtaining a loan under the Paycheck Protection Funding Program of the CARES Act 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 reverts 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

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 estate¹⁵⁸ and creditors have an interest in the estate, the same rule would appear to require a non-attorney trustee to retain a lawyer in order to appear and be heard in a bankruptcy court.

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

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

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

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

¹⁵⁸ § 323(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶³ § 1183(b)(7).

¹⁶⁴ § 1183(b)(3).

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

¹⁶⁶ FED. R. EVID. 706.

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

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

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

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

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

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

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

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

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

¹⁶⁹ § 1186(b).

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

¹⁷¹ § 1185(b).

¹⁷² § 327(a).

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

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

¹⁷⁴ § 363(c)(2).

¹⁷⁵ § 363(b).

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

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

B. Duties of Debtor in Possession

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

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

¹⁷⁶ See generally *In re Ozcelebi*, 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

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

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

¹⁸¹ § 1116(1).

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

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

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

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

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

¹⁸³ § 308.

¹⁸⁴ § 1187(b).

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

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

¹⁸⁷ § 1118.

¹⁸⁸ § 1184.

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

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

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

¹⁸⁹ § 1106(a)(1).

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

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

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

¹⁹¹ § 1106(a)(5-8).

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

C. Removal of Debtor in Possession

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Removal of a debtor from possession may be an alternative to dismissal or conversion of a subchapter V case for cause under § 1112(b)(1).²⁰² In *In re Pittner*, 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

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 debtor²⁰⁸ and has other duties that Section IV(B)(3) discusses.

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

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

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

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

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

²⁰⁸ § 1183(b)(5).

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

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

An eventual consequence of removal of the debtor from possession may be the court's revocation of the subchapter V election so that the case proceeds as a traditional chapter 11 case, with the appointment of a trustee to administer it. In *In re National Small Business Alliance*, 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

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

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

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

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

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

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

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

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

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

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

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

VI. Administrative and Procedural Features of Subchapter V

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

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

A. Elimination of Committee of Unsecured Creditors

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

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

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

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

²¹⁰ SBRA § 4(a)(11).

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

²¹² See Section III(A).

B. Elimination of Requirement of Disclosure Statement

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

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

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

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

²¹⁴ § 1125(b).

²¹⁵ FED. R. BANKR. P. 3017(a).

²¹⁶ § 1125(f)(3)(A).

²¹⁷ § 1125(f)(3)(B).

²¹⁸ § 1125(f)(3)(C).

²¹⁹ § 1125(f)(1).

²²⁰ § 1125(f)(2).

²²¹ § 1181(b).

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

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

C. Required Status Conference and Debtor Report

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

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

²²³ § 1129(a)(1).

²²⁴ § 1129(a)(2).

²²⁵ § 1129(a)(3).

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

²²⁷ § 105(d).

²²⁸ § 1181(a).

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

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

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

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

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

²³⁰ § 1188(b).

²³¹ § 1188(c).

²³² New§ 1183(b)(3).

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

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

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

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

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

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

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

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

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

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

D. Time for Filing of Plan

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

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

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

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

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

²³⁶ § 1189(a).

²³⁷ See *supra* note 190.

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

²³⁹ *Id.*

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

²⁴¹ § 1193(a).

²⁴² § 1121(e).

²⁴³ § 1129(e).

²⁴⁴ § 1181(a).

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

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

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

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

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

²⁴⁶ § 1181(a).

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

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

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

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

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

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

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

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

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

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

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

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

E. No U.S. Trustee Fees

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

F. Modification of Disinterestedness Requirement for Debtor's Professionals

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

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

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

²⁵² SBRA § 4(b)(3).

²⁵³ § 327(a).

²⁵⁴ § 101(14)(C).

²⁵⁵ § 1195.

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

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

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

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

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

²⁵⁷ FED. R. BANKR. P. 3014.

²⁵⁸ FED. R. BANKR. P. 3017.1.

²⁵⁹ INTERIM RULE 3017.

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

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

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

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

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

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

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

I. Filing of Proof of Claim; Bar Date

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

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

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

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

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

²⁶⁰ FED. R. BANKR. P. 3017.1.

²⁶¹ INTERIM RULE 3017.2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷⁹ CAA § 1001(f)(1)(A)(i).

²⁸⁰ CAA § 1001(f)(1)(A)(iii).

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

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

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

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

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

²⁸² CAA § 101(f)(1)(A)(iii).

²⁸³ CAA § 101(f)(2)(A)(i).

²⁸⁴ CAA § 101(f)(2)(B).

VII. Contents of Subchapter V Plan

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

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

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

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

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

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

²⁸⁶ § 1190(3).

²⁸⁷ § 1181(a).

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

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

²⁹⁰ § 1123(a)(8).

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

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

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

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

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

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

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

²⁹¹ § 1123(c).

²⁹² § 1189(a).

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

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

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

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

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

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

²⁹⁵ See Section IX(A).

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

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

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

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

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

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

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

³⁰⁰ *Id.*

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

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

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

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

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

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

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

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

³⁰⁵ *Id.* at 24.

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

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

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

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

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

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 25.

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

A business debtor may grant a security interest in a principal residence as additional collateral without receiving new value, perhaps in connection with a workout involving forbearance or restructuring of the debt. A potential issue is whether the § 1190(3) exception to the antimodification rule applies in this situation when the debtor receives no additional loan proceeds.

C. Payment of Administrative Expenses Under the Plan

If the court confirms a plan under the cramdown provisions of § 1191(b), § 1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date.³¹¹ Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 502(f).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of the trustee and of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.³¹²

³¹⁰ *Id.*

³¹¹ § 1191(e).

³¹² The permission to pay these priority claims “through the plan” without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. *See* Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 15-16.

In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 347 n. 82 (Bankr. S.D. Fla. 2020), the court observed that a sub V plan cannot provide for the deferred payment of postpetition rent obligations under a lease of nonresidential real property.

The *Seven Stars* court agreed that § 1191(e) permits deferred payment of administrative expense claims allowed under § 503(b). It concluded, however, that § 365(d)(3), not § 503(b), governs postpetition rent obligations. The court ruled, “As such, even though new Section 1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent.” *Id.* Even if the court permitted the debtor to proceed under subchapter V in its case that began prior to its enactment, the court ruled, it could not confirm a plan that did not provide for full payment of postpetition rent on the effective date of the plan in accordance with earlier orders of the court.

The Consolidated Appropriations Act, 2021 (the “CAA”)³¹³ made temporary changes to § 365(d) dealing with the timely performance of the debtor’s postpetition obligations as lessee under an unexpired lease of nonresidential real property. As Section VI(K) discusses, the temporary amendment added subparagraph (B) to § 365(d)(3) to permit the court to extend the time for the performance of such obligations for up to 120 days in a sub V case if it determined that the debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”³¹⁴

Importantly, CAA also added subparagraph (C) to § 365(d)(3) to provide that, if the court granted such an extension, the obligation “shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).”³¹⁵

³¹³ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020).

³¹⁴ § 365(d)(3)(B), as enacted by CAA § 1001(f)(1)(A)(iii).

³¹⁵ § 365(d)(3)(C), as enacted by CAA § 1001(f)(1)(A)(iii).

The provisions expire on December 26, 2022³¹⁶ but continue to apply in any subchapter V case filed before then.³¹⁷

Because temporary § 365(d)(3)(C) requires treatment of a deferred postpetition lease obligation as an administrative expense for purposes of § 1191(e), it seems that, notwithstanding the *Seven Stars* analysis, a cramdown plan may provide for the deferral of payment of obligations that the court extends. The difficulty with the conclusion is that subparagraph (B) still requires that the court order performance of postpetition obligations within no more than 120 days after the order for relief.

Arguably, a debtor who has not complied with the mandatory requirement of § 365(d)(3)(B) has not satisfied the confirmation requirement of § 1129(a)(2) that the plan proponent comply with all applicable provisions of the Bankruptcy Code. Courts will have to determine whether temporary § 365(d)(3)(C) grants permission to defer payments that the debtor had the obligation to make within the time that § 365(d)(3)(B) requires.

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

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

In a traditional chapter 11 case, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met in a traditional case except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits

³¹⁶ CAA § 1001(f)(2)(A).

³¹⁷ CAA § 1001(f)(2)(B).

so-called “cramdown” confirmation “if the plan does not discriminate unfairly, and is fair and equitable,” with regard to each impaired class that has not accepted it.³¹⁸ Section 1129(b)(2) states the rules for the “fair and equitable” requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)).³¹⁹

The effects of confirmation in a traditional case do not differ depending on whether cramdown confirmation under § 1129(b) occurs.

Section 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual if an unsecured creditor invokes it.³²⁰ Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.³²¹

If all the applicable requirements in § 1129(a) are met in a sub V case except for the projected disposable income rule of paragraph (a)(15), § 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.³²² This paper refers to it as a “consensual plan.”

³¹⁸ § 1129(b)(1).

³¹⁹ § 1129(b)(2).

³²⁰ § 1181(a). For cases applying the applicable § 1129(a) standards, see *In re Hyde*, 2022 WL 2015538 (Bankr. E.D. La. 2022); *In re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020); *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020). See also *In re BCT Deals, Inc.*, 2022 WL 854473 (Bankr. C.D. Cal. 2022) (Court entered confirmation order on debtor’s motion for confirmation in accordance with local rule without a hearing based on absence of opposition to motion after notice of opportunity to object).

³²¹ INTERIM RULE 1007(b).

³²² § 1191.

Section 1191(b) states the rules for cramdown confirmation in sub V cases. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case.³²³ In general, §1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)).

The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims remain applicable in a sub V case.³²⁴

Importantly, both consensual confirmation and cramdown confirmation require compliance with all requirements of § 1129(a) except those specifically mentioned above. Sections VIII(D) and (E) discuss confirmation issues that have arisen in subchapter V cases under provisions that SBRA did not change.

Cramdown confirmation under §1191(b) does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as Section VIII(B) discusses.

For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* do not accept the plan. Unless a class consists of only one creditor, a single creditor cannot invoke the projected disposable income requirement, which a

³²³ § 1181(a).

³²⁴ § 1191(c)(1).

single creditor can do in a traditional case even if all impaired classes accept the plan.³²⁵ Section VIII(D)(8) discusses application of the good faith requirement of § 1129(a)(3) in the context of confirmation of a consensual plan when an unsecured creditor objects because the debtor is not paying enough disposable income to creditors.

Official Form B315 contemplates a short confirmation order that identifies the plan and recites that all requirements for confirmation have been met. As in many traditional chapter 11 cases, however, courts in subchapter V cases have entered lengthy and detailed confirmation orders with extensive findings of fact and conclusions of law, even in the absence of objections to confirmation.³²⁶

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

In a subchapter V case, the effects of confirmation differ depending on whether confirmation occurs under § 1191(a) (where all classes have accepted it) or under § 1191(b) (where one or more – or even all – classes have not accepted it).³²⁷

Some effects of consensual confirmation are more advantageous to a debtor – particularly an individual – than the effects of cramdown confirmation. Some effects of cramdown confirmation, however, are more advantageous than consensual confirmation.

³²⁵ § 1129(a)(15). One may view the projected disposable income requirement for cramdown confirmation as protection for a dissenting class of unsecured creditors that substitutes for the inapplicable absolute priority rule. See *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020). In absolute priority rule theoretical terms, it recognizes “sweat equity” (i.e., future income) as “new value” that permits equity owners to retain their interests. The inability of a single creditor to invoke the projected disposable income rule is consistent with the inability of a single creditor to invoke the absolute priority rule under § 1129(b); both apply only if a class does not accept.

³²⁶ E.g., *In re North Richland Hills Alamo, LLC*, 2022 WL 2134976 (Bankr. N.D. Tex. 2022); *In re Roundy*, 2021 WL 5428891 (Bankr. D. Utah 2021). *In re Abri Health Services, LLC*, 2021 WL 5095489 (Bankr. N.D. Tex. 2021); *In re Triple J Parking*, 2021 Bankr. Lexis 2304 (Bankr. D. Utah 2021).

³²⁷ Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (Part IX); compensation of the trustee (Section IV(E)); deferral of administrative expenses (Section VII(C)); postconfirmation modification of the plan (Section VIII(C)); discharge (Part X); contents of property of the estate (Part XI); and postconfirmation default and remedies (Part XII).

In addition, cramdown confirmation imposes different requirements that provide opportunities for creditors to object to confirmation. Resolution of the objections may require an evidentiary hearing that exposes the debtor to uncertainty and additional legal fees and other expenses required for the debtor to prepare for trial and to prevail.

Counsel for a subchapter V debtor must understand these differences in proposing a plan and engaging in negotiations about it with creditors and the sub V trustee, who must also understand them to fulfill the duty to facilitate a consensual plan.³²⁸

Differences in requirements for confirmation

Whether consensual or cramdown confirmation occurs, confirmation in a sub V case requires satisfaction of all the applicable confirmation requirements of § 1129(a) except for acceptance by all impaired classes (§ 1129(a)(8) and (a)(10)), and, in an individual case, compliance with the projected disposable income requirement of §1129(a)(15).

Consensual confirmation of a sub V plan under § 1191(a) requires acceptance by all impaired classes, as § 1129(a)(8) mandates. (This necessarily means that the plan complies with § 1129(a)(10), requiring acceptance by at least one class of claims.)

If one or more classes of impaired claims do not accept the plan, cramdown confirmation under § 1191(b) requires that the plan not discriminate unfairly and that it be “fair and equitable” under the provisions of § 1191(c), as Section VIII(B) discusses.

Section 1191(c)(1) requires treatment of a secured claim in compliance with § 1129(b)(2)(A), which applies in a traditional chapter 11 case.³²⁹ Because the typical method for meeting this requirement is periodic payments with a value equal to the value of the

³²⁸ See *In re Louis*, 2022 WL 2055290 (Bankr. C.D. Ill. 2022).

³²⁹ See Section VIII(B)(2).

encumbered property, compliance with this requirement may require an evidentiary hearing with regard to the property's value and the proposed rate of interest.

Section 1191(c)(2) requires compliance with the projected disposable income requirement, which Section VIII(B)(4) discusses. Determination of the issues may require an evidentiary hearing with regard to the amount of the projected disposable income and the period over which the debtor must pay it.

Finally, § 1191(c)(3) requires the court to find either that the debtor will be able to make payments under the plan or that it is reasonably likely that the debtor will do so. If the court determines that it is reasonably likely that the debtor will make plan payments, the plan must also include "appropriate remedies. Section VIII(B)(5) explains these provisions. Resolution of an objection based on the debtor's ability to make plan payments may, like other cramdown issues, require an evidentiary hearing.

Different consequences of consensual and cramdown confirmation

In a subchapter V case, the effects of confirmation differ depending on whether consensual or cramdown confirmation occurs. Section VIII(A)(3) discusses the advantages and disadvantages for the debtor of consensual or cramdown confirmation based on these differences.

Discharge. Discharge occurs immediately upon confirmation of a consensual plan. Discharge does not occur after cramdown confirmation until the debtor completes payments under the plan. A cramdown discharge does not discharge debts on which the last payment is due after the three to five year term of the plan. In the case of any entity, courts disagree about whether a debt excepted from discharge under § 523(a) is excepted from a cramdown discharge,

as they are in an individual case regardless of the type of discharge. Part X discusses these issues.

Property of the estate. Unless the confirmation order or plan provides otherwise, confirmation of a consensual plan vests property of the estate in the debtor, whereas cramdown confirmation results in the retention of property of the estate in the debtor. Moreover, after cramdown confirmation, property of the estate includes property that the debtor acquires after the filing of the petition and postpetition earnings. See Part XI.

Payments under the plan. When cramdown confirmation occurs, the sub V trustee makes payments under the plan, unless the confirmation order or plan provides otherwise. Under a consensual plan, the debtor makes payments. See Part IX.

Termination of services of subchapter V trustee. If the court confirms a consensual plan, the services of the trustee terminate upon the plan's substantial confirmation. In the cramdown situation, the subchapter V continues to serve as trustee. See Part IX.

Deferral of payment of administrative expenses. The debtor may pay administrative expenses, such as compensation for the subchapter V trustee and the debtor's attorneys and other professionals, if the court confirms a plan under the cramdown provisions. A consensual plan cannot defer administrative expenses without the agreement of the administrative expense claimant. See Section VII(C).

Postconfirmation modification of the plan. After substantial consummation of a consensual plan, the debtor may not modify it. The debtor may modify the plan after confirmation under the cramdown provisions within three to five years after confirmation, as the court determines. See Section VIII(C).

The type of confirmation also affects the remedies available to creditors upon postconfirmation default, as Part XII discusses.

3. Benefits to debtor of consensual or cramdown confirmation

Two features of subchapter V reflect a policy of encouragement of consensual plans. One is the unique duty of a subchapter V trustee in § 1183(b)(7) to “facilitate the development of a consensual plan of reorganization.”³³⁰ The other is the requirement in § 1188(c) that the debtor file a report prior to the mandatory status conference that “details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.”

A strategic question is whether the debtor wants consensual confirmation.³³¹ Cramdown confirmation is advantageous to the debtor in one important way: a debtor may seek postconfirmation modification of a confirmed cramdown plan even if it has been substantially consummated, but a debtor cannot modify a confirmed consensual plan after substantial consummation.³³²

A debtor who faces default after cramdown confirmation because of unanticipated postconfirmation business conditions (for example, a material decrease in income or unexpected expenses) may thus seek postconfirmation modification to deal with the issue, but a debtor operating under a confirmed consensual plan cannot. Moreover, a debtor may need to modify a plan for other reasons necessary for or helpful to its business or financial condition.³³³

³³⁰ See Section IV(B)(1).

³³¹ For a discussion of the advantages of consensual confirmation in an individual case, see *In re Louis*, 2022 WL 2055290 at * 14-16 & nn. 11, 12 (Bankr. C.D. Ill. 2022).

³³² See Section VIII(C). Section VIII(C)(1) discusses substantial consummation.

³³³ The debtor in *In re National Tractor Parts, Inc.*, 2022 WL 2070923 (Bankr. N.D. Ill. 2022), sought to modify its consensual plan confirmed under § 1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVID-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA’s claim as a general unsecured claim, payable in quarterly payments.

Because postconfirmation modification may be necessary for or helpful to the debtor's postconfirmation success, a debtor may want to preserve the flexibility of postconfirmation modification through cramdown, rather than consensual, confirmation.

Another potential advantage of cramdown confirmation is that postconfirmation payment of administrative expenses, usually compensation of the subchapter V trustee and the debtor's attorney and other professionals, is permissible in a cramdown plan under § 1191(3).³³⁴ As a practical matter, however, it is likely that the same result can occur under a consensual plan.

If the debtor has proposed a feasible plan that all impaired classes have accepted but does not have the ability to pay administrative expenses in full on its effective date, the subchapter V trustee and debtor professionals will be hard-pressed to thwart confirmation of a consensual plan by insisting on immediate payment in full. The facts that deferral can happen anyway through cramdown confirmation and that the trustee and the debtor are charged with achieving consensual confirmation should lead to their agreement to deferred payment so that the plan complies with § 1129(a)(9)(A).

Several consequences of consensual confirmation are more beneficial to a debtor than cramdown confirmation. Some of these advantages may be achievable through a cramdown plan

The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made *de minimis* payments totaling \$ 1,428.20 to creditors in two classes but had not yet made a \$ 50,000 payment to a creditor in another class or begun quarterly payments to generally unsecured creditors.

The court held that commencement of payments occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

³³⁴ See Section VIII(B)(6).

or may be relatively unimportant. Two of them that a cramdown plan cannot deal with, however, are important – one for individual debtors and one for entity debtors.

In an individual case, an important consequence of cramdown confirmation is that property of the estate under § 1186(a) includes property that the debtor acquires after the filing of the petition and postpetition earnings. This means that, if conversion to chapter 7 occurs after confirmation, the chapter 7 estate includes postpetition property and earnings.³³⁵ The result is the same in a traditional chapter 11 case.³³⁶ Section 1186(a), however, does not apply if consensual confirmation occurs, so an individual debtor retains postpetition property and earnings upon conversion of a case after consensual confirmation.³³⁷

This difference is not important in the case of an entity because the distinction between postpetition and prepetition assets and earnings is immaterial.³³⁸

In the case of an entity, the critical advantage of consensual confirmation is that it is clear that the exceptions to discharge in § 523(a) do not apply. Upon confirmation of a consensual plan, an entity receives a discharge under § 1141(d)(1), and the exceptions to discharge under § 523(a) apply only to an individual under § 1141(d)(2).³³⁹

Cramdown confirmation, however, results in a discharge under § 1192. Section 1192 does not discharge debts “of the kind” specified in § 523(a), which states that a § 1192 discharge does not discharge an “individual debtor” from any of the specified debts. Courts disagree about whether the § 523(a) exceptions apply to the discharge of an entity under § 1192.³⁴⁰

³³⁵ See Section XI(B)(2).

³³⁶ See Section XI(A).

³³⁷ See Section XI(B)(2).

³³⁸ See Section XI(B)(1).

³³⁹ See Section X(A).

³⁴⁰ See Section X(D).

Note that an entity can achieve this advantage of consensual confirmation only if the claim of the creditor asserting an exception to discharge (1) is not in a separate class; and (2) is not so large that the creditor controls acceptance of the class in which it is placed. Rejection by a creditor in a separate class prevents consensual confirmation. If the creditor is in a class with other creditors, such as the class of general unsecured claims, its rejection of the plan can prevent confirmation if the amount of its claim is more than one-third of the amount of all the claims in the class that vote.

Although provisions in a plan or confirmation order cannot provide these advantages in a cramdown situation, they can provide other advantages that automatically accompany consensual confirmation.

Confirmation of a consensual plan results in termination of the sub V trustee's services upon "substantial consummation" and distributions to creditors by the debtor.³⁴¹ The sub V trustee continues to serve after cramdown confirmation and makes payments under the plan, unless the plan or confirmation order provides otherwise.³⁴² The postconfirmation role of the sub V trustee and the trustee's disbursement of funds requires compensation of the trustee, which increases expenses in the case.

This may not matter to the debtor. A carefully drafted plan will provide for the trustee's compensation to be paid from the debtor's plan payments. If so, creditors effectively bear the burden of the trustee's compensation, not the debtor.

For this reason, creditors may support or even encourage payment by the debtor rather than the trustee. Moreover, the sub V trustee may prefer to avoid the ministerial duty of making

³⁴¹ See Section IX(A).

³⁴² See Section IX(B).

disbursements. In short, parties opposed to confirmation of a cramdown plan may nevertheless have no objection to provisions of a plan or confirmation order for the debtor to make disbursements.

Two differences in the consequences of confirmation relating to the discharge may be somewhat less important to the debtor. One difference is that discharge occurs upon confirmation of a consensual plan under § 1141(d)(1)³⁴³ but not until completion of payments after three to five years, as fixed by the court, upon cramdown confirmation under § 1192.³⁴⁴ The other is that debts on which the last payment is due after the three-to-five year period are not discharged under the cramdown discharge under § 1192(1). These differences may be of more concern to an individual debtor than to an entity.³⁴⁵

A significant advantage of consensual confirmation is that the projected disposable income and feasibility components of the fair and equitable rule do not apply. The debtor therefore does not face litigation over those and other potential issues that may arise in cramdown confirmation, such as valuation of a secured creditor's collateral and the appropriate interest rate. Consensual confirmation thus eliminates uncertainty about confirmation and the expense of litigating cramdown issues.

These benefits are potentially achievable in the cramdown context.

A plan under § 1190(1)(C) must in any event include projections with regard to the debtor's ability to make payments as proposed. In many cases it is likely that creditors or the subchapter V trustee will expect commitment of the equivalent of projected disposable income as

³⁴³ See Section IX(A).

³⁴⁴ See Section IX(B).

³⁴⁵ See *In re Louis*, 2022 WL 2055290 at *14 nn. 11, 12 (Bankr. C.D. Ill. 2022) (Noting that discharge occurs immediately upon confirmation in consensual plan and that long-term mortgage debts to be paid by owners of property rather than debtor may not be included in cramdown discharge.).

a condition for support of a consensual plan. If the debtor has addressed the amount of payments to be made to creditors satisfactorily to the sub V trustee and creditors active in the case, projected disposable income, as well as feasibility, may not be significant issues at confirmation.

Similarly, negotiations with secured creditors may result in settlement of valuation and interest rate issues.

Thus, it is possible that careful drafting of the plan, negotiations with objecting parties, and the resolution of objections to confirmation through modification of the plan to address them can result in cramdown confirmation without objection – what might be called “consensual nonconsensual confirmation.” If objections cannot be resolved such that the debtor must litigate them, it is unlikely that consensual confirmation would be possible anyway.

In summary, the primary advantage of cramdown confirmation is the availability of postconfirmation modification. For an individual, the primary disadvantage of cramdown confirmation is the inclusion of postpetition property and earnings as property of the estate if the case later converts to chapter 7.

4. Whether balloting on plan is necessary

Balloting on the plan is obviously necessary if the debtor wants to achieve consensual confirmation under § 1191(a) because all classes of impaired creditors must accept the plan to meet the confirmation requirement of § 1129(a)(8).

When the debtor expects that at least one class of claims – typically a major secured lender in its separate class – will not accept any plan that the debtor can realistically propose, or when the debtor wants cramdown rather than consensual confirmation based on its evaluation of the consequences just discussed, the question is whether balloting is required.

As Section VIII(A)(3) discusses, subchapter V contemplates efforts to achieve a consensual plan by imposing a duty on the sub V trustee to facilitate development of a consensual plan and by requiring the debtor to report at the status conference on the efforts that it has undertaken and will undertake to attain a consensual plan. Courts have been critical of sub V trustees and attorneys for debtors who have not attempted to achieve confirmation of a consensual plan.³⁴⁶

Subchapter V's emphasis on consensual confirmation supports a conclusion that balloting should ordinarily be required and that the debtor should at least try to obtain consensual confirmation. Nevertheless, circumstances may exist where doing so would be a fruitless exercise that does not justify the time and expense of doing so.

One such circumstance arises when a creditor with the ability to prevent consensual confirmation of a plan clearly intends to do so. Because even acceptance by all other impaired classes will not result in consensual confirmation, no legal reason exists for asking them to vote.

A debtor who expects acceptances from other classes, however, may find it advantageous to go through the balloting exercise.

As an initial matter, balloting even in the face of expected rejection eliminates the need for the debtor to explain why balloting should not be required and the efforts it has undertaken to negotiate with the creditor. It shows that the debtor is trying and lets the court see the effort.

In addition, it is always possible that, once the plan is filed, and maybe even after the creditor has rejected it, the creditor may re-evaluate its position and be amenable to further

³⁴⁶ See, e.g., *In re Louis*, 2022 WL 2055290 (Bankr. C.D. Ill. 2022); *In re 218 Jackson LLC*, 631 B.R. 937 (Bankr. M.D. Fla. 2021). In *Louis*, the court observed that the subchapter V trustee had an “absolute duty” to work with the debtor, the debtor’s attorney, and creditors to try to achieve consensual confirmation of a plan. *Louis*, 2022 WL 2055290 at * 18.

negotiations that will resolve its issues. If all other class have accepted the plan, the creditor's acceptance may permit consensual confirmation.

Moreover, acceptance by other creditors may as a practical matter be helpful in convincing the court to confirm a cramdown plan. If cramdown confirmation issues are close calls, a court may be sympathetic to resolving them in favor of confirmation when other creditors have accepted the plan.

The issue is more difficult when the debtor does not want consensual confirmation. It is arguable that the good faith requirement precludes cramdown confirmation when the debtor has not attempted confirmation of a consensual plan.³⁴⁷ It would seem, however, that a debtor's good faith efforts to propose a plan that meets cramdown requirements and that resolves objections of the subchapter V trustee and creditors should satisfy the good faith requirement and permit cramdown confirmation, if that is the type of confirmation that the debtor has determined is in the debtor's best interests. Cramdown confirmation of a plan without balloting that draws no objections or that is modified to resolve them by agreement – a “consensual nonconsensual plan” – is consistent with subchapter V's objectives.

5. Final decree and closing of case

The type of confirmation affects the timing of the entry of a final decree and the closing of the subchapter V case. Section 350(a) provides for the closing of a case “after an estate has been fully administered and the court has discharged the trustee.” Bankruptcy Rule 3022 implements § 350 in a chapter 11 case by providing, “After an estate is fully administered in a

³⁴⁷ See *In re Louis*, 2022 WL 2055290 at *16 (Bankr. C.D. Ill. 2022) (“This Court interprets the provisions of Chapter 11 Subchapter V to require at least some attempt at consensual confirmation for a plan to be put forth in good faith.”).

chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.”

Full administration of a case necessarily includes entry of the discharge and discharge of the trustee.

If the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation,³⁴⁸ and the subchapter V trustee’s services are terminated upon substantial consummation³⁴⁹ of the plan.³⁵⁰ Full administration of a subchapter V case, therefore, may ordinarily occur shortly after confirmation of a consensual plan.

In the cramdown context, in contrast, discharge does not occur until completion of payments under the plan,³⁵¹ and the trustee continues to serve until that time.³⁵² Full administration cannot occur until three to five years after confirmation, depending on the period during which the debtor must make payments.³⁵³

Accordingly, whereas the court may enter a final decree and close a subchapter V case shortly after confirmation of a consensual plan, entry of a final decree and closing of the case after cramdown confirmation must await the completion of plan payments.³⁵⁴

The fact that the subchapter V case after cramdown confirmation must remain open pending completion of plan payments may prompt a debtor to request “administrative closing” of the case to reduce the costs of administration after confirmation and before closing of the case.

³⁴⁸ See § X(A).

³⁴⁹ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

³⁵⁰ See § IV(D)(1).

³⁵¹ See § X(B).

³⁵² See § IV(D)(1).

³⁵³ See § VIII(D)(4)(ii).

³⁵⁴ See *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at *3-5 (Bankr. D. P.R. 2022).

The court denied the debtor's request to administratively close a subchapter V case in *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 (Bankr. D. P.R. 2022). The court concluded that a case can be closed only when it is fully administered and that the debtor's concerns about administrative costs were unfounded because the debtor was exempt from paying U.S. Trustee fees³⁵⁵ and because its duty to file reports under § 308³⁵⁶ and Bankruptcy Rule 2015 terminated upon confirmation. *Id.* at *8.³⁵⁷ See also *id.* at * 6.

B. Cramdown Confirmation Under §1191(b)

1. Changes in the cramdown rules and the “fair and equitable” test

Discussion of the revised cramdown rules in a sub V case begins with a summary of the key provisions that govern cramdown confirmation under pre-SBRA law.

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan.³⁵⁸ Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.³⁵⁹

Section 1129(b) permits cramdown confirmation if all the requirements for confirmation in § 1129(a) are met except the requirement of paragraph (a)(8) that all impaired classes accept it. Section 1129(b), however, does not affect the confirmation requirement of § 1129(a)(10) that

³⁵⁵ The court discussed cases dealing with administrative closing of traditional chapter 11 cases of individuals (in which discharge is deferred until completion of payments under the plan) in view of the burden on an individual debtor of paying U.S. Trustee fees for a lengthy time after confirmation if the case remained open. *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at *5-8 (Bankr. D. P.R. 2022).

³⁵⁶ Although § 308 applies only in a small business case, § 1187(b) requires a subchapter V debtor to comply with it.

³⁵⁷ Interim Bankruptcy Rule 2015(a)(6) provides that the duty to file periodic reports in a chapter 11 small business case terminates on the effective date of the plan. Interim Bankruptcy Rule 2015(b) requires a subchapter V debtor to perform the duties prescribed in (a)(6).

³⁵⁸ § 1129(a)(8).

³⁵⁹ § 1129(a)(10).

at least one impaired class of creditors accept the plan. Cramdown confirmation under § 1129(b) is not available if no impaired class of creditors has accepted the plan.

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).³⁶⁰ In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.³⁶¹

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.³⁶² Instead, §1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.³⁶³ Section 1191(c) states a new “rule of construction” for the requirement that a plan be “fair and equitable.”³⁶⁴ It replaces the “fair and equitable” requirements of §1129(b), which do not apply in a subchapter V case.

The debtor may invoke §1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, §1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income test applicable to all debtors.³⁶⁵

³⁶⁰ § 1129(b)(2)(B).

³⁶¹ See 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d]. For competing views of whether the absolute priority rule should apply in a traditional case of an individual, see Brett Weiss, *Absolute-Priority Rule Should Not Apply in Individual Cases*, 40-MAY AMER. BANKR. INST. J. 20 (2021), and Emily C. Eggmann and Robert E. Eggmann, *Absolute-Priority Rule Should Apply in Individual Chapter 11 Cases*, 40-MAY AMER. BANKR. INST. J. 21 (2021).

³⁶² § 1181(a).

³⁶³ § 1191(b).

³⁶⁴ § 1191(c).

³⁶⁵ § 1191(d).

Under the cramdown rules in §1191(b), if all other confirmation standards are met, the court must confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. These two general standards are the same as the ones that govern cramdown confirmation under § 1129(b).

It does not appear that subchapter V effects any change in the unfair discrimination requirement.³⁶⁶ Section 1191(c) does, however, provide a new “rule of construction” in subchapter V cases for the condition that a plan be “fair and equitable,” to replace the detailed definition of that term that § 1129(b) contains.

The following text explains the requirements of the “fair and equitable” test in sub V cases.

2. Cramdown requirements for secured claims

Subchapter V does not change existing law about permissible cramdown treatment of secured claims. With regard to a class of secured claims, a subchapter V plan is “fair and equitable” under § 1191(c)(1) if it complies with the standards for secured claims stated in § 1129(b)(2)(A).

Subchapter V does limit the ability of a partially secured creditor with an unsecured deficiency claim to block cramdown confirmation. In a traditional chapter 11 case, an undersecured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a traditional case because of the absence of an accepting impaired class of claims,

³⁶⁶ See Section VIII(D)(1).

which § 1129(a)(10) requires.³⁶⁷ This requirement is inapplicable for cramdown confirmation in a sub V case under § 1191(b).

In addition, the creditor in a sub V case cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

Section 1129(b) states different requirements for cramdown confirmation for secured and unsecured claims. Compliance with the absolute priority rule, for example, is not a requirement for confirmation of a plan over a secured creditor's objection if the unsecured class accepts the plan. The absolute priority rule arises from cramdown requirements relating to unsecured claims in § 1129(b)(2)(B), but it is not in the requirements for cramdown of a secured claim in § 1129(b)(2)(A).

In a sub V case, paragraph (1) of § 1191(c) makes the § 1129(b)(2)(A) cramdown requirements applicable to secured claims, and paragraphs (2) and (3) impose additional requirements, the commitment of disposable income and a finding of feasibility.

It is unclear whether the additional requirements apply when only the secured creditor rejects the plan. Without discussing the issue, the court in *In re Pearl Resources, LLC*, 622 B.R. 236, 267-70 (Bankr. S.D. Tex. 2020), concluded that the plan, accepted by unsecured creditors, complied with the additional requirements in confirming the plan over the objections of secured creditors.

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

Section 1191(c) does not state a “fair and equitable” rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the

³⁶⁷ § 1129(a)(10).

“best efforts” test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.³⁶⁸

Section 1191(c) states that the “fair and equitable” requirement *includes* the factors just mentioned. A plan may also not meet the requirement if it proposes to pay a secured creditor more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.³⁶⁹

4. The projected disposable income (or “best efforts”) test

The projected disposable income (or “best efforts”) requirement is in § 1191(c)(2).³⁷⁰

Section 1191(c)(2) states two alternatives for satisfying the test. The same payments that satisfy the projected disposable income test may also satisfy the “liquidation” or “best interest of creditors” test of § 1129(a)(7).³⁷¹

³⁶⁸ The court in *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020), reasoned that the projected disposable income is a substitute for the absolute priority rule. See also *supra* note 325.

³⁶⁹ *In re Topp’s Mechanical, Inc.* 2021 WL 5496560 (Bankr. D. Neb. 2021). The secured creditor in the case had a claim for about \$ 3,765,000 secured by collateral worth about \$ 2,125,000, resulting in an unsecured deficiency claim of about \$ 1,640,000. The creditor elected treatment under § 1111(b)(2). As Section VIII(E)(1) discusses, the requirement for cramdown confirmation of an undersecured claim when the creditor elects § 1111(b)(2) requires payments that (1) have a value equal to the value of the collateral and (2) total the full amount of the claim.

The plan proposed to pay the creditor the full amount of the secured portion of the claim with interest, about \$ 2,625,000. In addition, the plan provided for payment of the unsecured claim, for total payments of about \$ 4,265,000.

The trustee contended that payments of interest on the secured portion of the claim should be taken into account in satisfying the requirement that the creditor receive payments that totaled the full amount of its claim. Under this method, the creditor was entitled to receive only approximately \$ 1,140,000 on its unsecured claim, about \$ 500,000 less than the \$ 1,190,000 the plan proposed to pay. Because the proposed payments to the secured creditor resulted in \$500,000 less being paid to unsecured creditors, the trustee contended, the plan discriminated unfairly against the unsecured class and was not fair and equitable.

The court concluded that the trustee’s interpretation of the cramdown requirements was correct and that, therefore, the plan discriminated unfairly against the unsecured creditors and was not fair and equitable.

³⁷⁰ § 1191(c)(2). Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

³⁷¹ See *Legal Service Bureau, Inc. v. Orange County Bail Bonds (In re Orange County Bail Bonds, Inc.)*, 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 owner³⁷⁴ or the postpetition liquidation of an asset³⁷⁵ in an amount not less than the value of the debtor's disposable income.

³⁷² § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

This was the chapter 13 rule until the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. BAPCPA in 2005, which amended 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.

Presumably, the amended chapter 13 provision takes account of the fact that the “means test” standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

The difference in how the debtor must use projected disposable income may affect the timing of payments to unsecured creditors but appears to have no material effect on the amount of money that must be paid under the plan or how much of it goes to unsecured creditors. *See id.* § 8:68.

³⁷³ The projected disposable income tests in chapters 11 and 12 also contain this alternative, but the chapter 13 one does not.

³⁷⁴ *In re The Lost Cajun Enterprises, LLC*, 2021 WL 6340185 (Bankr. D. Col. 2021). The court confirmed a plan, over the objection of a creditor, that provided for pro rata cash payments to unsecured creditors on the plan's effective date, funded by a capital contribution from the debtor's sole member, equal to the debtor's projected disposable income for three years. The court did not consider whether the time should be longer.

³⁷⁵ *Legal Service Bureau, Inc. v. Orange County Bail Bonds (In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022). The plan provided for the pro rata distribution to creditors of proceeds realized from the postpetition sale of real property obtained through foreclosure of a deed of trust it held to secure a bail bond. The proceeds exceeded the value of the debtor's disposable income for three years. The court ruled that a three-year period applied because the bankruptcy court had not fixed a longer time. Section VIII(B)(4)(ii) further discusses the case.

The court in *In re Young*, 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021), ruled that individuals who claimed that they had no disposable income could not obtain confirmation of their sub V plan.³⁷⁶

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.³⁷⁷ Like the chapter 12 requirement (and unlike the requirement in traditional chapter 11 cases), it applies to entities as well as individuals.

Key confirmation issues are: (1) How is projected disposable income determined? (2) How does the court determine whether the required period should be longer than three years; and (3) If so, how does the court determine how much longer the period must be?

i. Determination of projected disposable income

The Bankruptcy Code does not define “projected disposable income,” but it defines “disposable income” in chapters 12³⁷⁸ and 13.³⁷⁹ In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.³⁸⁰

Section 1191(d) defines disposable income as income that is received by the debtor and that is not “reasonably necessary to be expended” for these specified purposes:

— the maintenance or support of the debtor or a dependent of the debtor;³⁸¹ or

³⁷⁶ The *Young* court reasoned, “Debtors who elect not to make plan payments should not get the benefit of subchapter V. If making reasonable plan payments while working is unpalatable to the Debtors, they should have filed a chapter 7 case.” *In re Young*, 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021).

³⁷⁷ See § 1225(b). Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. 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

³⁸⁶ Generally, an “above-median” debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a “below-median” debtor is one whose income is below the median. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12. The rules for determining the debtor’s status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the “means test” rules for determination of disposable income; and § 1325(b)(4), which defines “applicable commitment period” for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an “above-median” debtor must use the means test rules and pay projected disposable income for five years. A “below-median” debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor’s plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See id.* §§ 4:9, 8:12.

³⁸⁷ § 1325(b)(3).

³⁸⁸ In chapter 11 cases, § 1129(a)(15) states that projected disposable income is “as defined in [§ 1325(b)(2)].” § 1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of “amounts reasonably necessary to be expended” under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in § 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

³⁸⁹ Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor’s dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that § 1191(d)(1) states. For a discussion of application of the “reasonably necessary” standard for expenditures for maintenance and support in chapter 13 cases, *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:28.

³⁹⁰ *E.g., In re Hyde*, 2022 WL 2015538 at * 9 (Bankr. E.D. La. 2022).

With regard to expenditures for the business, income is not “disposable income” under §1191(d)(2) if it is “reasonably necessary to be expended” for expenditures “necessary for the continuation, preservation, or operation” of the business.³⁹¹ The rule contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that are anticipated (*e.g.*, the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.*, increasing inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.³⁹² As later text discusses, an extension of the period that the debtor must make payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or for expenditures to grow the business. The court in *In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021), permitted an operating reserve based on testimony of the debtor’s principal that the reserve was necessary to protect against shortfalls in cash due to the cyclical nature of the debtor’s income.

³⁹¹ § 1191(d)(2).

³⁹² See, *e.g.*, *Hammrich v. Lovald* (*In re Hammrich*), 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve); *In re Schmidt*, 145 B.R. 983 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re Kuhlman*, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re Janssen Charolais Ranch, Inc.*, 73 B.R. 125 (Bankr. D. Mont. 1987) (*dicta*) (reserve is allowable). But see *Broken Bow Ranch, Inc. v. Farmers Home Admin.* (*In re Broken Bow Ranch, Inc.*), 33 F.3d 1005 (8th Cir. 1994).

Another question arises if a debtor is a “pass-through” entity for income tax purposes (e.g., a subchapter S corporation or an entity taxed as a partnership, including a limited liability company). Such a business does not pay tax on its income. Rather, its income is “passed through” to its owners, who must pay tax on it regardless of whether the income is distributed to them. Payment of profits to owners of a business does not easily fit within the concept of an expenditure reasonably necessary for its continuation, preservation, or operation.

If the debtor’s disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income³⁹³ but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

Courts will have to decide whether distributions to owners to pay taxes the owners incur are an appropriate expenditure that is “reasonably necessary for the continuation, preservation, or operation of the business” when the debtor is not obligated to pay the tax.

The projected disposable income test has its genesis in chapter 13, which contemplates periodic, usually monthly, payments to the trustee for disbursement to creditors in accordance with the plan. In some cases, the amount of the monthly payment may increase by a specified

³⁹³ Payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

amount at one or more specified times.³⁹⁴ In any event, chapter 13 plans typically provide for the debtor to pay a regular fixed amount.

While fixed payment plans are the standard in individual cases where material variations in income are not expected, debtors in business cases may be concerned that unpredictable changes in the economy may depress earnings or increase expenses and make it difficult or impossible to pay a fixed amount. Creditors, on the other hand, may expect that, if conditions improve, the debtor should pay more.

Thus, a debtor might propose, or creditors might insist on, the payment of *actual* disposable income over the required period rather than a fixed monthly amount. Variations could include minimum or maximum requirements or some percentage of disposable income in excess of specified amounts.

Such provisions are clearly permissible in a consensual plan that arises from negotiations between the debtors and creditors. The statutory requirements seem flexible enough that a debtor's plan that included them would satisfy the PDI test. Whether a court could impose such provisions is a more difficult question, in part because of difficulties in defining how to calculate projected disposable income when the payment is not fixed and in specifying how the debtor accounts for and reports it.

A debtor must also pay careful attention to the drafting of such a provision. *In re Patel*, 621 B.R. 245 (Bankr. E.D. Cal. 2020), illustrates the issues that arise when a plan provides for payment other than fixed amounts.

³⁹⁴ Such plans are commonly referred to as “step” plans. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:23.

In *Patel*, the chapter 11 plan of the individual debtors, confirmed in 2011, provided for payment to creditors of all of the debtor's "disposable income as defined in § 1129(a)(15)(B)" in quarterly payments over seven years. The plan required reports every 120 days, but the debtor stopped making them after 24 months.

The debtor never made any payments, and an unsecured creditor filed a motion to convert the case to chapter 7 based on the default. The debtor contended that no default existed because there had been no disposable income.

Construing the plan as a contract and applying state contract law, the court concluded that disposable income included income from all sources, not just income from the business, as the debtor argued, and that the debtor had fiduciary or contractual duties under the plan to account for disposable income. Accordingly, although state law ordinarily places the burden on the creditor to show a default, the court concluded that the debtor must show the completion of payments to receive a discharge.

The court concluded that the debtor had not shown that he had not had any disposable income and converted the case to chapter 7.

The determination of objections to confirmation based on the PDI requirement requires the court to receive evidence about their accuracy and reliability, which may include testimony from an accountant or financial advisor as well as the debtor's principal.³⁹⁵

³⁹⁵ *In re The Lost Cajun Enterprises LLC*, 2021 WL 6340185 (Bankr. D. Col. 2021).

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

A projected disposable income test applies in cases under chapter 12³⁹⁶ and 13³⁹⁷ and in traditional chapter 11 cases of individuals.³⁹⁸ Each section prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the “commitment period,” but only chapter 13 specifically uses the term by defining the “applicable commitment period” – the period for which the debtor must use projected disposable income to pay unsecured creditors – as three years for “below-median” debtors and five years for “above-median” debtors.³⁹⁹

For sub V cases, § 1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.⁴⁰⁰ The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the chapter 11 and above-median chapter 13 tests.⁴⁰¹

Section 1191(c)(2) contains no standards for fixing the commitment period. And because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent under the tests in other chapters may not provide guidance.

In chapters 12 and 13 and in traditional chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a

³⁹⁶ § 1225(b).

³⁹⁷ § 1325(b).

³⁹⁸ § 1129(a)(15). The requirement applies only if an unsecured creditor invokes it.

³⁹⁹ § 1125(b)(4).

⁴⁰⁰ § 1191(c)(2).

⁴⁰¹ The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A), and five years for above-median debtors, § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor wants.⁴⁰² Case law dealing with the length of a plan under the other tests does not deal with the issue that § 1191(c)(2) presents.⁴⁰³

⁴⁰² In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

In chapter 13 cases, the court has no choice to make. The statute fixes the “applicable commitment period” as three years for a below-median debtor and five years for an above-median debtor. The only dispute for the court is whether the debtor is below-median or above-median.

In chapter 11 cases, § 1129(a)(15) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

⁴⁰³ The court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years. §§ 1222(c), 1322(d).

In chapter 13 cases, the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

In a traditional chapter 11 case of an individual, § 1129(a)(15) sets the commitment period as the longer of five years or the period for which the plan provides payments. Thus, the terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments.

Until enactment of BAPCPA in 2005, which increased the minimum commitment period in chapter 13 cases for above-median debtors to five years, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. § 1322(c) (2000) (current version at § 1322(d) (2018)) (BAPCPA renumbered subsection (c) as subsection (d)); *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:9. And the pre-BAPCPA projected disposable income test required use of projected disposable income for only three years, regardless of the length of the plan. 11 U.S.C. § 1325(b)(1)(B) (2000) (current version at 11 U.S.C. § 1325(b)(4) (2018)).

The pre-BAPCPA rules for chapter 12 cases were different, and BAPCPA did not change them. As in pre-BAPCPA chapter 13 cases (and as in cases of below-median chapter 13 debtors under current law), the maximum duration of a plan under § 1222(c) is three years unless the court approves a longer period for cause. But unlike pre-BAPCPA chapter 13, the chapter 12 projected disposable income test in § 1225(b)(1) requires use of projected disposable income during any longer period that the court approves.

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* CHAPTER 13 PRACTICE AND PROCEDURE § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under § 1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

Although the case law deals with the question of how long a plan should be, it does so in the context of a debtor’s proposal of a longer period. The case law does not consider the different question of whether the court should require the debtor to make payments for a longer period than the plan proposes.

Courts will have to determine what facts and circumstances justify a longer commitment period and, if so, how much longer the period should be.

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.⁴⁰⁴

Courts will also have to decide how to proceed when a creditor or trustee asks to fix the commitment period for a longer time than proposed in the debtor's plan.⁴⁰⁵ The authority of the court to fix the commitment period implies authority to order more payments than the debtor's plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court's determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

The court's authority to fix the commitment period implies that the court may raise the issue *sua sponte*.

Several courts have addressed the issue of the period over which the debtor must pay disposable income to creditors.

⁴⁰⁴ See 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

⁴⁰⁵ Subchapter V does not expressly give the trustee standing to object to confirmation. The trustee's duty to appear and be heard at the confirmation hearing, § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee's views on any confirmation issue to the court.

If the trustee is not a lawyer, a trustee's "objection" may initiate a dispute that requires legal representation, whereas a trustee's report bringing potential issues to the attention of the court may not. See Section IV(F). Unless the court concludes as a legal matter that it has no independent duty to determine compliance with confirmation requirements, it makes no practical difference, unless the trustee plans to appeal an adverse determination. Failure to object might be a waiver of it for appellate purposes.

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), which Section VIII(D)(8) discusses in detail, involved a plan that all impaired classes had accepted, so the PDI requirement did not apply. The court rejected the objecting creditor’s contention that the debtor’s failure to propose payments for more than three years established a lack of good faith.

In re Urgent Care Physicians, Ltd., 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), considered arguments by the U.S. Trustee and creditors that the court should require the debtor to make payments for five years instead of the three years that the plan proposed for the plan to be fair and equitable. The court concluded that a three-year term was appropriate.

The legislative history of subchapter V, the court said, indicated that Congress had recognized that small businesses typically have shorter life-spans than large businesses and that it had enacted subchapter V to permit small businesses to obtain bankruptcy relief in a timely, cost-effective manner and remain in business, thereby benefitting not only the owners, but also employees, suppliers, customers, and others who rely on the business.

Congress’s recognition that small businesses typically have shorter life-spans, the court reasoned, “suggests that a plan term of three years is more reasonable, generally speaking (or as a default), than a five-year term, absent unusual circumstances.” *Id.* at *10. The court added that Congress’s concern for employees, customers, and others, as well as for the small business itself, “reflects an intent to balance the shorter life-span planning of small businesses and timely cost-effective benefits to debtors, against the benefits to creditors.” *Id.*

The *Urgent Care Physicians* court concluded that a three-year term achieved the proper balance. The court noted that the debtor provided outpatient health care for urgent needs, had deferred payments to insiders and some healthcare equipment payments, and had committed to paying at least its projected disposable income. Extending the term for two more years, the court

continued, would further defer salary restoration to key staff, and further deferring full repayment of equipment charges could jeopardize availability of the equipment. *Id.* at *11.

The court concluded, *id.* at *11 (citation omitted):

While at first blush the simple math of an extended plan term might seem to generate a higher payment to unsecured creditors, the inherent risks to the small business debtor of that extension could defeat the unsecured creditors’ desire for greater recovery. The three-year term here is fair and equitable, as it properly balances the risks and rewards for both the debtor and its creditors. In these circumstances, the Court declines to fix a longer plan period. A longer plan term would disproportionately harm the debtor in forcing it to accrue additional unpaid expenses and potentially emerge from its reorganization saddled with more debt.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 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

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

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.

finding that there is a reasonable likelihood that the debtor will make payments *and* the plan provides appropriate remedies. This reading gives meaning to both parts of subparagraph (A).

BTATCA changed § 1191(c)(3) to resolve the issue by requiring appropriate remedies if there is a “reasonable likelihood” that the debtor will make plan payments but not if the court finds that it will, as the text explains.

The court in *In re Moore & Moore Trucking, LLC*, 2022 WL 120189 (Bankr. E.D. La. 2022), held that a provision in a plan that permitted the objecting secured creditor to foreclose in the event of default was an appropriate remedy that met the requirement of § 1191(c)(3)(B).⁴⁰⁹ In *In re Hyde*, 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), the court concluded that a provision for the debtor and the debtor's non-filing spouse to grant a second mortgage on their home to the trustee for the benefit of creditors in the event of default in payments of projected disposable was an appropriate remedy.

Courts in sub V cases have addressed objections based on feasibility (under the statute prior to the BTATCA amendment) in the context of the facts in the case.

In *In re Ellingsworth Residential Community Association, Inc.*, 2020 WL 6122645 (Bankr. M.D. Fla. 2020),⁴¹⁰ the bankruptcy court confirmed the plan of a homeowner's association over the objection of a creditor that it was not feasible because its funding depended on a proposed assessment of owners that the owners had not yet been approved.

Based on testimony from the president of the association that the plan was feasible and that the homeowners would approve the assessment, the court found that the assessment would be approved and that the debtor would therefore be able to make payments as proposed. As part of its ruling, the court imposed a requirement that the homeowners approve the assessment within four months, in default of which the court would find the debtor in breach of the plan.

⁴⁰⁹ The case arose prior to BTATCA's amendment of the statute. The revised section is § 1191(c)(3)(B)(ii). See *supra* note 408.

⁴¹⁰ In an earlier order, the bankruptcy court had determined that the debtor was eligible for subchapter V even though as a nonprofit homeowner's association it had no profit motive. *In re Ellingsworth Residential Community Association, Inc.*, 619 B.R. 519 (Bankr. M.D. Fla. 2019). The district court agreed with the bankruptcy court in an order affirming the issuance of a scheduling order. *Guan v. Ellingsworth Residential Community Association, Inc. (In re Ellingsworth Residential Community Association, Inc.)*, 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed*, 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied*, 2022 WL 1131391 (2022).

In *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020), the court confirmed the plan of the jointly administered debtors over the objections of several creditors that the plan was not feasible because its projections with regard to disposable income were speculative and subject to market conditions.

The court observed, *id.* at 269 (footnotes omitted):

The new requirement [of § 1191(C)(3)(A)⁴¹¹] fortifies the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposed it. . . . The feasibility requirement for confirmation requires a showing that the debtor can realistically carry out its plan. Though a guarantee of success is not required, the bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.

The court found that expert testimony regarding the plan's feasibility was credible and confirmed the plan. In addition, the court found that the plan's provision for the liquidation of assets in the event of default satisfied the requirement of § 1191(c)(3)(B) that the plan contain appropriate remedies.

Other courts have similarly relied on testimony from an accountant⁴¹² or credible testimony from the debtor's principal⁴¹³ in determining whether a plan meets the feasibility requirement of § 1191(c)(3)(B)(ii).

In *In re Gabbidon Builders, LLC*, 2021 WL 1964544 (Bankr. W.D. N.C. 2021), the court denied confirmation of the debtor's plan and converted the case to chapter 7. The debtor planned

⁴¹¹ The case was decided before BTATCA's amendment of the statute. See *supra* note 408.

⁴¹² *In re Moore & Moore Trucking, LLC*, 2022 WL 120189 (Bankr. E.D. La. 2022).

⁴¹³ *In re Urgent Care Physicians*, 2021 WL 6090985 (Bankr. E.D. Wisc. 2021).

to sell a parcel of real property, to use the proceeds to make some payments to creditors and to purchase a new lot, to construct a house on the new lot and sell it, and to use those proceeds to pay creditors. The plan also proposed monthly payments to creditors from operating income.

The court found that the principal's testimony in support of confirmation was unreliable and conflicting. The court concluded that the evidence did not establish that sale of the property was imminent, that the proposed construction of a new house could occur as proposed, or what the debtor would receive upon its sale. *Id.* at *2-3. Similarly, the court concluded that no evidence supported the debtor's predictions of future income. *Id.* at *4.

Testimony from a debtor's principal was likewise insufficient to establish feasibility in *In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership*, 2021 WL 1679062 (Bankr. N.D. W. Va. 2021). The court questioned the debtor's revenue projections, noting the absence of testimony as to how it would achieve a 50 percent increase over declining historical results. *Id.* at *4.⁴¹⁴

The court in *In re Lupton Consulting LLC*, 2021 WL 3890593 (Bankr. E.D. Wisc. 2021), concluded that the plan was not feasible because the debtor's financial projections submitted by its principal were not reliable in view of historical data and discrepancies with operating reports.

In an individual case, the court in *In re Hyde*, 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), concluded that testimony from the debtor and the debtor's non-filing spouse about the debtor's income from Social Security benefits and part-time work, the non-filing spouse's income and commitment to assist in the funding of the plan, and annual household expenses

⁴¹⁴ The court addressed the feasibility issue after it had decided to dismiss the case for cause, including the failure to explain ambiguities in monthly reports, postpetition payment of unsecured creditors without court approval, failure to file postpetition sales tax returns and pay the taxes, and receipt of a postpetition loan from a company owned by the principal's spouse without court approval. 2021 WL 1679062 at *3.

established that the debtor could realistically carry out the plan providing for payment of projected disposable income for five years.

6. Payment of administrative expenses under the plan

Section 1191(e) permits confirmation of a plan under §1191(b) that provides for payment through the plan of administrative expense claims and involuntary gap claims. Section VII(C) discusses this provision.

C. Postconfirmation Modification of Plan

The rules for postconfirmation modification in §1193 differ depending on whether the court has confirmed a consensual plan under §1191(a) or a cramdown plan under §1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case.⁴¹⁵

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

If the court has confirmed a consensual plan under §1191(a), §1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under §1191(a).⁴¹⁶ The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote.⁴¹⁷ These are the same rules that govern postconfirmation modification in traditional chapter 11 cases under § 1127(b).

Section 1101(2) defines “substantial consummation.” It requires that three events occur. The first is the “transfer of all or substantially all of the property proposed by the plan to be

⁴¹⁵ § 1181(a).

⁴¹⁶ § 1193(b).

⁴¹⁷ § 1193(d).

transferred.” § 1101(2)(A). The second is the “assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan.” § 1101(2)(B). The third is the “commencement of distribution under the plan.” § 1101(2)(C).

Typically, the determining factor for substantial consummation is the commencement of distribution.

In re National Tractor Parts, Inc., 2022 WL 2070923 (Bankr. N.D. Ill. 2022), considered when distributions commence. There, the debtor sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVID-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA’s claim as a general unsecured claim, payable in quarterly payments.

The proposed modification provided for separate classification of the SBA’s claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim under the original plan provisions if it did not.

The United States Trustee objected to modification on the ground that “commencement of distribution under the plan” had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made de minimis payments totaling \$ 1,428.20 to creditors in two classes but had not yet made a \$ 50,000 payment to a creditor in another class or begun quarterly payments to general unsecured creditors.

The *National Tractor Parts* court held that “commencement of distribution” occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

The *National Tractor Parts* court concluded that § 1101(2)(C) is plain and unambiguous. The court explained, *id.* at * 4:

The plain language of [§ 1101(2)(C)] does not require commencement of distribution to every creditor, or every class, or even substantially all creditors or classes. It means, simply, that the process contemplated in the confirmed plan is underway.

The court observed, further, that the language in § 1101(2)(A) and (B) refers to “all or substantially all” of property to be transferred or dealt with by the plan, whereas such language is “conspicuous in its absence from § 1101(2)(C). *Id.* at *4.

National Tractor Parts is consistent with other cases dealing with other cases addressing the issue in traditional chapter 11 cases.⁴¹⁸

⁴¹⁸ *E.g., In re Centrix Fin. LLC*, 394 F. App’x 485, 489 (10th Cir. 2010) (“[The] construction of § 1102(A) as requiring completion of substantially all payments to creditors would render meaningless § 1102(C), which requires only that distributions under the plan be commenced.”) (Unpublished). *In re Wade*, 991 F.2d 402, 406 n. 2 (7th Cir. 1993) (“Section 1101(2) states that substantial consummation is reached when, *inter alia*, distribution has commenced but not necessarily been completed.” (Emphasis in original); *In re JCP Properties, Ltd.*, 540 B.R. 596, 607 (Bankr. S. D. Tex. 2015) (“To require a substantiality of distribution payments rather than a mere existence of distribution payments, where the very same definition expressly includes a substantiality component for transferred property, would render § 1102’s ‘all or substantially all’ a mere surplusage within § 1101(2).”); *In re Western Capital Partners, LLC*, 2015 WL 400536 (Bankr. D. Colo. 2015).

Some courts, however, have concluded that commencement of distribution does not occur merely because the debtor has made some payments under the plan.⁴¹⁹ As one court explained:⁴²⁰

Applying the plain meaning approach of statutory interpretation, it seems that commencement should mean not just the beginning of payments to a single creditor, but the commencement of distribution to all or substantially all creditors.

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

If the plan has been confirmed under §1191(b), §1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the court fixes.⁴²¹ The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of §1191(b).⁴²²

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. In these chapters, postconfirmation modification is permitted at any time prior to the completion of payments under the plan; the modified plan must meet confirmation requirements.⁴²³ Unlike the provisions

⁴¹⁹ *E.g.*, *In re Dean Hardwoods, Inc.*, 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010); *In re Litton*, 222 B.R. 788 (Bankr. W.D. Va. 1998) (holding plan not substantially consummated because one distribution made to one creditor), *aff'd* on other grounds, 232 B.R. 666 (W.D. Va. 1999); *In re Heatron, Inc.*, 34 B.R. 526, 529 (Bankr. W.D. Mo. 1983) (holding plan not substantially consummated 29 months after confirmation when 53% of payments under the confirmed plan had been made). *See also In re McDonnell Horticulture, Inc.* 2015 WL 1344254 at *3 (Bankr. E.D.N.C. 2015) (Noting that “courts in this District have held that distribution of payments under a plan needs to have commenced with respect to ‘all or substantially all’ creditors,” the court concluded that payments had commenced.); *In re Archway Homes, Inc.*, 2013 WL 5835714 at *4 (Bankr. E.D.N.C. 2013) (citing *Dean Hardwoods, supra*, with approval but concluding distributions had commenced.).

The *National Tractors* court characterized this approach as the minority view. *In re National Parts, Inc.*, 2022 WL 2070923 at *5 (Bankr. N.D. Ill. 2022).

⁴²⁰ *In re Dean Hardwoods, Inc.*, 431 B.R. 387, 392 (Bankr. E.D. N.C. 2010).

⁴²¹ § 1193(c).

⁴²² The provisions of § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.

⁴²³ §§ 1229, 1329.

in the other chapters, §1193(c) does not permit modification at the request of creditors or the trustee.⁴²⁴

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

As Sections VIII(A) and (B) explain, both consensual and cramdown confirmation require that the plan meet all the requirements of § 1129(a) except those noted. This Section discusses confirmation issues under § 1129(a) that do not involve subchapter V provisions but that have arisen in subchapter V cases.⁴²⁵ Section VIII(E) discusses confirmation and related issues involving secured claims that have arisen in subchapter V cases.

1. Classification of claims; unfair discrimination

A plan must designate classes of claims, with some exceptions such as priority tax claims, and interests, § 1123(a), and specify any class that is not impaired, § 1123(b). Classification is particularly critical if the debtor wants consensual confirmation because consensual confirmation requires that all classes of claims and interests accept the plan or not be impaired. § 1129(a)(8).⁴²⁶ The classification rule in § 1122(a) is that the claims or interests in a class must be “substantially similar.” An issue related to classification is that cramdown confirmation of a subchapter V plan requires, among other things, that the plan not “discriminate unfairly.” §1191(b).

Two cases have considered the classification of secured claims in subchapter V plans.

⁴²⁴ § 1193(c).

⁴²⁵ For a review and application of requirements for confirmation in a subchapter V case, see *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020). See also *In re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020).

⁴²⁶ It is also important in the cramdown context because cramdown confirmation still requires that the plan comply with the provisions of the Bankruptcy Code. § 1329(a)(1). But a court in the cramdown situation might overlook the issue if the treatment of all members of the class complies with the cramdown requirements anyway.

In *In re New Hope Hardware, LLC*, 2020 WL 6588615 (Bankr. N.D. Ga. 2020), the debtor sought confirmation of a consensual plan that put two creditors, each secured by a separate vehicle, in the same class. Only one of them accepted the plan. The court concluded that, because each creditor had rights in different collateral, the claims were not substantially similar, and the classification therefore violated § 1122(a). *Id.* at * 3.

In *In re Olson*, 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), however, the court confirmed a plan that provided for a class of “miscellaneous secured claims.”

In re Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020), involved cramdown confirmation of a sub V plan that provided different treatment for two classes of unsecured claims. One class consisted of disputed unsecured claims of a group of creditors that totaled approximately \$ 360,000; the other class included all other unsecured claims of approximately \$ 50,000.

The plan provided for creditors in each class to receive payments of 59 percent of their claims from disposable income over five years, but the method of payments differed. The undisputed creditors were to receive equal monthly payments. The payments for the disputed creditors, however, were adjusted to reflect the seasonal nature of the debtor’s business, which was the sale of retail outdoor sporting goods in South Lake Tahoe, California.⁴²⁷ Further, the plan provided for the payments on the disputed claims to be made into a reserve account pending determination of the objections to the claims. *Id.* at 6.

⁴²⁷ Payments for the months of April through June and September through November were twice as much as payments for the months off January through March and July, August, and December.

The *Fall Line Tree Service* court concluded that the differences in treatment were “rationally related to the rights of the parties and to seasonal cash flow realities of the Lake Tahoe recreation market” and ruled that the plan did not discriminate unfairly. *Id.* at 6.

Unfair discrimination may also occur when a plan proposes to pay an undersecured creditor who exercises the § 1111(b)(2) election⁴²⁸ more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.⁴²⁹

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

Consensual confirmation requires acceptance by all impaired classes of claims and interests. § 1129(a)(8). This includes holders of equity interests if the plan impairs them. *In re New Hope Hardware, LLC*, 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020).

If a creditor does not vote on the plan, the question is whether the creditor is deemed to have accepted the plan.

In *In re Olson*, 2020 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.

⁴³¹ The court nevertheless confirmed the plan based on acceptances by all of the holders of equity interests that occurred at the confirmation hearing.

⁴³² *Accord, In re Louis*, 2022 WL 2055290 at * 17 (Bankr. C.D. Ill. 2022).

4. Timely assumption of lease of nonresidential real estate

Section 365(d)(4)(A) provides for the automatic rejection of a lease of nonresidential real property unless it is assumed within the time it specifies. The court may, prior to the expiration of the deadline, extend it for 90 days, for cause. § 365(d)(4)(B). If the lease is rejected, the debtor must immediately surrender the leased property to the lessor. § 365(d)(4)(A).

The Consolidated Appropriations Act, 2021 (the “CAA”) temporarily amended § 365(d) to change the deadline for assumption from 120 days to 210 days after the order for relief and to permit an extension of the time for an additional 90 days.⁴³³ On December 28, 2022, the deadline reverted to 120 days, which may be extended for up to 90 days.⁴³⁴

In *In re Motif Designs, Inc.*, 2020 WL 7212713 (Bankr. S.D. Mich., 2020), the sub V debtor obtained an extension of time to file its plan but had not sought to assume the lease. The plan, however, provided for the debtor to continue to occupy the property for about four months after the confirmation hearing. Because the plan provided for occupancy of the property in violation of § 365(d)(4), the court denied confirmation because the plan did not meet the requirement of § 1129(a)(1) that the plan comply with the applicable provisions of the Bankruptcy Code.

⁴³³ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f)(1)(B), 134 Stat. 1182, 3219 (December 27, 2020).

⁴³⁴ *Id.* § 1001(f)(2)(A).

5. The “best interests” or “liquidation” test of § 1129(a)(7)

Section 1129(a)(7)(A)(ii) requires that a creditor who has not accepted the plan must receive under the plan property with a value that is not less than what the creditor would receive if the debtor were liquidated under chapter 7.

In re Young, 2021 WL 1191621 (Bankr. D. N.M. 2021), determined that a plan did not comply with this requirement based on its finding that the fees of a chapter 7 trustee would be less than the anticipated costs of liquidating property under a plan.

In re Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020), discusses evidentiary issues in connection relating to the liquidation analysis.

The *Fall Line Tree Service* court rejected an objecting creditor’s argument that purchased goodwill, arising from the debtor’s earlier acquisition of its business from the creditor, should be included in the liquidation analysis under Generally Accepted Accounting Principles. The court concluded, “[P]urchased goodwill in the original sale of the going concern that has since devolved into this chapter 11 case is not an asset for purposes of hypothetical chapter 7 liquidation analysis.” *Id.* at 4.

The court also rejected the creditor’s assertion that the debtor’s monthly operating reports showed that the value of its inventory was understated, ruling that such reports are not probative of inventory value. The admissible evidence, the court continued, showed that the debtor had used book value at actual wholesale cost in its liquidation analysis, which the court thought was actually more than a chapter 7 liquidation would produce. *Id.* at *4.

6. Voting by holder of disputed claim

In re Fall Line Tree Service, Inc., 2020 WL 7082416 at *2 (Bankr. E.D. Cal. 2020), serves as a reminder that only the holder of an *allowed* claim is entitled to vote on a chapter 11

plan under § 1126(a).⁴³⁵ Bankruptcy Rule 3018(a) permits the court, after notice and a hearing, to allow a claim temporarily in an amount that the court deems proper for the purpose of accepting or rejecting a plan, but the creditor had not sought that relief.⁴³⁶

7. Individual must be current on postpetition domestic support obligations

The confirmation requirement of § 1129(a)(14) is that an individual debtor have paid all amounts payable on a domestic support obligation (“DSO”) “that first became payable” after the petition date. It makes no exception when a debtor’s inability to pay a postpetition DSO is due to circumstances beyond the debtor’s control. *In re Sullivan*, 626 B.R. 326, 334 (Bankr. D. Colo, 2021).⁴³⁷

8. Application of § 1129(a)(3) good faith requirement in context of consensual plan when creditor objects because debtor is not paying enough disposable income

In a traditional chapter 11 case of an individual, § 1129(a)(15) requires a plan to provide for the debtor to pay projected disposable income, or its value, for the longer of five years or for the term of the plan, if an unsecured creditor objects. The requirement applies even if the class of unsecured creditors has accepted the plan.

This rule does not apply in a sub V case. Section 1129(a)(15) is inapplicable, §1181(a), and neither consensual confirmation under §1191(a) nor cramdown confirmation under §1191(b) requires that the plan comply with § 1129(a)(15).

⁴³⁵ Section 1126(a) states, “The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.”

⁴³⁶ The creditor in *Fall Line Tree Service* was the only creditor in the class, rejected the plan, and objected to its confirmation. The fact that the court disregarded its claim for voting purposes, therefore, did not affect the result in the case.

⁴³⁷ The problem for the debtor in *Sullivan* was that his monthly obligations for alimony and child support were \$ 16,835 and his gross monthly income was \$ 7,600. The debtor was seeking to modify those obligations in the divorce case and proposed to modify his plan at a later time to accommodate a future ruling by the divorce court. In the meantime, he proposed to pay what he hoped the modified amounts would be. *Sullivan*, 626 B.R. 326, 334. In addition to ruling that § 1129(a)(14) prevented confirmation, the court noted, “Nor was the chapter 11 process meant to create a long-term shelter for debtors while they await the outcome of contested divorce litigation.” *Id.* at 6.

Consensual confirmation under § 1191(a) requires compliance only with the applicable provisions of § 1129(a). Accordingly, consensual confirmation requirements do not include a projected disposable income test.

Cramdown confirmation in a sub V case similarly does not require compliance with § 1129(a)(15), but § 1191(c)(2) does require payment of projected disposable income for a minimum of three, and a maximum of five, years, as the court determines.⁴³⁸

The issue is how the good faith requirement of § 1129(a)(3) applies to an objection to confirmation of a consensual plan when the debtor could pay more than the plan provides. A similar issue arises in chapter 13 cases when the debtor could pay more than the projected disposable income test of § 1325(b) requires.

Objections based on good faith arise in chapter 13 cases, for example, when the debtor proposes to retain an expensive home, car, or other luxury item (and use income to pay the debts they secure instead of paying unsecured creditors) or if the debtor receives social security benefits.⁴³⁹ The chapter 13 projected disposable income rules permit a deduction for payments on secured claims⁴⁴⁰ and exclude social security benefits. The argument is that good faith requires a debtor to surrender expensive luxury items rather than pay for them or that the debtor's social security benefits permit the debtor to pay more, even though the proposed payments comply with the projected disposable income test.⁴⁴¹ The same “good faith” objection exists in the context of a consensual plan in a sub V case, when the projected income test similarly does not apply.

⁴³⁸ See Section VIII(B)(4).

⁴³⁹ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:34, 8:59.

⁴⁴⁰ See *id.* §§ 8:29, 8:56, 8:59.

⁴⁴¹ See *id.* § 4:34.

Courts have taken various approaches in chapter 13 cases.⁴⁴² Appellate courts have rejected a “best efforts” approach to good faith (under which good faith requires that a debtor use “best efforts” to pay creditors).⁴⁴³ Instead, courts use a “totality of the circumstances” test in which ability to pay is one of many factors.⁴⁴⁴

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), examined the issue in a subchapter V case. There, the debtor’s plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan,⁴⁴⁵ but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate.

The debtor, with estimated pre-tax annual income over the three-year period ranging from \$ 360,000 to \$ 525,000, projected monthly expenses of \$ 16,000, including \$ 9,000 to pay the mortgage on his residence (in which he alone would reside), and related taxes, maintenance, and utilities. The plan provided for payments of \$ 488,061.82 over three years, of which \$ 159,500 would be available for distribution to unsecured creditors after payment of administrative expenses, priority tax claims, a priority domestic support obligation claim, and prepetition mortgage arrearages.

The creditor asserted that good faith in an individual chapter 11 case required the debtor’s “best effort” to repay creditors. In view of the debtor’s luxurious lifestyle, the creditor argued that the debtor should be required to add two years of payments from income for the benefit of

⁴⁴² See *id.* § 8:26.

⁴⁴³ See *id.* § 4:31.

⁴⁴⁴ See *id.* § 4:32.

⁴⁴⁵ Six creditors, holding claims totaling \$ 1,871,481.51 (84.6%), accepted the plan. Two creditors, holding claims totaling \$ 340,035.15 (15.4%) rejected it.

unsecured creditors, which would add \$ 144,000 to the amount unsecured creditors would receive.

The court noted that courts analyze the good faith requirement of § 1129(a)(3) based on the “totality of the circumstances.” In addition, the court observed, the good faith requirement “should be construed narrowly, particularly when raised by a dissenting creditor whose class has voted to accept the plan.” *Walker*, 628 B.R. 9, 16.

The court expressed its concerns that “a robust application of the good faith doctrine creates a risk that the court’s analysis will lapse into an inquiry that ‘may clothe subjective moral judgments with the force of law’”⁴⁴⁶ and that “a broad application of the good faith requirement also would ‘create an undue risk of judicial usurpation of the legislative power to determine the scope of and eligibility for [bankruptcy] relief.’”⁴⁴⁷

The *Walker* court thus rejected the suggestion that good faith under § 1129(a)(3) inflexibly requires a debtor’s “best effort” to make every possible resource available to repay creditors. The court reasoned that the rejection of such a rule in a sub V case involving consensual confirmation under § 1191(a) is especially relevant because § 1129(a)(15) is not applicable. The court stated, 629 B.R. at 17-18 (citation omitted):

The omission of § 1129(a)(15) from the confirmation requirements under § 1191(a) sends a clear legislative message that decision whether a plan’s funding justifies confirmation should be resolved by the creditor voting process and chapter 11’s fundamental policy of “creditor democracy.” When the affected creditors support confirmation of a plan, the

⁴⁴⁶ *In re Walker*, 628 B.R. 9, 17 (Bankr. E.D. Pa. 2021), *quoting In re Glunk*, 342 B.R. 717, 731 (Bankr. E.D. Pa. 2006) (*quoting* *Sarasota, Inc. v. Weaver*, 2004 WL 2514290, at *3 (E.D. Pa. Nov. 5, 2004) (*quoting In re Woodman*, 287 B.R. 589, 592 (Bankr. D. Me. 2003), *aff’d* 2003 WL 23709465 (D. Me. Sept. 19, 2003), *aff’d* 379 F.3d 1 (1st Cir. 2004)).

⁴⁴⁷ *Id.* at 17, *quoting In re Glunk*, 342 B.R. 717, 732 (Bankr. E.D. Pa. 2006).

court generally should be circumspect about overriding the expressed will of the voting creditors based on the good faith requirement of 11 U.S.C. § 1129(a)(3). This narrow application of 11 U.S.C. § 1129(a)(3) is especially apt in a case under subchapter V.

The court agreed that the debtor could pay more to creditors and noted, “Any court should have serious concerns about approving an individual’s reorganization plan in which the debtor proposed to live alone in a large residence, while paying arguably unnecessary carrying costs – roughly \$ 9,000 per month – thereby reducing the available distribution to creditors.” *Walker*, 628 B.R. 9, 18.

If it were a creditor, the court continued, it might reject the plan “absent more evidence that the Debtor is making some tangible sacrifices in order to repay his debts.” *Id.* at 18. But the court emphasized, “[T]he subjective reaction of a bankruptcy judge to a debtor’s proposed plan is not the test by which good faith is measured under 11 U.S.C. § 1129(a)(3).” *Id.* at 18.

Instead, the court explained, “[T]he good faith determination requires objective consideration of the totality of the circumstances. In the end, the critical issue is whether a plan adheres sufficiently to Bankruptcy Code policy and is sufficiently fair to warrant a finding that it was proposed in good faith.” *Id.* at 18.

The court found it “extremely significant” that the unsecured class of creditors had voted overwhelmingly in support of the plan. The court reasoned, “Presumably, these creditors made a business judgment that any misgivings they may have regarding the Debtor’s lifestyle and the likely accompanying reduction in their potential distribution under the Plan were outweighed by the benefits conferred by the Plan.” *Id.* at 18.

The *Walker* court also took into account the fact that the debtor had voluntarily put additional money into the plan that the projected disposable income test applicable to cramdown

confirmation would not necessarily require. The additional funding arose from the fact that the debtor's payments included the commitment of preconfirmation earnings and that disposable income as predicted did not account for the full postpetition income tax liability on anticipated future earnings. 629 B.R. at 15.

In effect, these two adjustments resulted in \$ 170,000 more in projected disposable income than the amount than the statute required. Accordingly, the debtor argued, the plan provided for more money to be paid to unsecured creditors than they would receive if the debtor paid adjusted disposable income for five years.

The court agreed that reference to the amount that a debtor would have to pay under the projected disposable income test of § 1191(c)(2) in the cramdown situation was helpful in evaluating good faith in connection with confirmation of a consensual plan, even though the test does not apply. *Id.* at 15. The court concluded that the debtor's voluntary commitment of additional money, which the strict statutory requirements would not require, supported a finding of good faith. *Id.* at 18.

The court overruled the good faith objection, *id.* at 19:

[W]hile it may be true that the Debtor could provide a greater distribution to creditors . . . the plan is neither so unfair or offensive to basic notions of justice nor so inconsistent with bankruptcy policy as to warrant court intervention to overrule the will of voting creditors.

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

Although the cramdown requirements in § 1129(b) do not apply in subchapter V cases, § 1181(a), the provisions of § 1129(b)(2)(A) govern determination of what is "fair and equitable" with regard to secured claims for purposes of cramdown confirmation under § 1191(c)(1). This

Section discusses issues relating to cramdown treatment of secured claims in subchapter V cases that involve the cramdown standards in § 1129(b)(2)(A) that apply to secured claims in subchapter V cases and other sections of the Bankruptcy Code that SBRA did not affect.

1. The § 1111(b)(2) election

The § 1111(b)(2) election comes into play when a secured creditor is undersecured in that its claim exceeds the value of the property in which it has a lien. Before discussing its operation and effects, it is useful to review the general rule for allowance of secured claims in a bankruptcy case under § 506(a).

Section 506(a) provides that an allowed claim of a creditor secured by a lien on property in which the estate has an interest is secured “to the extent of the value of such creditor’s interest in the estate’s interest in such property . . . and is an unsecured claim to the extent that the value of such creditor’s interest . . . is less than the amount of such allowed claim.” Simply put, § 506(a) gives the secured creditor a secured claim equal to the value of the encumbered property and an unsecured claim for the deficiency. Bankruptcy professionals colloquially refer to this result as the “bifurcation” of the claim into a secured claim and an unsecured claim.⁴⁴⁸ If the secured obligation is “nonrecourse” – *i.e.*, the debtor is not personally liable, and the creditor can collect its debt only from the encumbered property – the creditor does not have an unsecured claim in the case.

Assume, for example,⁴⁴⁹ that a secured creditor has a claim of \$ 100,000 secured by property worth \$ 30,000. Under § 506(a), bifurcation results in the creditor having two claims: a

⁴⁴⁸ See generally see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:5.

⁴⁴⁹ The example is taken from the excellent explanation of § 1111(b) in *In re Body Transit, Inc.*, 619 B.R. 816, 831-33 (Bankr. E.D. Pa. 2020).

secured one for \$ 30,000 and an unsecured one for \$ 70,000. If the claim is non-recourse, the creditor has no unsecured claim.

Section 1111(b) modifies the treatment of secured claims in chapter 11 cases in two ways.

First, § 1111(b)(1) provides that a secured claim will be allowed or disallowed under § 506(a) regardless of whether the creditor has recourse against the debtor. The effect is that a nonrecourse secured creditor has an allowed unsecured claim against the debtor.

Second, § 1111(b)(2) permits a secured creditor to elect to have its entire claim treated as a secured claim, with two exceptions discussed later. In the example, therefore, the electing secured creditor has a secured claim of \$ 100,000 and no unsecured claim.

Whether the undersecured creditor makes the election may make a significant difference in how much it must receive for the plan to comply with cramdown requirements.

Section 1129(b)(2)(A) states three alternative ways to satisfy the “fair and equitable” requirement for cramdown confirmation with regard to a secured claim. They apply in a sub V case under § 1191(c)(1).⁴⁵⁰

The most common alternative, in clause (i) of § 1129(b)(2)(A), is for the secured creditor to retain its liens and receive deferred cash payments. Alternatively, a plan is “fair and equitable” if it provides for sale of the encumbered property and attachment of liens to the proceeds, § 1129(b)(2)(A)(ii), or for the realization by the creditor of the “indubitable equivalent” of the claim, § 1129(b)(2)(A)(iii).

The specific statutory language with regard to permissible cramdown treatment of a secured claim through deferred cash payments is: the creditor must receive “deferred cash

⁴⁵⁰ See Section VIII(B)(2).

payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of [the creditor's] interest in the estate's interest in such property.” § 1129(b)(2)(A)(i)(II).

The somewhat complicated language effectively states two requirements. First, the deferred cash payments must total at least the amount of the allowed secured claim. Second, the *value* of the stream of payments must be equal of the value of the encumbered property. The second requirement requires application of an appropriate present value interest or discount rate. For purposes of the example, we assume it is six percent.

If the creditor in the example does not make the § 1111(b)(2) election, application of the cramdown rules is straightforward: the plan must propose to pay the entire amount of the secured claim, \$ 30,000, with interest at six percent. Payment of the claim in full satisfies the first part of the test, and the provision for interest satisfies the second one. Thus, a plan could amortize \$ 30,000 over, say, five years at six percent interest, in monthly payments of \$ 580, a total of \$ 34,800. The plan must treat the deficiency claim of \$ 70,000 as an unsecured claim, usually included in the class of general unsecured claims.

Such a provision would not, however, satisfy the first cramdown requirement if the creditor elected § 1111(b)(2). The total of payments is only \$ 34,800, \$ 65,200 short of the amount of the allowed secured claim, \$ 100,000.⁴⁵¹

⁴⁵¹ This assumes that the interest payments of \$ 4,800 count in satisfying the total of payments requirements. It is not clear that they do. *See In re Body Transit, Inc.*, 619 B.R. 816, 833, n. 25 (Bankr. E.D. Pa. 2020), *citing* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[5][b].

The court in *In re Topp's Mechanical, Inc.* 2021 WL 5496560 (Bankr. D. Neb. 2021), after explaining the competing views, adopted the majority view, concluding that “the interest component of a debtor’s stream of payments may serve a dual purpose of satisfying the allowed claim of the creditor and providing present value to the creditor.” *Id.* at *6. Because the debtor’s plan proposed to pay the secured creditor more than it was entitled to receive as a result of the § 1111(b)(2) election, the debtor had less money to pay to unsecured creditors, who had not accepted the plan. The court therefore ruled that the plan discriminated unfairly and was not fair and equitable. Section VIII(B)(3) discusses the case in the context of the “fair and equitable” requirement of § 1191(c).

Payment of the claim over five years would require an additional \$ 1,087 per month, a total monthly payment of \$ 1,667.

A longer amortization period would lower the monthly payment because there is more time to pay the claim and because more interest is paid. The following chart shows payment schedules that would satisfy both § 1129(b)(2)(A)(II) requirements (amounts rounded except monthly payment on last line). Whether a court would conclude that the longer lengths of time are “fair and equitable” is, of course, another question.

Payment Schedules Providing for Payments Totaling \$ 100,000 With a Value of \$ 30,000						
Amortization Period	Payment On \$30,000	Interest Paid at 6%	Total of Payments (\$ 30,000 + Interest payments)	Remaining Balance (\$ 100,000 – (d))	Monthly Payment on Remaining Balance ((e)/months)	Total Monthly Payment (b) + (f)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
5 years	\$ 580	\$ 4,800	\$ 34,800	\$ 65,200	\$ 1,067	\$ 1,667
10 years	\$ 333	\$ 9,968	\$ 39,968	\$ 60,032	\$ 500	\$ 883
15 years	\$ 253	\$ 15,568	\$ 45,568	\$ 54,432	\$ 302	\$ 555
20 years	\$ 215	\$ 21,583	\$ 51,583	\$ 48,417	\$ 202	\$ 417
25 years	\$ 193	\$ 27,987	\$ 57,987	\$ 42,013	\$ 140	\$ 333
30 years	\$ 180	\$ 34,751	\$ 64,751	\$ 35,249	\$ 98	\$ 278
53 yrs, 4 mos	\$ 156.43	\$ 70,113	\$ 100,113	\$ 0.00	\$ 0.00	\$ 156.43

Section 1111(b)(1)(B) states two exceptions to the availability of the § 1111(b)(2) election.

One of the exceptions applies when the encumbered property is sold under § 363 or is to be sold under the plan. If the creditor has recourse against the debtor, the § 1111(b)(2) election is not available when the property is being sold. § 1111(b)(1)(B)(ii).

The other exception applies when the undersecured creditor’s interest in the encumbered property is of “inconsequential value.” § 1111(b)(1)(B)(ii).

In a traditional chapter 11 case, a secured creditor for strategic purposes may want to retain a large unsecured deficiency claim so that it controls the vote of the unsecured class. This may give the secured creditor a “blocking position” to prevent confirmation because, unless other classes exist, a debtor cannot meet the requirement of § 1129(a)(10) that at least one impaired class of claims accept the plan.

Because subchapter V permits confirmation even if no class accepts, a secured creditor does not have a blocking position regardless of whether it makes the § 1111(b) election. Especially if a nominal distribution to unsecured creditors is likely, a secured creditor in a sub V case may conclude that making the § 1111(b) election will enhance its recovery and negotiating position.

Three courts have considered a creditor’s right to make the § 1111(b) election in a subchapter V case. The issue was whether the creditor could not invoke the election because its interest was “inconsequential.” The cases are required reading for judges and practitioners dealing with § 1111(b) elections in subchapter V cases.⁴⁵²

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), involved a taxi business that owned a single taxi medallion in which its only creditor held a security interest to secure a debt of \$ 576,927. The debtor contended that the value of the medallion was \$ 90,000; the creditor claimed it was worth \$ 200,000.

The court noted that courts have taken different approaches to determining whether property is of inconsequential value, but concluded that, under any approach, it was impossible

⁴⁵² See generally Thomas C. Scherer and Whitney L. Mosby, *The Applicability of the § 1111(b) Election in a Small Business Case*, 40 AMER. BANKR. INST. J. 12 (May 2021).

to conclude that the medallion's value was inconsequential, whether it was worth \$ 90,000 or \$ 200,000. *Id.* at * 3. The court then reviewed the different approaches.

The “most obvious approach,” the court said, it to determine and apply the plain meaning of the word “inconsequential.” Nothing that various dictionaries defined the word as “irrelevant,” “of no significance,” “unimportant”, and “able to be ignored,” the court concluded as “an abstract matter” that neither value was inconsequential. 2020 WL 5806507 at *3.

The court acknowledged that “some context is required,” and that “[a]n item of a certain value might be relatively ‘inconsequential’ to a multi-billion dollar company.” 2020 WL 5806507 at *3. But the court could not conclude that the value of the medallion was “irrelevant,” “of no significance,” or something that is “able to be ignored” when it was the debtor’s most important and valuable asset, essential to its reorganization, regardless of its value. *Id.*

The court noted that, if the debtor owned the medallion outright and proposed to abandon it under § 554 (which permits abandonment of an asset that is “of inconsequential value or benefit to the estate”), it could not conceivably be treated as having inconsequential value. The court found no justification for giving the term a different meaning in § 1111(b) than it has in § 554. 2020 WL 5806507 at *3.

The *VP Williams Trans* court then considered the view that the value of the asserted security interest should be compared to the value of the collateralized asset. Under this approach, a junior security interest that is “almost completely out-of-the-money” has inconsequential value. 2020 WL 5806507 at *4.⁴⁵³ The court saw no difference between this view and valuation in the abstract but concluded that it did not matter in the current case because

⁴⁵³ The court cited McGarey v. MidFirst Bank (*In re McGarey*), 529 B.R. 777 (D. Ariz. 2015).

the creditor held the only security interest in the collateral and, therefore, the value of its lien equaled the value of the collateral.

Next, the *VP Williams Trans* court discussed the view that the court should compare the value of the security interest to the amount of the debt.⁴⁵⁴ Under this approach, the court explained, a secured claim might have inconsequential value if the collateral is worth only a small fraction of the total claim. The court questioned application of this view when the value of the collateral is not small by itself but is significantly less than the debt. 2020 WL 5806507 at *4.

To illustrate, the court assumed that only one secured creditor with a \$ 200,000 debt holds a security interest in collateral worth \$ 100,000, which would not be “inconsequential.” The result should not be different, the court reasoned, when the claim is \$ 2,000,000 because the value of the collateral, and therefore the value of the secured claim, is the same. The court observed that denying the § 1111(b)(2) election to the \$ 2 million claimant would result in a debtor having greater rights to retain and use collateral “against the secured creditor’s will” when the debtor’s economic interests are actually far more out-of-the-money. 2020 WL 5806507 at *4.

Under yet another approach, the *VP Williams Trans* court continued, a secured claim may be deemed inconsequential if the § 1111(b)(2) election would give rise to a claim that could not as a practical matter be amortized fully under the cramdown confirmation standards in § 1129(b)(2)(A)(i), discussed above.⁴⁵⁵ The court reasoned that this view conditioned a creditor’s right to the § 1111(b)(2) election on the debtor having a feasible way to deal with it.

⁴⁵⁴ The court cited *In re Wandler*, 77 B.R. 728, 733 (Bankr. N.D. 1987).

⁴⁵⁵ The court cited *In re Wandler*, 77 B.R. 728, 733 (Bankr. N.D. 1987) (Holding that collateral worth \$ 15,000 was “inconsequential” in context of claim of \$ 390,000 and reasoning that payments having a nominal amount of \$ 390,000 but an actual current value \$ 15,000 would not be realistic).

The court found nothing in the statute to suggest that “‘feasibility’ from the debtor’s perspective was intended to be a limit on a creditor’s right to invoke section 1111(b).” 2020 WL 5806507 at *4.

Finally, the *VP Williams Trans* court considered and rejected the analysis of the *Body Transit* court, discussed below, that took policy considerations into account in making the “inconsequential value” determination. Later text discusses the court’s reasoning, following discussion of *Body Transit*.

After its discussion of the various approaches to the determination of “inconsequential value,” the *VP Williams Trans* court concluded that the case before it was not difficult because the creditor’s interest was not inconsequential under any of them. 2020 WL 5806507 at *6.

In *In re Body Transit, Inc.*, 619 B.R.816, 835 (Bankr. E.D. Pa. 2020), the court ruled that the correct methodology is to compare the value of the lien position to the total amount of the claim.

The court reasoned that the statutory text of § 1111(b)(1)(B)(ii) “explains how to value [the creditor’s interest in the collateral] and then directs the court to determine whether the value is inconsequential. The statutory text does not state how to make that second determination of ‘inconsequentiality.’” 619 B.R. at 835. To make the second determination, the court continued, the court must “compare the value of the collateral to something else, and the statutory text offers no guidance there.” *Id.*

The court concluded that the proper comparison is between the value of the collateral to the total amount of the claim. The court stated, *id.* at 835, *quoting* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[3][a] (footnotes omitted):

Section 1111(b) is intended to preserve creditors' nonbankruptcy rights, not enhance them.... Since “inconsequential” is not synonymous with “zero,” plain meaning would suggest that “inconsequential value” has to include something more than zero value. This leads to the view that a creditor whose lien is almost, but not quite, out-of-the-money should be treated as if [it] were wholly unsecured, which is for practical purposes the status the creditor would likely ascribe to itself outside of bankruptcy with collateral of little or inconsequential value. Put another way, it [sic] if the collateral's value is inconsequential when compared to the total debt owed to the creditor, the creditor should be treated as unsecured, not secured [for purposes of § 1111(b)(1)(B)].

The court then turned to consideration of whether the creditor’s interest was of “inconsequential value” when the value of the collateral was \$ 80,000, 8.2 percent of the amount of the secured debt, \$ 970,233. The court stated, 619 B.R. at 836:

[T]he “inconsequential value” determination is not a bean counting exercise; the determination cannot be based solely on a mechanical, numerical calculation. Some consideration must be given to the policies underlying both the right to make the § 1111(b) election and the exception to that statutory right. In other words, while “the numbers” provide an important starting point in deciding how much value is “inconsequential,” the court also must consider other relevant circumstances presented in the case and make a holistic determination that takes into account the purpose and policy of the statutory provisions that govern the reorganization case.

Under this analysis, the court concluded that the value of the creditor’s interest was inconsequential and that it could not make the § 1111(b)(2) election.

In the *Body Transit* court's view, the purpose of the § 1111(b)(2) election is to protect the creditor from determination of its secured claim at a time when the value of its collateral is temporarily depressed, which could permit the debtor to realize a considerable gain upon its sale when the market rebounds. 619 B.R. at 833. The court reasoned that the case before it involving a fitness club and exercise equipment as collateral "does not resemble the classic fact pattern that Congress designed § 1111(b) to prevent. [The creditor] is not a secured creditor being cashed out during a temporary decline in the value of its collateral, with the Debtor seeking to retain such collateral and obtain the windfall benefit of a market correction in the foreseeable appreciation that restores value to the collateral." 619 B.R. at 836.

Rather, the court found, any increase in the value of the debtor's enterprise would most likely be "attributable to some combination of market forces, the entrepreneurial efforts and acumen of the Debtor's principal and, perhaps, the investment of additional capital." *Id.* at 836.

These circumstances, the *Body Transit* court reasoned, supported the conclusion that the collateral was of "inconsequential value" within the meaning of § 1111(b)(1)(B)(i). The court also found support for its conclusion in the purposes and policies underlying subchapter V. *Id.* at 837.

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), discussed earlier, rejected consideration of the policies that *Body Transit* invokes.

With regard to the intended purpose of the § 1111(b)(2) election, the court reasoned, "Section 1111(b) is not conditioned on a temporary decline in collateral value; it is available to secured creditors who are not happy with a value that a debtor has proposed, and who are not happy with the prospect of having to live with a judge's decision as to what the value of the collateral is." *Id.* at 5.

The *VP Williams Trans* court reasoned that the desire of Congress to foster small business reorganization had no bearing on the interpretation of § 1111(b). “Congress also desire to foster other forms of chapter 11 reorganizations,” the court said, “but section 1111(b) applies in all chapter 11 cases, including subchapter V. If Section 1111(b) was supposed to give way in a subchapter V case, or to have a different application in such a case, that was for Congress to say, and Congress did not do so.” 2020 WL 5806507 at *6.

The third case is *In re Caribbean Motel Corp.*, 2022 WL 50401 (D. P.R. 2022). The creditor held a claim of about \$ 3.1 million secured by collateral worth \$ 550,000, about 15% of its claim. Without determining which approach to use, the court concluded that the value of the collateral was not inconsequential. *Id.* at *5-6.

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

One of the ways for a plan to meet the “fair and equitable” requirement for cramdown treatment of a secured claim under § 1129(b)(2)(A) (applicable in subchapter V under § 1191(c)(1)) is to provide for the creditor to realize the “indubitable equivalent” of its claim. The court in *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020), examined and applied this provision in confirming a subchapter V plan of jointly administered debtors over the objection of creditors holding statutory mineral property liens under Texas law.

The total of the creditors’ claims was \$ 1,151,287 million. Their statutory liens extended to all of the debtors’ gas and oil properties, valued at approximately \$ 35 million. The plan provided that the creditors: (1) would retain their liens on one property, valued at \$ 7,440,000; (2) would release their liens on all other properties; and (3) would receive pro rata payments from disposable income on a quarterly basis for two years. The plan further provided that, if the claims were not paid in full, with interest, in two years, the debtors would sell portions of the

retained collateral to pay the claims in full. In addition, the plan provided that, if the debtors did not pay the claims in full within 34 months, the creditors would receive a lien in the debtor's interest at that time in another property. *Id.* at 248-49.

The creditors rejected the plan and objected to its confirmation. Among other things, they argued that the plan was not fair and equitable because it did not provide for them to retain their existing liens and did not provide the indubitable equivalent of their claims. 622 B.R. at 266-67.⁴⁵⁶ The court overruled their objections and confirmed the plan.

The court explained that the indubitable equivalent requirement is tied to a "claim," not to the property securing the claim. Thus, the court rejected the argument that the plan could not modify their lien rights in any fashion and still meet the indubitable equivalent standard 622 B.R. at 270.

The court then addressed the creditors' argument that the plan did not meet the indubitable equivalent requirement because it reduced their 29 to 1 value-to-debt equity cushion to a 6 to 1 cushion. The court provided the following review of case law, 622 B.R. at 271-72 (original footnotes omitted):⁴⁵⁷

The Fifth Circuit has expressly recognized that one accepted method of providing indubitable equivalence is the exchange of collateral. Whether the indubitable equivalent offered is equivalent is a matter left to the discretion of the bankruptcy court in its careful

⁴⁵⁶ The creditors also objected on the grounds that the plan did not meet the disposable income requirement of § 1191(c)(2) and the feasibility requirements of § 1191(c)(3). 262 B.R. at 266. The court concluded that the plan met these requirements and that it provided adequate remedies for default. *Id.* at 267-70.

⁴⁵⁷ In footnotes to the first paragraph of the quoted text, the court cited: *In re Sun Country Dev, Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Walat Farms, Inc.*, 70 B.R. 330, 336 (Bankr. E.D. Mich. 1987) ("a bankruptcy court is permitted, indeed required, to make these determinations on a case by case basis and to order confirmation of a plan which indubitably protects and pays the claim of an objecting creditor"); *In re Swiftco, Inc.*, 1988 WL 143714 (Bankr. S.D. Tex. 1988); and *In re Philadelphia Newspapers, LLC*, 418 B.R. 548, 568 (E.D. Pa. 2009), *aff'd* 599 F.3d 298 (3d Cir. 2009).

In re Philadelphia Newspapers ruled that a plan providing for the sale of the creditor's collateral without permitting the creditor to credit bid satisfied the indubitable equivalent requirement. The Supreme Court later ruled to the contrary in *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 132 S.Ct. 2065 (2012). The Supreme Court concluded that the specific requirement for credit bidding in § 1129(b)(2)(A)(ii), which permits cramdown when a plan provides for the sale of collateral, precluded an interpretation of the indubitable equivalent standard that permitted sale without credit bidding.

reliance upon sufficient facts. Courts should not accept offers of indubitable equivalence lightly and should insist on a high degree of certainty. Moreover, indubitable equivalence is a flexible standard. The indubitable equivalent standard requires a showing that the objecting secured creditor will receive the payments to which it is entitled, and that the changes forced upon the objecting creditor are completely compensatory, meaning that the objecting creditor is fully compensated for the rights it is giving up. For example, the Fifth Circuit has stated that the “[a]bandonment of the collateral to the class would satisfy indubitable equivalent, as would a replacement lien on similar collateral.”

In *Investment Company of The Southwest*, [341 B.R. 298, 325 (B.A.P. 10th Cir. 2006),] the court recognized that a debtor may be permitted to use some portion of the equity cushion in collateral to help implement a plan without violating the indubitable equivalent standard, as long as the secured creditor remains over-secured beyond a reasonable doubt and has sufficient protection. Courts have approved plans that did not pay a secured lienholder all of its collateral sale proceeds, as long as the court is satisfied that there will always be more value in the remaining collateral than the lender's lien amount.⁴⁵⁸ Courts also have routinely held that a partial surrender of collateral to an over-secured creditor provides such creditor with the indubitable equivalent of its claim.⁴⁵⁹ A sister Court approved a plan over the objection of a secured creditor finding the debtor had provided the indubitable equivalent because the secured creditor remained over-secured beyond a reasonable doubt and had sufficient payment protection over the life of the plan.⁴⁶⁰ In essence, in the bankruptcy context, the indubitable equivalent means that the treatment afforded the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim, and also insure the integrity of the creditor's collateral position.⁴⁶¹

Applying these standards, the court concluded that the plan provided “virtual certainty” that the claims would be paid in full and that the 6 to 1 value-to-debt ratio provided an equity cushion that was sufficient adequate protection. 622 B.R. at 272.

The court rejected the creditors’ arguments that a plan could not modify a Texas statutory mineral lien under any circumstances and that lien-stripping may not be accomplished under any

⁴⁵⁸ The court cited: *In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987) (Concluding that it was unlikely that creditor's claim would ever become even partially unsecured and that plan provided secured creditor with variety of safeguards and fair interest rates); and *Affiliated Nat'l Bank-Englewood v. TMA Assocs., Ltd. (In re TMA Associates, Ltd.)*, 160 B.R. 172, 174 (D. Colo. 1993).

⁴⁵⁹ The court cited *In re May*, 174 B.R. 832, 838–839 (Bankr. S.D. Ga. 1994).

⁴⁶⁰ The court cited *In re SCC Kyle Partners, Ltd.*, 2013 WL 2903453 (Bankr. W.D. Tex.2013).

⁴⁶¹ The court cited 4 COLLIER ON BANKRUPTCY ¶ 506.03.

circumstances, concluding that § 1123(a)(5)(E) permits a plan to modify any lien as long as it complies with § 1129(b)(2)(A).⁴⁶²

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

Subchapter V has different provisions for the disbursement of payments to creditors and the role of the trustee depending on whether the court confirms a consensual plan or a cramdown plan.

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

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other than § 1129(a)(15),⁴⁶³ the court must confirm the plan.⁴⁶⁴ Confirmation of a consensual plan under §1191(a) leads to the termination of the trustee’s service under §1183(c)(1) when the plan has been “substantially consummated.”⁴⁶⁵ The debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest.⁴⁶⁶

⁴⁶² The court cited *In re Bates Land & Timber, LLC*, 877 F.3d 188 (4th Cir. 2017), which permitted cramdown confirmation of a plan providing for a secured creditor to receive property valued at \$ 13.7 million and cash of \$ 1 million on its \$ 14.6 million claim in exchange for the release of prepetition collateral.

The *Pearl Resources* court distinguished two cases on which the creditors relied, *In re CRB Partners, LLC*, 2013 WL 796566 (Bankr. W.D. Tex. 2013), and *In re Swiftco, Inc.*, 1988 WL 143714 (Bankr. S.D. Tex. 1988). The court noted that these cases ruled that the plans did not provide the indubitable equivalent of the creditors’ claims because of an insufficient equity cushion or reasonable doubt as to payment but recognized that liens could be modified.

⁴⁶³ Section 1129(a)(15) states chapter 11’s projected disposable income requirement, which applies only in the case of an individual. See Section VIII(B)(4).

⁴⁶⁴ § 1191(a).

⁴⁶⁵ § 1183(c)(1).

⁴⁶⁶ § 1183(c)(2).

Under § 1101(2), “substantial consummation” generally occurs upon “commencement of distribution under the plan.”⁴⁶⁷ Unless the plan implicates other requirements for substantial consummation, the sub V trustee’s service terminates under §1183(c)(1) when the first payment under the plan occurs.

Arguably, a sub V trustee could make the first payment under the plan, although the statute does not appear to require this. But it is clear that, at least after the first payment, the sub V trustee no longer exists and cannot make payments thereafter.

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

When the court confirms a cramdown plan, §1194(b) provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise.⁴⁶⁸ Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.⁴⁶⁹

Because the sub V trustee must make payments under a cramdown plan, the trustee’s service does not terminate upon its substantial consummation.⁴⁷⁰ The trustee’s service continues, at a minimum, until the trustee has made the required disbursements. Subchapter V does not specify when the trustee’s service is terminated under a cramdown plan. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge.,

⁴⁶⁷ § 1101(2)(C). “Substantial consummation” under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A) and (2) assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(B). Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

⁴⁶⁸ § 1194(b). Curiously, paragraph (b) of § 1194 is titled “Other Plans,” even though it applies exclusively to plans confirmed under the cramdown provisions of § 1191(b) and no other provisions of § 1194 deal specifically with payments under a consensual plan confirmed under § 1191(a).

⁴⁶⁹ § 1226(c), 1326(c).

⁴⁷⁰ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

as Section X(B) discusses. That seems to be the appropriate time for the trustee or the debtor to request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.⁴⁷¹

Section 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.⁴⁷² The statute contains no standards for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because §1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee. In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.⁴⁷³ Courts vary as to whether the debtor may make direct payments to other types of creditors.

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated

⁴⁷¹ See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-16 ("Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee.").

⁴⁷² § 1194.

⁴⁷³ W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:10.

and postpetition payments due on leases or executory contracts that are being assumed. In such instances, the trustee usually disburses the amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the plan does not modify.⁴⁷⁴

Some courts require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.⁴⁷⁵ In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as Section VIII(B)(4) discusses.

The court in *In re Spindler*, 623 B.R. 543 (Bankr. W.D. Wis. 2020), permitted a chapter 12 debtor to make direct payments to a mortgage lender under a plan that provided for the re-amortization of the debt in monthly payments over 30 years.

The court reviewed three approaches to direct payments that courts have taken in chapter 12 cases. One view is that the Bankruptcy Code prohibits direct payments on impaired or modified claims,⁴⁷⁶ while a second allows debtors to pay secured creditors directly, regardless of their impaired status.⁴⁷⁷ *Id.* at 546-47.

Most courts adopt a third approach that permits direct payments depending on the circumstances of the case.⁴⁷⁸ *Id.* at 547. In deciding whether to permit direct payments, the

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ The court cited *Fulkrod v. Savage (In re Fulkrod)*, 973 F.2d 801 (9th Cir. 1992) and *In re Marriott*, 161 B.R. 816 (Bankr. S.D. Ill. 1993).

⁴⁷⁷ The court cited *Wagner v. Armstrong (In re Wagner)*, 36 F.3d 723 (8th Cir. 1994) and *In re Crum*, 85 B.R. 878 (Bankr. N.D. Fla. 1988).

⁴⁷⁸ The court cited *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Speir*, 2018 WL 3814276 (Bankr. N.D. Miss. Aug. 8, 2018); *Westpfahl v. Clark (In re Westpfahl)*, 168 B.R. 337 (Bankr. C.D. Ill. 1994); *In re Golden*, 131 B.R. 201 (Bankr. N.D. Fla. 1991); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); and *In re Pianowski*, 92 B.R. 225 (Bankr. W.D. Mich. 1988).

Spindler court explained, these courts consider some or all of the factors that *In re Pianowski*, 92 B.R. 225 (Bankr. W.D. Mich. 1988) identified: (1) the past history of the debtor; (2) the business acumen of the debtor; (3) the debtor's post-filing compliance with statutory and court-imposed duties; (4) the good faith of the debtor; (5) the ability of the debtor to achieve meaningful reorganization absent direct payments; (6) the plan treatment of each creditor to which a direct payment is proposed to be made; (7) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (8) the legal sophistication, incentive and ability of the affected creditor to monitor compliance; (9) the ability of the trustee and the court to monitor future direct payments; (10) the potential burden on the chapter 12 trustee; (11) the possible effect on the trustee's salary or funding of the U.S. Trustee system; (12) the potential for abuse of the bankruptcy system; and (13) the existence of other unique or special circumstances.

The *Spindler* court noted that *In re Aberegg*, 961 F.2d 1307 (7th Cir. 1992), concluded that chapter 13 debtors could make direct payments in some cases and that *Aberegg* took a pragmatic approach to direct payment of mortgages that extend beyond the term of the plan, finding that it would be counterproductive to require debtors to make payments through the trustee until completion of plan payments and then to arrange for direct payments thereafter. *Spindler*, 623 B.R. at 547.

The *Spindler* court adopted the majority approach and, based on the circumstances of the case, permitted the direct mortgage payments.⁴⁷⁹ Among other things, the court noted that the debtor had negotiated payment terms with the lender and that it did not make sense to require the payment method to change at the end of the plan. *Id.* at 548-49.

⁴⁷⁹ The court also permitted, without objection, direct payment of a student loan.

When the subchapter V trustee makes payments under the plan, the trustee will be entitled to compensation for that service. To avoid this expense, a debtor may propose that the debtor, rather than the subchapter V trustee, make all payments under the plan. Creditors may support such a procedure because, at least in theory, they can receive the benefits of the reduced cost. A subchapter V trustee may prefer that the debtor make payments because it relieves the trustee of a potentially tedious administrative burden and reduces the risk of nonpayment for such additional services.

Although chapter 13 caselaw, as earlier text discusses, generally does not permit the debtor to make all payments under a plan, subchapter V does not expressly prohibit it. Moreover, the chapter 13 situation is distinguishable because the chapter 13 trustee receives compensation based on a commission on disbursements the trustee makes, whereas the subchapter V trustee generally bills on an hourly basis.

Anecdotal evidence and a few cases (that do not discuss the issue)⁴⁸⁰ indicate that at least some courts are permitting the debtor to make all payments under the plan in the absence of any objection.

The fact that the subchapter V trustee does not make payments under the plan does not, however, terminate the subchapter V trustee's services.⁴⁸¹

C. Unclaimed Funds

When a disbursement to a creditor occurs in a bankruptcy case but the creditor does not timely claim it, § 347 governs the disposition of the unclaimed property.⁴⁸² Unclaimed property typically arises when a check is mailed to the creditor at its address shown on its proof of claim

⁴⁸⁰ See, e.g., *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at * 2 (Bankr. D. P.R. 2022).

⁴⁸¹ E.g., *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 at * 8 (Bankr. D. P.R. 2022).

⁴⁸² SBRA amended § 347 to provide for disposition of unclaimed funds in subchapter V cases, SBRA § 4(a)(5), and the CARES ACT made a technical amendment to it. CARES Act §1113 (a)(4)(B).

or the debtor's records, but the creditor has changed its address or the creditor simply does not negotiate the check.

Disposition of unclaimed funds in a subchapter V case depends on who makes the distribution.

For distributions that the subchapter V trustee makes, § 347(a) requires that, 90 days after the final distribution, the trustee stop payment on any check remaining unpaid and pay the money into the court for disposition under chapter 129 of title 28. The applicable provisions of chapter 129 direct the Court to disburse unclaimed funds to the "rightful owners," 28 U.S.C. § 2041, upon "full proof of the right thereto." 28 U.S.C. § 2042. Accordingly, a creditor may later seek to recover the unclaimed funds. This is the same rule that applies to a trustee's disbursements in cases under chapters 7, 12, and 13.

For payments that the debtor makes, § 347(b) provides that any funds that remain unclaimed at the expiration of the time allowed to claim the funds become property of the debtor or of the entity acquiring the assets of the debtor under the plan. This rule also applies in chapter 9 and traditional chapter 11 cases and to distributions that a debtor or party other than the trustee makes in chapter 12 cases.

Section 347(b) does not prescribe the method by which the time to claim the funds is determined. A well-drafted plan, therefore, should establish the deadline, or the debtor or other party may request that the court fix one. Plans in traditional chapter 11 cases that do not provide for full payment of unsecured creditors often provide that no further distributions will be made to

creditors who do not timely claim their distribution and for the pro rata distribution of unclaimed funds to creditors who have claimed their distributions.⁴⁸³

X. Discharge

The discharge that a debtor receives in a sub V case and its timing depend on whether consensual or cramdown confirmation occurs.

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

Section 1141(d) governs discharge in a traditional chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan. It does not apply when the court confirms a cramdown plan.⁴⁸⁴

Section 1141(d)(5) does not apply in a sub V case.⁴⁸⁵ The omission is material only in an individual case because (d)(5) applies only when the chapter 11 debtor is an individual. Section 1141(d)(5) has two primary effects in an individual case.⁴⁸⁶

⁴⁸³ If funds in the final distribution are unclaimed, the provision might result in an administrative burden if the amount of unclaimed funds is insufficient to make a meaningful distribution to other creditors. A plan could resolve this problem by providing that, if the unclaimed funds in the final distribution are below a specified threshold, the funds will become property of the debtor instead of being distributed to creditors.

⁴⁸⁴ § 1181(c).

⁴⁸⁵ § 1181(a).

⁴⁸⁶ Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.

Subparagraph C of § 1141(d)(5) provides the court may not grant a discharge under either subparagraph (A) or (B) if the court finds that § 522(q)(1) is applicable, certain criminal proceedings are pending, or the debtor is liable for a debt described in § 522(q)(1). The same grounds for discharge are in § 727(a)(12). Section 522(q)(1) denies a debtor an exemption of assets in excess of an aggregate amount of \$ 170,350 (as of April 1, 2019; it is subject to adjustment every three years) under circumstances described in subparagraphs (A) or (B) of § 522(q)(1) unless the court finds under § 522(q)(2) that certain exempt property is reasonably necessary for the support of the debtor or any dependent.

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B)

First, § 1141(d)(5) prohibits entry of a discharge order until the individual has completed payments under the plan unless the court orders otherwise for cause.⁴⁸⁷

Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable.⁴⁸⁸

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under § 1191(a).⁴⁸⁹ Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

A plan may provide for so-called “lien-stripping” of a junior lien on the debtor’s property. “Strip-off” of a junior lien may occur if the property’s value is less than the amount of senior liens; “strip-down” reduces the amount of the lien to the value of the property in excess of the amount of the senior liens. In a chapter 13 case, lien-stripping does not occur until the end of the case, when the debtor receives a discharge.⁴⁹⁰ In a subchapter V case, however, consensual confirmation of a plan may result in immediate stripping of the lien.⁴⁹¹

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in

denies the exemption if the debtor owes a debt arising from (1) violation of state or federal securities laws; (2) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under the federal securities laws; (3) any civil remedy under 18 U.S.C. § 1964; or (4) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

⁴⁸⁷ § 1141(d)(5)(A).

⁴⁸⁸ § 1141(d)(5)(B).

⁴⁸⁹ *In re Vega Cruz*, 2022 WL 2309798 (Bankr. D. P.R. 2022). The individual debtor also does not have to deal with the § 522(q) issues discussed *supra* note 486 although they rarely arise.

⁴⁹⁰ § 1325(a)(5)(B)(i)(I). *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:11. *See also id.* § 21:23 (discussing whether “strip-off” or “strip-down” may occur when a chapter 13 debtor completes payments under a plan but is not entitled to a discharge).

⁴⁹¹ *In re Vega Cruz*, 2022 WL 2309798 (Bankr. D. P.R. 2022).

§ 502(g) (claims from the rejection of an executory contract or unexpired lease lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan.⁴⁹²

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.⁴⁹³ Only an individual is entitled to a discharge in a chapter 7 case.⁴⁹⁴ An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.⁴⁹⁵

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order.

Section X(C)(1) discusses exceptions to the § 1141(d)(1)(A) discharge.

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

When the court confirms a cramdown plan, § 1141(d) does not apply, except as provided in § 1192.⁴⁹⁶ Instead, the debtor receives a discharge under § 1192.

Section 1192 provides for discharge to occur “as soon as practicable” after the debtor completes all payments due within the first three years of the plan, “or such longer period not to

⁴⁹² § 1141(d)(1)(A).

⁴⁹³ § 1141(d)(3).

⁴⁹⁴ § 727(a)(1).

⁴⁹⁵ § 727(a).

⁴⁹⁶ § 1181(c).

exceed five years as the court may fix.”⁴⁹⁷ Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with cramdown confirmation under §1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The cramdown discharge under §1192 discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions that Section X(C)(2) discusses, unless § 1141(d), the plan, or the confirmation order provides otherwise.

The §1192 discharge also applies to “all other debts allowed under [§ 503] and provided for in the plan.”⁴⁹⁸ Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;⁴⁹⁹ compensation of the trustee and professionals employed by the trustee and the debtor;⁵⁰⁰ and claims for goods the debtor received within 20 days of the filing.⁵⁰¹ The discharge provision recognizes that a plan confirmed under §1191(b) may provide for the payment of administrative expenses through the plan.⁵⁰²

C. Exceptions to Discharge in Subchapter V Cases

Exceptions to a subchapter V discharge differ depending on whether the court confirms a consensual plan under § 1191(a) or cramdown confirmation occurs under § 1191(b).

⁴⁹⁷ § 1192. Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. § 1192 contains no provision for an earlier discharge.

⁴⁹⁸ § 1192.

⁴⁹⁹ § 503(b)(1).

⁵⁰⁰ § 503(b)(2).

⁵⁰¹ § 503(b)(9).

⁵⁰² § 1191(e). Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under § 1191(b). *See* Section VI(C).

Section 1191(e) also permits payment of claims specified in § 507(a)(3) through the plan. Section 507(a)(3) provides a priority for “involuntary gap claims” allowed under § 502(f).

1. Exceptions to discharge after consensual confirmation

As Section X(A) explains, § 1141(d) applies in a subchapter V case after confirmation of a consensual plan, except for the provisions of § 1141(d)(5) that govern the discharge of an individual in a traditional case.

The discharge that § 1141(d)(1)(A) grants upon confirmation has two exceptions.

First, in the case of an individual, § 1141(d)(2) provides that the discharge does not discharge any debt of the kind specified in § 523(a). No such exceptions apply to the discharge of an entity in a traditional or subchapter V case.

Second, § 1141(d)(6) provides that the discharge does not discharge an entity⁵⁰³ from any debt: (1) of the kind specified in § 523(a)(2)(A) or (B)⁵⁰⁴ that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid (§ 1141(d)(6)(B)). Although § 1141(d)(6) does not apply to an individual, the debts it excepts in § 1141(d)(6)(A) are debts in § 523(a) that § 1141(d)(2) excepts from an individual discharge, and the definition of excepted debts in § 1141(d)(6)(B) is identical to the definition of tax debts excepted under § 523(a)(1)(C).

Section X(C)(3) discusses procedural requirements for determination of whether a debt is excepted under § 523(a)(2), (4), or (6).

⁵⁰³ Section 1141(d)(6) uses the term “corporation.” Section 101(9) broadly defines “corporation” to include most business entities.

⁵⁰⁴ § 523(a)(2) applies to debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by: (A) false pretenses, false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition or (B) use of a written statement respecting the debtor’s or an insider’s financial condition that is materially false, on which the creditor relied, and that the debtor made or published with intent to deceive.

2. Exceptions to discharge after cramdown confirmation

As Section X(A) discusses, § 1141(d) does not apply when cramdown confirmation occurs under § 1191(b). Instead, § 1192 governs the discharge in that circumstance.

Section 1192 provides for two exceptions to discharge.

First, §1192(1) states that the discharge does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court.⁵⁰⁵ Any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation.⁵⁰⁶

Accordingly, the § 1192(1) exception provides that the discharge does not apply to debts on which the final payment is due after completion of payments under the plan, which is when the debtor receives a cramdown discharge. Chapters 12 and 13 similarly except such debts because they likewise provide for discharge at the end of the plan term.⁵⁰⁷ Because the debtor has a continuing obligation to make payments on such debts after completion of plan payments and discharge, such debts are excepted from discharge.

Second, §1192(2) excepts any debt “of the kind specified in [§ 523(a)].”⁵⁰⁸ The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual, but not an entity, under § 1141(d)(2) when the court confirms a consensual plan. Section X(D) discusses the issue of whether the § 523(a) exceptions apply to the discharge of an entity upon cramdown confirmation.

⁵⁰⁵ § 1192(1).

⁵⁰⁶ See Section VIII(B)(4)(ii).

⁵⁰⁷ See *infra* note 552.

⁵⁰⁸ § 1192(2).

Section X(C)(3) discusses procedural requirements for determination of whether a debt is excepted under § 523(a)(2), (4), or (6).

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

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge under subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is nondischargeable. Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting. If the debtor does not list the creditor, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of a proof of claim and a timely request for the determination, unless the creditor had actual notice of the deadlines in time to do so.⁵⁰⁹ The clerk's office must give at least 30 days' notice of the deadline.⁵¹⁰

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

1. Statutory language and background

Section 1192(2) excepts debts from the cramdown discharge “of the kind specified in § 523(a).” Unlike § 1141(d)(2), which makes the § 523(a) exceptions applicable after consensual confirmation only to an individual, § 1192(2) does not limit the applicability of the § 523(a) exceptions after cramdown confirmation to individuals. This language indicates that the exceptions also apply in entity cases.

⁵⁰⁹ § 523(a)(3).

⁵¹⁰ The Official Forms for the notice of the filing of a sub V case (Form B309E2 for cases of individuals and Form B309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.

The language of § 523(a), however, leads to a different conclusion. As amended by SBRA, the preamble to § 523(a) is:

A discharge under section 727, 1141, *1192*, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – [defined in paragraphs (1) through (19) of § 523(a)].

SBRA added the italicized “1192” to the list of other sections, which are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.

As amended, therefore, § 523(a) states, “A discharge under section . . . 1192 . . . does not discharge an individual debtor from any debt” that § 523(a) lists. The implication of this language is that § 1192(2)’s reference to debts “of a kind specified” in § 523(a) includes only debts that § 523(a) excepts, which are only debts of individuals. In other words, although §1192(2) states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of an entity has no operative effect because § 523(a), as amended, applies only to individuals.

SBRA’s amendment to include § 1192 in § 523(a) seems superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), §1192(2) alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a §1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the §1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and “any debt

that is otherwise nondischargeable.”⁵¹¹ The use of the words “otherwise nondischargeable” logically refers to § 523(a), which applies only to individuals.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law, as Section X(D)(2) discusses – one would expect the House Judiciary Committee Report to point that out. It does not.⁵¹² To the contrary, the Report’s explanation that the exceptions are for “any debt that is otherwise nondischargeable” demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Two bankruptcy cases decided under chapter 12, however, support the conclusion that the § 523(a) exceptions may apply to a §1192 discharge of an entity.⁵¹³ The chapter 12 discharge provisions have the same language as §1192, and the prefatory language of § 523(a) as amended refers to them and §1192 in the same way.⁵¹⁴

In the two chapter 12 cases, the corporate debtors contended that the § 523(a) exceptions to the chapter 12 discharge did not apply to them because § 523(a) states that it only excepts debts of an individual. Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

⁵¹¹ H.R. REP. NO. 116-171, at 8.

⁵¹² Retired Bankruptcy Judge A. Thomas Small, Jr., submitted testimony in support of the legislation. Judge Small’s explanation of the § 1192 discharge similarly made no reference to the § 523(a) exceptions to the discharges of non-individuals. *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), available at https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

⁵¹³ *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re JRB Consol., Inc.*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

⁵¹⁴ The chapter 12 discharge provision applicable when a debtor completes plan payments, § 1228(a), excepts from discharge any debt “of a kind specified” in § 523(a). § 1228(a)(2). A debtor may receive a so-called “hardship” discharge under certain conditions even if the debtor does not complete plan payments under § 1228(b). Section 1228(c)(2) uses the same language to except such debts from a hardship discharge.

In *In re JRB Consolidated, Inc.*,⁵¹⁵ the court reasoned that the operative language in § 1228(a)(2) (“debts of the kind” specified in § 523(a)) “does not naturally lend itself to also incorporate the meaning ‘for debtors of the kind’ referenced in § 523(a).”⁵¹⁶ Instead, the court concluded, “debts of the kind” is limited to the types of debts that the subparagraphs of § 523(a) identify.⁵¹⁷ Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.⁵¹⁸

The court in *In re Breezy Ridge Farms, Inc.*,⁵¹⁹ adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)⁵²⁰ apply to debts “of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)” that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms.⁵²¹ The *Breezy Ridge Farms* court explained that its interpretation harmonized the provisions of § 1228 and § 523(a):

Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.⁵²²

⁵¹⁵ *In re JRB Consol.*, 188 B.R. at 373.

⁵¹⁶ *Id.* at 374.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.

⁵²⁰ Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. See Section X(A).

⁵²¹ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.

⁵²² *Id.*

Commentators⁵²³ and courts have disagreed about whether the § 523(a) exceptions are applicable to the cramdown discharge of an entity. The next section examines the competing rulings.

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

Four bankruptcy judges – two in the same district – have ruled that the exceptions to discharge in § 523(a) apply only in an individual case and, therefore, that no § 523(a) exceptions to a § 1192 cramdown discharge of a corporation (or other entity⁵²⁴) exist.⁵²⁵ Reversing one of the decisions, the Fourth Circuit in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), concluded that § 1192(2) excepts debts that are listed in § 523(a) from the cramdown discharge of both individual and corporate debtors. The debate involves analysis of legislative history and the context of the statutes in support of the competing textual analyses.

Rulings of the bankruptcy courts that § 523(a) exceptions are inapplicable to entity discharge

The bankruptcy court in *Cleary Packaging*⁵²⁶ adopted and expanded the rationale of *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc.*

⁵²³ Compare, e.g., 5 NORTON BANKRUPTCY LAW AND PRACTICE § 107:19; James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, NORTON BANKR. L. ADVISER, Oct. 2019, Part IX (exceptions are applicable to discharge of sub V entity) with Richard P. Cook, *Discharges in Subchapter V: What Has Changed? What Remains the Same? Are Elephants Hiding in Mouseholes?*, 41-Jun Am. Bankr. Inst. J. 24 (June 2022) (exceptions should not be applicable to discharge of sub V entity).

⁵²⁴ “Corporation” is a defined term in the Bankruptcy Code, § 101(9) and includes, among other things, a limited liability company. E.g., *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 36 F.4th 509, 512 n. 1 (4th Cir. 2022). The text uses “corporate” or “corporation” interchangeably with “entity”.

⁵²⁵ *Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021).

⁵²⁶ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

Crabcake Factory USA), 626 B.R. 871 (Bankr. D. Md. 2021), the first case to address the issue.

Two later bankruptcy court opinions follow the approach of these cases.⁵²⁷

The bankruptcy courts focused on the text of § 523(a) and invoked two principles of statutory construction to support the conclusion that the discharge exceptions apply only to an individual. The first is the familiar rule that the plain meaning of the text governs interpretation of the bankruptcy statutes unless such an interpretation produces an absurd result.⁵²⁸ The second is that “every word must be given meaning so that no word in a statute is rendered superfluous.”⁵²⁹

For the bankruptcy courts, the critical text is in the preamble of § 523(a), which states that a discharge *under § 1192* discharges *an individual debtor* from all debts except the 21 types of listed debts. This clear and unambiguous language makes the exceptions applicable only to the § 1192 discharge of the debtor.

A contrary interpretation, the bankruptcy courts continue, would render SBRA’s amendment of § 523(a) to insert § 1192 superfluous. Section 1192(2) states that a § 1192 discharge does not discharge a debt “of the kind specified in § 523(a).” For the exceptions in § 523(a) to apply to discharges of individuals and entities under § 1192(2), it is not necessary to add § 1192 to § 523(a).

⁵²⁷ *Jennings v. Lapeer Aviation, Inc.* (*In re LaPeer Aviation, Inc.*), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); *Catt v. Rtech Fabrications, LLC* (*In re Rtech Fabrications LLC*), 635 B.R. 559 (Bankr. D. Idaho 2021);

⁵²⁸ *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA* (*In re Satellite Restaurants, Inc. Crabcake Factory USA*), 626 B.R. 871, 875-76 (Bankr. D. Md. 2021), *citing* *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

⁵²⁹ *Id.* at 876. The court cited: *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (A court should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”); and *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, — U.S. —, 137 S.Ct. 1002, 1010 (2017) (“We thus begin and end our inquiry with the text, giving each word its ‘ordinary, contemporary, common meaning.’” (quoting *Walters v. Metro. Ed. Enter., Inc.*, 519 U.S. 202, 207, (1997))).

The reference to § 1192 in § 523(a) must mean something, and “the only reasonable meaning is that Congress intended to limit application of the § 523(a) exceptions in a Subchapter V case to individuals.”⁵³⁰ In other words, the only function of the addition of “§ 1192” to the qualifying language of § 523(a) “is to limit application of § 523(a) to individual debtors in Subchapter V cases.”⁵³¹ “This is not simply the logical reading of the statute but also it is the result mandated by common principles of statutory construction.”⁵³²

Under this textual analysis, the *Cleary Packaging* bankruptcy court concluded, “When giving effect to every word of the statute, the 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

⁵⁴⁰ *Id.* at 474, quoting Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764-66 (2005) (internal notes and citations omitted). See also *Cleary Packaging*, 630 B.R. at 475, n. 12.

⁵⁴¹ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466, 475 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

⁵⁴² See generally Roger S. Goldman, et al., *Discharging False Claims Liability in Bankruptcy, Section 1141(d)(6)(A) of the Bankruptcy Code: An Incentive to Settle FCA Cases?*, 23 No. 1 Health Law 40 (American Bar Association 2010).

⁵⁴³ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466, 475 & n. 17 (Bankr. D. Md. 2021), *rev’d* 36 F.4th 509 (4th Cir. 2022).

⁵⁴⁴ The court quoted *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

Simply put, the bankruptcy courts conclude that Congress did not intend that § 1192(2) change established law regarding exceptions to an entity's chapter 11 discharge.

The *Cleary Packaging* bankruptcy court also concluded that the scope of the chapter 11 discharge should be the same in all chapter 11 cases. The court explained, 630 B.R. at 475:

Although the entities at issue in a Subchapter V case are smaller than those in most traditional chapter 11 cases, the state law structure of these entities and their need for a balance sheet restructuring are akin to larger chapter 11 cases. These entities act in the same general manner and should be subject to the same potential liabilities through the chapter 11 process. In fact, history has shown that individuals running very large corporations are capable of using the entity for improper purposes, yet the entity receives a discharge in chapter 11 if its plan is confirmed. It seems incongruent that Congress would penalize a smaller entity for similar individual conduct.

The *Cleary Packaging* bankruptcy court also noted that the § 523(a) exceptions do not apply to a discharge granted upon confirmation of a consensual plan under § 1191(a) – an outcome determined by class voting, not the actions of individual creditors. Thus, if enough creditors in a class including a creditor who claims a nondischargeable debt accept it (and all other impaired classes accept it), consensual confirmation under § 1191(a) discharges the allegedly nondischargeable claim. 630 B.R. at 476.

The court concluded, “[A]ny such result is arbitrary and undermines the equality principles of creditor treatment under the Code.” 630 B.R. at 476.

The *Cleary Packaging* bankruptcy court summarized its ruling as follows, *id.* at 476:

The nature and purpose of the discharge are different for corporate debtors, and those differences must, in this Court's opinion, be respected in Subchapter V.

The Court is persuaded by Congress' rejection of prior exceptions to discharge for corporate debtors and, more importantly, the plain language that Congress used in section 523(a) to confine those exceptions to individual debtors. Absent clear and unambiguous direction from Congress to deviate from that approach, the Court finds that an entity's discharge under section 1192 of the Code is unimpeded by section 523(a) of the Code.

The Fourth Circuit's reasoning in support of its interpretation

The Fourth Circuit in *Cleary Packaging* did not address the bankruptcy court's analysis of legislative history, the history of exceptions to discharge in chapter 11 cases, or the need for consistency in the scope of the discharge of an entity in subchapter V and chapter 11 cases. Instead, the court made four points about "the context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code's structure" that supported its interpretation. 36 F.4th at 515.

Fourth Circuit's analysis of distinctions in discharge provisions

The Fourth Circuit's first point is that "Congress conscientiously defined and distinguished the kinds of debtors" covered by the discharge provisions in chapters 7, 11, and 13. 36 F.4th at 516. Entities cannot get a discharge in chapter 7 and 13 cases; in traditional chapter 11 cases, Congress "explicitly distinguished" individual and corporate discharges by excluding different debts from each. In contrast, the court concluded, "Congress purposefully addressed both individual and corporate debtors when defining the right of discharge in Subchapter V proceedings." *Id.*

As an initial matter, the discharge provisions of chapters 7 and 13 are irrelevant to the issue. Chapter 7 is a liquidation proceeding, so a corporation effectively no longer exists after the filing of a chapter 7 case. The reason for denying a discharge to an entity in a liquidation case is to avoid trafficking in corporate shells and bankrupt partnerships.⁵⁴⁵ Section 727(a)(1) clearly and simply distinguishes individuals and entities by providing that such entities do not

⁵⁴⁵ 5 Norton Bankruptcy Law and Practice § 86:2 ("Beyond removing what was often a meaningless extension of the discharge provisions, the purpose of Code § 727(a)(1) is to avoid the trafficking in corporate shells and in bankrupt partnerships. Consistent with this purpose, the discharge provisions of Chapter 11 similarly deny discharge to debtors who are not individuals if the confirmed Chapter 11 plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under Code § 727(a) if the case were a Chapter 7 case.") (Citing H.R. Rep. No. 95-595 (1977); S. Rep. No. 95-989 (1978)).

receive a discharge. The same prohibition exists in a chapter 11 case when a corporation liquidates assets and does not remain in business. § 1141(d)(3).

An entity cannot receive a chapter 13 discharge because an entity cannot be a chapter 13 debtor under § 109(e).⁵⁴⁶ Chapter 13 distinguishes between entities and individuals by making only individuals eligible for chapter 13, not through a discharge provision.

The distinctions in the operation of the discharge provisions of chapter 7 and 13 between individuals and entities, therefore, shed no light on the interpretation of chapter 11 and subchapter V provisions that deal with exceptions to discharge.

A review of the structure of the discharge provisions of § 1141(d) and § 1192(2) helps to understand the Fourth Circuit's point about distinctions between exceptions to discharge for individuals and debtors in chapter 11 and subchapter V cases.

Section 1141(d) provides for a discharge in a traditional case (and after consensual confirmation in a sub V case) upon confirmation in one paragraph applicable to all debtors (§ 1141(d)(1)(A)) and excepts debts specified in § 523(a) from an individuals' discharge in another. (§ 1141(d)(2)). In a subchapter V case, § 1192(2) excepts debts in § 523(a) without limiting its application to individuals. The Fourth Circuit's conclusion is that Congress must have intended that the § 523(a) exceptions apply to all debtors because § 1192(2) did not limit the exceptions to individuals as § 1141(d)(2) does.

The structures of § 1141(d) and § 1192(2) support the Fourth Circuit's interpretation but they do not compel it. The legislative history of subchapter V and the history of the enactment of Chapter 11 without any exceptions to a corporation's discharge that the bankruptcy courts

⁵⁴⁶ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 12:6.

examined demonstrate that Congress did not intend that § 1192 apply to all debtors in a way that is materially different from the way that the discharge provisions of § 1141(d) apply to all debtors, as later text discusses in more detail.

Fourth Circuit’s concern about reconciliation with § 1141(d)(6)

The Fourth Circuit’s second point is that the bankruptcy court’s interpretation would “create difficulty in reconciling § 523(a) with § 1141(d)(6).” 36 F.4th at 516. The Fourth Circuit did not elaborate on its concern.

Section 1141(d)(6) provides that the discharge does not discharge an entity⁵⁴⁷ from any debt: (A) of the kind specified in § 523(a)(2)(A) or (B)⁵⁴⁸ that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (B) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid (§ 1141(d)(6)(B)). Although § 1141(d)(6) does not apply to an individual, the debts it excepts in § 1141(d)(6)(A) are debts that are nondischargeable in an individual case under § 523(a)(2), and the debts in § 1141(d)(6)(B) are identical to debts excepted under § 523(a)(1)(C).

Two possible concerns involving § 1141(d)(6) arise from the bankruptcy court’s interpretation.

First, if § 1192(2) does not except debts of an entity after cramdown discharge, the discharge will discharge debts that § 1141(d)(6) excepts, because § 1141(d) does not apply in the

⁵⁴⁷ Section 1141(d)(6) uses the term “corporation.” Section 101(9) broadly defines “corporation” to include most business entities.

⁵⁴⁸ § 523(a)(2) applies to debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by: (A) false pretenses, false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition or (B) use of a written statement respecting the debtor’s or an insider’s financial condition that is materially false, on which the creditor relied, and that the debtor made or published with intent to deceive.

case of cramdown confirmation under § 1181(c). If consensual confirmation occurs, however, such debts are excepted because § 1141(d) governs the discharge.

The fact that an entity could escape nondischargeability of a § 1141(d)(6) debt through cramdown confirmation but not through consensual confirmation supports the conclusion that the § 523(a) exceptions must apply after cramdown confirmation because the § 523(a) exceptions encompass debts described in § 1141(d)(6). In this situation, under the bankruptcy court's interpretation, an entity has an incentive to seek cramdown confirmation rather than consensual confirmation so that it receives a broader discharge.

This anomalous result with regard to limited types of debts does not provide a persuasive basis for concluding that Congress intended to except *all* types of § 523(a) debts from discharge in order to preserve exceptions for a few. While § 1141(d)(6) debts rarely arise in reported chapter 11 cases, the problem of exceptions to discharge in entity cases is widespread. The fact that the bankruptcy court's interpretation gives an entity a broader discharge in cramdown cases with regard to types of debts that rarely arise does not indicate that Congress intended to depart from the intentional and deliberate elimination of exceptions to discharge in entity cases, as later text explains.

The second issue involves the specific language of § 1141(d)(6)(A). That subparagraph provides that it does not discharge debts owed to certain creditors "of the kind specified" in § 523(a)(2)(A) or (B).

Again, a review of the statutes helps to clarify the issue.

Section 523(a) states that a discharge under § 1141 and § 1192 (and others) does not discharge an individual debtor from the listed debts. Section 1192(2) excludes debts "of the kind

specified” in § 523(a). Under the bankruptcy court’s interpretation, the inclusion of § 1192 in § 523(a)(2) means that § 1192(2) does not except debts of an entity.

Application of the bankruptcy court’s interpretation to § 1141(d)(6)(A) would mean that § 1141(d)(6) likewise does not except debts of an entity from a discharge in a traditional chapter 11 case under the following syllogism:

1. Both § 1192(2) and § 1141(d)(6)(A) except debts “of the kind specified” in § 523(a).
2. Section 523(a) states that discharges under the listed sections, including § 1141 and § 1192, do not discharge “an individual debtor” from the debts it lists.
3. The bankruptcy court’s conclusion that the exception to a § 1192 discharge for debts “of the kind specified” in § 523(a) does not apply to an entity because § 523(a) applies only to the discharge of an individual also applies to a § 1141 discharge.

A determination that § 1141(d)(6) does not except debts of an entity contradicts its express language that it excepts the listed debts from the discharge of a corporation. Accordingly, the conclusion from this exercise is that the bankruptcy court’s interpretation of § 523(a) as limiting exceptions to discharge in § 1192(2) to individuals cannot be correct because the same interpretation makes no sense when applied to § 1141(d)(6)(A).

The bankruptcy courts do not discuss the point, but their interpretation does not necessarily require the result that the foregoing discussion posits. Section 1141(d)(6) expressly states that it provides exceptions to the debts of corporations and was enacted as a stand-alone amendment to § 1141(d). The bankruptcy court’s interpretation cannot override the express provisions of § 1141(d)(6)(A) to except the debts it describes by reference to § 523(a) from a corporate discharge.

Further, the bankruptcy courts' interpretation can be reconciled with § 1141(d)(6)(A) based on differences in the context of § 1141(d)(6)(A) and in the circumstances of its enactment and the enactment of amendments to § 523(a) in 1986 and 2019 that added, respectively, the discharge provisions of chapter 12 and subchapter V. Context of the statutes and the circumstances of their enactment make it appropriate to interpret the same words differently in § 1141(d)(6)(A) than in § 1192(2).

As originally enacted in 1978, § 523(a) referenced only a chapter 7 discharge, a chapter 11 discharge, and the so-called “hardship” discharge in a chapter 13 case under § 1328(b).⁵⁴⁹ The limitation of the exceptions to debts of an individual at that time had no effect on the discharge of an entity. An entity could not be a chapter 13 debtor, and it could not get a chapter 7 discharge. Section 1141(d)(2) specifically excepted debts in § 523(a) only from the chapter 11 discharge of an individual. Chapter 12 did not exist.

In 1986, Congress enacted chapter 12 as a temporary provision⁵⁵⁰ and amended § 523(a) to include the chapter 12 discharge provisions.⁵⁵¹ Chapter 12 was modelled on chapter 13,⁵⁵²

⁵⁴⁹ In a chapter 13 case, a debtor receives a discharge under § 1328(a) upon completion of plan payments. As originally enacted, § 1328(a) excepted only one type of debt listed in § 523(a) from discharge, obligations for alimony and other support in § 523(a)(5). It was, therefore, called a “superdischarge” because only one exception to discharge applied. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.*

⁵⁵⁰ Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 255, Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986). After several extensions, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) made it a permanent part of the Bankruptcy Code.

⁵⁵¹ Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 257(n), Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986).

⁵⁵² Chapter 12 closely resembles chapter 13. In both chapters 12 and 13, creditors do not vote. The confirmation standards are similar, but different from those in chapter 11. Limits on the term of the plan exist in both chapters. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due. § 1322(b)(5) (chapter 13); § 1222(b)(5) and (9). Although a chapter 11 plan may provide for the cure of a default, it does not contain specific provisions for payments on long-term debt beyond the term of the plan. In fact, chapter 11 contains no limit on the term of the plan.

and its provisions for the exception of debts from discharge tracked the two exceptions to a chapter 13 discharge.⁵⁵³

One exception is for certain long-term debts on which the final payment is due after the final payment under the plan.⁵⁵⁴ Because the debtor has a continuing obligation to make payments on such debts after completion of plan payments and discharge, such debts are excepted from discharge.

The second exception is for debts “of a kind specified” in § 523(a).

Under the chapter 12 discharge provisions standing alone, the § 523(a) exceptions to discharge in chapter 12 cases are not limited to discharges of individuals. But Congress also enacted, in the same legislation, an amendment to § 523(a) to add the chapter 12 discharge

Sections 1222(b)(5) and 1322(b)(5) are the same. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due.

In chapter 12 cases, § 1222(b)(9) permits payment of allowed secured claims “consistent with” § 1225(a), but over a period of time longer than the term of the plan. Section 1225(a) is the chapter 12 analog of § 1325(a)(5) in chapter 13 cases. Both permit payment of an allowed secured claim with payments having a value of the allowed amount of the secured claim. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 5:10, 5:14. In a chapter 13 case, however, payments under this type of treatment must be completed within the plan term. *Id.* § 5:13.

⁵⁵³ More precisely, the exceptions in the chapter 12 discharge provisions are the same as the exceptions to the “hardship discharge” in chapter 13, with one exception based on a different provision in chapter 12 that permits payment of allowed secured claims beyond the term of the plan.

In a chapter 13 case at the time of temporary enactment of chapter 12, a debtor received a so-called “superdischarge” upon completion of plan payments in a chapter 13 case under § 1328(a), subject to only one exception in § 523(a)(5) for alimony and support obligations. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.* §§ 21:13, 21:16, 21:17.

A chapter 13 debtor who did not complete all plan payments could receive a so-called “hardship” discharge under § 1328(b) under certain conditions. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 21:8. Under § 1328(c), the hardship discharge of § 1328(b) is subject to exceptions for all of the debts in § 523(a). See *id.* § 21:18.

Like chapter 13, chapter 12 provides for both “completion” and “hardship” discharges. § 1228(a) (completion discharge); § 1228(b) (hardship discharge). Unlike chapter 13, however, both chapter 12 discharges are subject to all exceptions in § 523(a). § 1228(a)(2) (completion discharge); § 1228(c)(2) (hardship discharge).

The chapter 12 discharge provision differs from the chapter 13 hardship discharge provision in that it also excepts debts “provided for” in the plan under § 1222(b)(9), discussed *supra* note 552. These provisions recognize that, if a debtor will make payments on a debt beyond the term of the plan and after discharge, the debtor must remain liable on such a debt.

⁵⁵⁴ § 1228(a)(1) (completion discharge); § 1228(c)(1) (hardship discharge). See *supra* note 552.

sections to the list of discharges. As amended, therefore, § 523(a) stated that a chapter 12 discharge “does not discharge an individual debtor from any debt” that it lists.

In enacting subchapter V, Congress did the same thing with respect to the cramdown discharge in § 1192. First, it modelled the exceptions to the cramdown discharge on the exceptions in chapter 12. Specifically, § 1192(1) excepts debts on which the last payment is due after the plan’s term (which is when entry of discharge occurs after cramdown confirmation), and § 1192(2) excepts debts “of the kind specified” in § 523(a). Second, it added § 1192 to the list in § 523(a).

The bankruptcy courts’ interpretation in the subchapter V context is that the addition of § 523(a) must mean something, and what it means is that only debts of an individual are excepted from discharge. The same analysis means that the 1986 chapter 12 legislation also resulted in application of the exceptions in § 523(a) only to individuals (contrary to the rulings of two bankruptcy courts in chapter 12 cases discussed above).

The bankruptcy courts’ interpretation is subject to debate for other reasons, but its interpretation is not irreconcilable with § 1141(d)(6)(A).

The Fourth Circuit’s correct premise is that this reading of “of the kind specified” in § 1192 makes no sense when applying § 1141(d)(6)(A). But this does not mean that the same words must have the same effect in § 1141(d)(6)(A), or even that the meaning of the words that makes sense in § 1141(d)(6)(A) requires that they be interpreted the same way in § 1192 (or in the chapter 12 discharge provisions).

The reason is that § 1141(d)(6)(A) was enacted in 2019 as a stand-alone provision that makes a specific exception to the chapter 11 discharge of a corporation. It clearly states an exception that is applicable to a corporation regardless of how it describes the debts that are

excepted. It addressed a specific problem involving a specific category of debts to be excepted from a corporate discharge.

In contrast, § 1192(2) was enacted in connection with an amendment to § 523(a) in the same way that § 523(a) had been amended in 1986 upon enactment of chapter 12. Although enactment of § 1192(2) and the accompanying amendment to § 523(a) occurred after enactment of § 1141(d)(6)(A), its purpose and effect are the same as those in the chapter 12 legislation enacted in 1986. Determination of the meaning of the subchapter V legislation, therefore, properly involves consideration of the meaning of chapter 12 legislation that preceded § 1141(d)(6)(A), without regard to how the same language applies in § 1141(d)(6)(A).

The chapter 12 discharge provisions in § 1228 and corresponding amendment to § 523(a) were part of comprehensive legislation to deal with the reorganization of family farmers that, unlike chapter 13, permitted entities to file such cases. The similar subchapter V provisions were a part of comprehensive legislation to facilitate the reorganization of small businesses that modified important aspects of chapter 11. How congress used the same words in another specific context does not properly inform their interpretation in the context of comprehensive legislation. Conversely, the meaning of the words in the comprehensive legislation does not require the same meaning in a statute with limited effect where a different meaning is clear.

In other words, the bankruptcy courts' reading of the effect of the limitation of exceptions in § 523(a) to individuals with regard to the general effect of discharges that it lists does not mean that the same reading is applicable when a specific statute – § 1141(d)(6)(A) – references specific subparagraphs of § 523(a)(2) to describe debts that are clearly intended to be excepted from a corporate discharge.

Fourth Circuit’s discussion of exceptions in chapter 12 cases

The third structural point the Fourth Circuit advances, which it describes as “more telling,” is “Congress’s importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings.” 36 F.4th at 516. Citing the chapter 12 cases that earlier text discusses,⁵⁵⁵ the Fourth Circuit observed that, under the language of the chapter 12 discharge provisions materially identical to § 1192, those courts had determined that the § 523(a) exceptions applied to an entity’s chapter 12 discharge.

The proposition that subchapter V is “conceptually similar” to chapter 12 is imprecise. Although subchapter V resembles chapter 12 in some ways, it is significantly different in others.⁵⁵⁶ Critically, subchapter V is part of chapter 11, and its requirements for confirmation incorporate most of the requirements of § 1129(a). Thus, more accurately, subchapter V uses chapter 11 as its base and then incorporates some of chapter 12’s structure.⁵⁵⁷

Nevertheless, because the language of the discharge exceptions in chapter 12 and § 1192(2) is identical, the holdings in the chapter 12 cases support the Fourth Circuit’s ruling. In fact, the Fourth’s Circuit’s textual analysis is similar to the textual analysis those courts used. Otherwise, the cases add little enlightenment about the proper interpretation of the statutes in question. All they do is reach the same result as the Fourth Circuit for the same reasons.

The bankruptcy court in *Cleary Packaging* addressed the chapter 12 cases and distinguished them based on two important differences between chapter 12 and subchapter V.

⁵⁵⁵ *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re JRB Consol., Inc.*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

⁵⁵⁶ See Part I.

⁵⁵⁷ As the court observed in *In re Trepitin*, 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020): Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

630 B.R. at 472 & n. 9.⁵⁵⁸ First, subchapter V is an alternative for a business entity and applies to a much broader array of entities than those eligible for chapter 12 as family farmers and fishers. Second, subchapter V incorporates the discharge provisions of § 1141(d) in the context of a consensual plan. Unlike the chapter 12 discharge provision, § 1141(d) distinguishes between individual and corporate discharges.

The *Cleary Packaging* bankruptcy court concluded, “The lack of such distinction within Chapter 12 considered in conjunction with the narrowly circumscribed type of entity that may be a Chapter 12 debtor renders analogy between the two discharge provisions unpersuasive.” 630 B.R. at 472, n. 9, *quoting United States ex rel. Minge v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430 (S.D.N.Y. 2014).

Further, the bankruptcy court in *Cleary Packaging* noted that the plain language of the chapter 12 provision “could support a result different than that reached by the courts” in the chapter 12 cases. 630 B.R. at 472.

In short, although the chapter 12 cases support the Fourth Circuit’s decision in the sense that they are consistent with it, they provide no additional basis for it. They support the Fourth Circuit’s ruling only if their textual analysis is correct – the question before the Fourth Circuit – and if their reasoning and holdings appropriately apply in the subchapter V context. The much wider availability of subchapter V than chapter 12 requires a fresh examination of the statutory language in the subchapter V context.

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 Section 1141(d)(5) makes three other distinctions between the discharge of individual and entity debts. Section 1141(d)(5), which does not apply in subchapter V, § 1181(1), deals only with individual debtors and provides for (1) deferral of discharge until completion of plan payments; (2) the grant of a so-called "hardship discharge" under certain conditions for a debtor who has not completed plan payments; and (3) the court to grant the discharge if it finds no reasonable cause to believe that § 522(q)(1) is applicable and that no proceeding is pending in which the debtor may be found guilty of a felony as described in § 522(q)(1)(A) or liable for a debt as described in § 522(q)(1)(B). Similar provisions with regard to § 522(q) apply to the grant of a discharge under chapters 7 (§ 727(a)(12)), 12 (§ 1228(f)), and 13 (§ 1328(h)). For a discussion of the chapter 13 provision, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:5.

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

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, or 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).

⁵⁶⁰ The priority discussion here involves only the priority of unsecured creditors over equity interests. Although a secured creditor has a “priority” over unsecured creditors in that it has collateral to secure its debt, and unsecured creditors in a liquidation case cannot generally be paid from that liquidation of a creditor's collateral until the secured creditor receives full payment, that type of “priority” is irrelevant to the absolute priority rule. Priority claims under § 507 are likewise irrelevant to the issue because they must be paid in full. § 1129(a)(9). For simplicity, the discussion does not include consideration of issues that arise when one class of unsecured creditors is subordinated to the claims of another unsecured class.

⁵⁶¹ Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764 (2005) (internal notes and citations omitted).

As previous text discusses, and as the bankruptcy court in *Cleary Packaging* recognized, Congress enacted chapter 11 in 1978 with no exceptions to the discharge of a corporation's debts because *any* corporate discharge exception "would leave an undesirable uncertainty surrounding reorganizations that is unacceptable."⁵⁶²

The existence of nondischargeable debts of an entity, therefore, is related to the basic economic questions of how much a debtor can pay and how it is allocated. If the nondischargeable debt is large enough that the debtor cannot generate enough money to pay it within a reasonable time, reorganization is not possible. If reorganization is possible, the need to pay the nondischargeable debt in full affects the allocation of the money available to pay debts.

The absolute priority rule is only tangentially related to the question of what the debtor can pay. It does not apply if what the debtor can pay is enough to be acceptable to the class of unsecured creditors so that their acceptance makes it inapplicable. It is not related at all to the allocation of available money among creditors. The absolute priority rule, rather, involves allocation of the debtor's value between creditors and owners.

What the absolute priority rule affects is the ability of a debtor, especially a small business, to reorganize.

In one sense, ownership interests in an insolvent entity have no value because the entity's assets exceed its value. If a reorganization plan obligates the debtor to pay creditors an amount for *pro rata* distribution equal to the net liquidation value of the company (*i.e.*, the value of the debtor as a going concern less the amount of secured and priority debt), the reorganized debtor

⁵⁶² Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re Cleary Packaging LLC*), 630 B.R. 466, 474 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022), *quoting* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764-66 (2005).

has a net worth of zero. Creditors arguably lose nothing if existing owners retain the ownership interests that have no value.

Absolute priority rule principles, however, prescribe value to ownership interests in an insolvent entity and require that, in the absence of payment in full, the creditors become the owners of the reorganized debtor even in the circumstances just described unless – as a class – they accept a plan that provides otherwise.

Creditor ownership of a publicly-traded corporation is one thing. Creditor ownership of a private small business is another. It is unlikely that a market for the equity interests in a privately held business will exist. Creditors typically are not interested in holding a minority interest in a private company that they cannot readily turn into cash.

Moreover, the owners of a small business are usually its managers. In many instances, the value of a small business is dependent on the services that they provide. If reorganization means that they will lose their ownership interests, they may elect not to pursue reorganization in the first place. And if they do but are unable to restructure without retaining ownership, they may well abandon the effort or let the creditors as the new owners manage the business.

These real-life considerations are the bases for elimination of the absolute priority rule in entity cases under subchapter V. Simply put, its elimination permits the reorganization of small businesses that would otherwise not be possible or even attempted.

In accordance with the underlying premises of the absolute priority rule that equity in an insolvent entity has value and that creditors are its equitable owners, subchapter V substitutes the projected disposable income requirement for it. At bottom, the value of a corporation is its earning capacity. Instead of giving creditors the right to own the entity if they reject the plan, subchapter V gives them its earnings for a three to five year period, as the court determines. As

such, it turns the ownership interest that unsecured creditors could otherwise claim under the absolute priority rule into cash in a way that could not be accomplished under the absolute priority rule in a small business context.

Analysis of the Fourth Circuit's "fairness and equity" rationale

These principles guide analysis of the Fourth Circuit's conclusion that considerations of fairness and equity require exceptions to an entity's discharge in view of elimination of the absolute priority rule.

The Fourth Circuit's consideration of equity and fairness and its connection of exceptions to discharge with elimination of the absolute priority rule begins with the premise that elimination of the absolute priority rule allows an entity's owners to retain their ownership interests "at the expense of and over the objection of creditors." 36 F.4th at 517.

The court's premise is partially correct in that it is true that elimination of the absolute priority rule means that a *class* of creditors in a subchapter V case no longer has the ability to insist on full payment as a condition of the owners' retention of their interests. But a *single* creditor never had the right to invoke the absolute priority rule unless its claim was large enough to control the class vote.

Elimination of the absolute priority rule in subchapter V cases does not necessarily mean that owners retain their interests "at the expense" of creditors. In a subchapter V case, as earlier text discusses, ownership interests in the debtor are likely to have no realizable value. Reorganization usually depends on continued management by existing owners and therefore requires their retention of ownership. The liquidation value of assets often is less than the amount of debt that the assets secure. Retention of ownership interests that have no realizable value hardly comes at the expense of creditors.

In its consideration of fairness and equity, the Fourth Circuit connected elimination of the absolute priority rule to exceptions to an entity's discharge and concluded that treating an entity's discharge differently from an individual's would (1) undermine the balance of elimination of the absolute priority rule by adding an additional layer of fairness and equity; (2) make no sense; and (3) create perverse incentives. 36 F.4th at 517.

The connection of discharge exceptions to elimination of the absolute priority rule is not an appropriate one.

Recall that the absolute priority rule is a requirement in traditional cases that unsecured creditors may invoke collectively if their class rejects that plan. A creditor cannot invoke it on its own behalf if its class of creditors accepts the plan. It protects classes of creditors, not individual one creditor.

In contrast, nondischargeable debt involves only the creditor who holds it. Nondischargeability of a creditor's debt may improve *that* creditor's position, but it provides no benefits to *other* creditors.

Limitations on dischargeability of debts that favor some creditors does not balance the elimination of the absolute priority rule that affects all creditors.

Moreover, elimination of distinctions between individuals and entities for the exception of debts from discharge cannot possibly add an "additional layer of fairness and equity" for any creditors except those with nondischargeable debts. Nondischargeability of a particular debt does not affect determination of the debtor's PDI – the key determinant of how much the debtor must pay unsecured creditors. All it does is leave the debtor with an obligation to pay the nondischargeable debt because it cannot restructure it.

Indeed, the existence of a nondischargeable debt in a reorganization case is in most circumstances adverse to the interests of unsecured creditors generally.

First, it results in competition for available funds between unsecured creditors with dischargeable debts and those with nondischargeable debts. In general, any chapter 11 plan (including all subchapter V plans, whether consensual or cramdown) must treat similarly situated creditors the same. The fact that a debt is nondischargeable presumably will not increase its share of projected disposable income in a subchapter V case.⁵⁶³ At best, the plan may be able to deal with the nondischargeable debt by payment of the remaining balance after application of its pro rata share of PDI in payments that begin when the period for payment of PDI ends.

This situation creates an incentive for a debtor to minimize payments to creditors with dischargeable debts. Every dollar not paid to creditors generally is a dollar that is available to pay the nondischargeable debt. Conversely, every dollar paid on the nondischargeable debt in excess of a *pro rata* share of disposable income is a dollar that is not paid to unsecured creditors generally.

Second, the existence of nondischargeable debt increases the probability of liquidation. When a feasible plan is otherwise possible, liquidation generally results in a lower recovery for unsecured creditors than payments under a plan.

To the extent that application of exceptions to discharge in subchapter V affects any balance, it tips the scale in favor of the creditor whose debt is excepted from discharge and against creditors whose debts are not dischargeable.

⁵⁶³ The general rule in chapter 13 cases is that a plan must treat a nondischargeable claim in the same manner as other unsecured claims. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 7:10 – 7:14.

The Fourth Circuit did not elaborate on its observation that the discharge of an entity's debts with no exceptions "would make no sense and indeed would create adverse incentives." As earlier text explains, discharge without exceptions furthers the prospects for a successful reorganization and results in equality of treatment for creditors in a traditional case. For these reasons, Congress eliminated exceptions to the discharge of an entity when it enacted chapter 11 in 1978.

A subchapter V case is no different. Depending on the amount of a nondischargeable debt, its existence is likely to doom reorganization of a small business and result in its liquidation.

A subchapter V debtor may be able to manage nondischargeable debts if, collectively, they are relatively immaterial in relation to its total debts. For example, assume a debtor with \$300,000 of unsecured debt that will pay \$ 75,000 in projected disposable income over three years to unsecured creditors – a 25 percent distribution.

This debtor could probably pay a nondischargeable debt of, say, \$ 50,000. The debtor could pay the unpaid balance of \$ 37,500 by continuing PDI payments at the same level for an additional year and a half. Owners may elect to pursue reorganization in this situation, reasoning that retention of ownership rather than liquidation is worth the additional cost.

On the other hand, it is arguable that this debtor should be required to pay projected disposable income to creditors for five years rather than three, thereby increasing what they receive. The additional money that unsecured creditors receive is money that would otherwise be paid on the nondischargeable debt, so it increases the cost of the reorganization from the owners' standpoint. At some point, owners will decide that it is better for them to start over in other employment or a new venture than to devote the fruits of their efforts to payment of debt.

In contrast, assume that a debtor has \$ 5 million in unsecured debt, including a nondischargeable judgment of \$4.7 million, and projected disposable income over five years of \$280,000. Creditors receive a distribution of about 5.6 percent, and the nondischargeable debt is reduced to about \$4,436,800. It would take this debtor over 16 years to pay the rest of the nondischargeable debt based on its currently projected income. It is not realistic to expect that owners will sign on for this type of work. Liquidation is inevitable.

For creditors with the objective of putting the debtor out of business, that is a welcome result. It is a disaster for owners who have invested their time and money in the business, and it adversely affects employees who lose their jobs, customers who rely on the business, and creditors who will be paid less (and often nothing) when liquidation occurs.

The same result can occur with regard to relatively small nondischargeable debts if there are enough of them. Further, once a creditor's strategy of asserting a nondischargeable debt succeeds, the predictable result is that more creditors will assert such claims. Indeed, creditors will have a significant incentive to do so. A debtor must defend even non-meritorious claims, increasing administrative expenses and, necessarily, what creditors receive.

The Fourth Circuit's conclusion that discharge of a subchapter V entity without exceptions would "make no sense" and "create perverse incentives" is, therefore, suspect.

The availability of exceptions to an entity's discharge threatens the ability of a debtor to reorganize. It encourages the assertion and prosecution of exceptions to discharge, resulting in litigation that requires time that could otherwise be devoted to reorganization efforts and money for attorney's fees and expenses that would otherwise be available for creditors.

Moreover, if the result of a nondischargeable judgment is liquidation, the nondischargeable debt receives only its pro rata share of any net proceeds of liquidation.

Anecdotal experience teaches that the liquidation of a small business most often results in pennies on the dollar for unsecured creditors and, in many cases, nothing at all.⁵⁶⁴ The entire nondischargeability dispute becomes meaningless.

The bankruptcy courts' interpretation is the better one

The interpretations of the statute by the bankruptcy courts and the Fourth Circuit are both plausible, as the Fourth Circuit acknowledged in describing the question as a “close one.”⁵⁶⁵ Based on the legislative history of subchapter V and the historical background of the treatment of exceptions to the discharge of a corporation in traditional chapter 11 cases, the interpretation of the bankruptcy courts is the better one because it accurately reflects Congressional intent.

Exceptions to an entity's discharge in a subchapter V case create the same problems as exception of debts from a traditional chapter 11 discharge, whether the plan is consensual or not, that Congress addressed in 1978 by eliminating exceptions to an entity's discharge in a chapter 11 reorganization.

Perhaps Congress in 2019 had a different view of exceptions to an entity's discharge in the case of cramdown confirmation in a subchapter V case than the Congress in 1978. But it is difficult to conclude that, in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of small businesses by, among other things, eliminating the absolute priority rule in a cramdown situation, Congress in 2019 intended to re-introduce all the problems with exceptions to the discharge of a corporation that it eliminated over 50 years earlier.

⁵⁶⁴ This consideration may have been of no concern to the creditor in *Cleary Packaging*. An employee of the creditor, apparently related to some of the creditor's former owners, left to organize the debtor and compete with it, resulting in litigation and a judgment against the debtor and the former employee for over \$4.7 million. The creditor's objective in the subchapter V case could have been to put a competitor out of business through liquidation.

⁵⁶⁵ *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 36 F.4th 509, 512 (4th Cir. 2022).

Rather, in view of the facts that nothing in the legislative history of subchapter V mentions such a drastic change and parts of it indicate, to the contrary, that the existing structure would be continued, the better conclusion is that Congress did not intend that the exceptions to discharge in § 523(a) apply to the discharge of an entity under § 1192.

Two final observations about the effect of a subchapter V cramdown discharge without exceptions are appropriate.

First, a concern underlying the issue is the legitimate notion that a debtor should not be able to escape the consequences of fraud or other misconduct through the subchapter V process. After all, the classic formulation of the “fresh start” policy of the bankruptcy laws recognizes that bankruptcy relief is for the “honest but unfortunate debtor.”⁵⁶⁶ The same question exists in traditional chapter 11 cases, but Congress nevertheless provided for the elimination of nondischargeable debts when it enacted chapter 11, with one later exception in § 1141(d)(6).

The response is that an entity’s discharge in a reorganization case serves a different function than the “fresh start” discharge that an individual receives. In short, discharge of an entity without exceptions rests on the need for finality of a confirmed plan. Discharge without exceptions is essential for the reorganization of the entity, rather than its liquidation, in accordance with chapter 11’s creditor equality principles that require equal treatment of similarly situated creditors.⁵⁶⁷

Second, as earlier text discusses, a conclusion that an entity’s debt is excepted from an entity’s discharge does not mean that it will be paid in full. If reorganization fails for reasons discussed above and liquidation occurs, the creditor will receive only its *pro rata* share of the

⁵⁶⁶ Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

⁵⁶⁷ See Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 761 (2005) Professor Brubaker discusses this point in detail. *Id.* at 761-62.

proceeds from liquidation after satisfaction of secured claims, administrative claims, and priority claims.

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

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.⁵⁶⁸ Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, §1186 provides that, if the court confirms a plan under the cramdown provisions of §1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.⁵⁶⁹ Section 1186 applies to debtors that are entities as well as individuals.

Discussion of the effects of these changes begins with a summary of postpetition property and earnings under pre-SBRA law.

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

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).⁵⁷⁰

⁵⁶⁸ § 1181(a).

⁵⁶⁹ § 1186.

⁵⁷⁰ § 541.

Section 541(a)(7) provides that any interest in property that the *estate* acquires after the commencement of the case is property of the estate.

In the case of an entity, the debtor in possession (or trustee) controls the entity and all its property and acts on behalf of the estate. Bankruptcy does not recognize any distinction between the property interests of an entity debtor and those of the estate. Any interest in property that an entity acquires after the commencement of the case (including any postpetition earnings) must be property that the estate acquires and is property of the estate under § 541(a)(7).

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,⁵⁷¹ unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).⁵⁷² Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.⁵⁷³ In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.⁵⁷⁴

The rules in chapter 11 cases of individuals were the same as in chapter 7 cases before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA.”) Thus, property that an individual chapter 11 debtor acquired after the filing of the case and earnings from postpetition services were not property of the estate (with limited exceptions as noted above).

⁵⁷¹ Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.

⁵⁷² § 541(a)(6).

⁵⁷³ *Id.*

⁵⁷⁴ §§ 1207(a), 1306(a).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,⁵⁷⁵ and earnings from postpetition services,⁵⁷⁶ both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.⁵⁷⁷ Section 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).⁵⁷⁸ Section 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of

⁵⁷⁵ § 1115(a)(1).

⁵⁷⁶ § 1115(a)(2).

⁵⁷⁷ § 1181(a).

⁵⁷⁸ § 1186(a).

creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

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

Section 1115(a) does not apply to an entity, so its inapplicability in a sub V case has no effect on the property of the estate in a sub V case of an entity.

Section 1186 deals with property of the estate when cramdown confirmation occurs under §1191(b). It provides that property of the estate consists of property of the estate under § 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of §1186 when it applies begins with an explanation of what happens when it does not, *i.e.*, when the court confirms a consensual plan under §1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.⁵⁷⁹

The vesting of property of the estate in the debtor means that the automatic stay regarding acts against property terminates. Section 362(c)(1) provides, “[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate.”⁵⁸⁰ Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.⁵⁸¹

⁵⁷⁹ §§ 1227(b), 1327(b).

⁵⁸⁰ § 362(c)(1).

⁵⁸¹ § 1141(b).

In the cramdown situation, §1186 provides that property of the estate consists of property of the estate under § 541 (which covers all the debtor’s property at the time of confirmation, as earlier text explains) and any postpetition assets and earnings. This means that the automatic stay does not terminate at confirmation under § 362(c)(1) because all property of the debtor and all its earnings remain property of the estate.

Section 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1141(b) provides for vesting of property of the estate in the debtor upon confirmation. Section 1186, however, keeps the property in the estate when cramdown confirmation occurs.

The purpose seems to be to maintain judicial supervision of a debtor’s assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation⁵⁸² and makes payments under the plan,⁵⁸³ and discharge does not occur until the debtor has completed payments for the specified period.⁵⁸⁴

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.⁵⁸⁵ Section 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these

⁵⁸² See Section IV(D)(1).

⁵⁸³ See Section IX(B).

⁵⁸⁴ See Section X(B).

⁵⁸⁵ “[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statutes should prevail over older or more general ones.” *United States v. Lara*, 181 F.3d 183, 198 (1st Cir. 1999) (citing *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) and *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)); accord, e.g., *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); *Tug Allie-B, Inc., v. United States*, 273 F.3d 936, 941, 948 (11th Cir. 2001); *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1373 (11th Cir. 1999); *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); see 2B Sutherland Statutory Construction § 51:2 (7th ed. 2019-20 Supp.).

concepts, the provisions of §1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

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

SBRA's new rules governing property of the estate just discussed apply in the case of an individual sub V debtor.

Because § 1115(a) does not apply, postpetition assets and earnings of an individual are not property of the estate. The pre-BAPCPA rule recognizing the distinction between property of the estate and property of the debtor comes back into play.

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.⁵⁸⁶ The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

The exclusion of postpetition assets and income from property of the estate of an individual in a sub V case raises questions. In a chapter 7 case, an individual is free to use postpetition assets and earnings without restriction or judicial approval. That is the same rule that governed pre-BAPCPA chapter 11 cases of individuals, and it now applies in a sub V case. Does this mean, for example, that an individual who acquires assets postpetition, or has earnings

⁵⁸⁶ *E.g.*, *In re Copeland*, 609 B.R. 834 (D. Ariz. 2019); *In re Meier*, 550 B.R. 384 (N.D. Ill. 2016); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re Hoyle*, 2013 WL 3294273 (Bankr. D. Idaho June 28, 2013); *In re Tolkin*, 2011 WL 1302191 (Bankr. E.D.N.Y. Apr. 5, 2011), *aff'd sub nom.* *Pagano v. Pergament*, 2012 WL 1828854 (E.D.N.Y. May 16, 2012); *accord, e.g.*, *In re Lincoln*, 2017 WL 535259 (Bankr. E.D. La. Feb. 8, 2017); *In re Gorniak*, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re Vilaro Colón*, 2016 WL 5819783 (Bankr. D.P.R. Oct. 5, 2016). *Contra, e.g.*, *In re Markosian*, 506 B.R. 273, 275-77 (9th Cir. BAP 2014); *In re Evans*, 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. 2021), answered this question affirmatively. There, the U.S. Trustee sought dismissal of the individual's sub V case because the debtor lost \$ 4,000 playing slot machines during the first month after he filed the case. At the time of the hearing, the debtor had filed a plan that all classes of creditors had accepted. The debtor testified that he would no longer be gambling while he was in bankruptcy because, once his plan payments began, he would have no disposable income to do so.

The court concluded that the postpetition gambling did not constitute gross mismanagement of the estate that would provide cause for dismissal under § 1112(b)(4)(B) because the debtor had disclosed it in his monthly report and because nothing showed that the loss was material or had an adverse impact on the estate or its creditors. *Id.* at *7-8.

The court then observed that the gambling loss could not be gross management of the estate because, in a subchapter V case, the debtor's postpetition earnings were not property of the estate. *Id.*

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?⁵⁸⁷

⁵⁸⁷ Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate. May the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, §1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.⁵⁸⁸

One consequence of the addition of postpetition assets and earnings to the estate is that, if conversion to chapter 7 occurs after cramdown confirmation, postconfirmation property and earnings will be property of the chapter 7 estate. If the court confirms a consensual plan, such property may not be property of the estate because neither § 1115(a) nor §1186 applies. Sections XII(C) and (D) further discuss this issue.

Issues may arise because of the retroactive nature of the operation of §1186: Property that was not property of the estate becomes property of the estate upon cramdown confirmation. For example, what happens if, at the time of the confirmation hearing, an individual debtor has disposed of postpetition assets or earnings, which the debtor had the right to do when the property was not property of the estate? A creditor opposing confirmation could argue that the court cannot confirm the plan because the estate will not have all the property that §1186 requires it to have.

⁵⁸⁸ § 1186.

XII. Default and Remedies After Confirmation

If a debtor defaults after confirmation of a plan, creditors must decide what remedies are available and how to invoke them. If the court confirmed the plan under the cramdown provisions of §1191(b), the sub V trustee must also decide what to do if a default occurs.

A. Remedies for Default in the Confirmed Plan

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan's provisions for default and remedies control. In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. Secured creditors and lessors are unlikely to accept a plan unless it includes acceptable remedies in the plan that allow them to exercise their remedies if the debtor defaults. Unsecured creditors and tax claimants often do not participate actively in the case of a small business debtor, but if they do, they likewise have the opportunity to negotiate acceptable terms to deal with defaults.

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in §1191(c)(3)(B)(ii) may provide the source of remedies for default. When the court concludes only that there is a "reasonable likelihood" that the debtor will be able to make plan payments, cramdown confirmation under § 1191(c)(3)(B)(ii) requires that the plan provide "appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made."⁵⁸⁹ The only specific remedy in § 1191(c)(3)(B)(ii) is "the liquidation of nonexempt assets." The requirement for appropriate remedies does not apply if the court finds that the debtor *will* be able to make

⁵⁸⁹ See Section III(B)(5).

plan payments, but debtors who seek cramdown confirmation of a plan that does not contain them subject themselves to the higher feasibility standard.⁵⁹⁰

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of § 1191(c)(3)(B)(ii), creditors will want remedies that will protect their rights to recover.

For secured creditors and lessors who have property rights in specific assets, the primary objective is to recover possession of the encumbered or leased property and to exercise their rights promptly upon the debtor's default. Secured creditors and lessors will want provisions in the plan that recognize their rights to proceed against the debtor's property and that confirm that neither the automatic stay nor the discharge injunction will apply to their efforts to do so.

An unsecured creditor can subject the debtor's assets to its debt only through judicial process, a somewhat cumbersome and potentially lengthy process with uncertain results and expense that may not justify the effort. An effective remedy for unsecured creditors might include conversion to chapter 7 to permit a trustee to liquidate the assets. Later text in Section XII(C) discusses issues that arise upon postconfirmation conversion to chapter 7 that the plan might appropriately address to protect unsecured creditors.

⁵⁹⁰ See Section III(B)(5).

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

Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or “for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.”⁵⁹¹ If removal of the debtor in possession occurs after the trustee’s service has been terminated upon substantial consummation⁵⁹² of a consensual plan confirmed under §1191(a), §1183(c)(1) provides for reappointment of the trustee.

Section 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. Section 1183(c)(5)(B) authorizes the trustee to operate the business of the debtor, but the trustee’s duties do not include liquidation of the debtor’s assets. Nothing in subchapter V appears to authorize the trustee to do so.

The trustee’s operation of the business will be difficult, if not impossible, if secured creditors or lessors take possession of assets on account of the debtor’s defaults. Even if the trustee can operate the business, its future is unclear. Perhaps the plan will have provisions for the cure of defaults and the trustee can manage the business to cure defaults so that the plan can go forward. If not, the plan will remain in default, and the trustee may be able to do nothing more than observe as creditors exercise their remedies under the plan unless the plan is modified or the case is converted to chapter 7.

Property of the estate issues arise when reappointment of the trustee based on the debtor’s default occurs after confirmation of a consensual plan under §1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan

⁵⁹¹ § 1185(a). Section V(C) discusses removal for cause.

⁵⁹² Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

or confirmation order provides otherwise.⁵⁹³ If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no “debtor in possession” to be removed.

Under this view, §1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the estate remains property of the estate under §1186⁵⁹⁴) or because the plan or confirmation order so provides.

It is arguable that Congress did not intend to limit the operation of §1185(a) based on how property vests at confirmation. One possible interpretation of §1185(a), therefore, is that it impliedly authorizes the trustee to take possession of property of the debtor. Another potential interpretation is that it impliedly reverts the debtor’s assets into the estate.

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.⁵⁹⁵ Moreover, if the plan was a consensual one confirmed under §1191(a), postconfirmation modification under §1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan).⁵⁹⁶ Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

⁵⁹³ See Section XI(B).

⁵⁹⁴ See Section XI(B).

⁵⁹⁵ § 1193(b).

⁵⁹⁶ Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.⁵⁹⁷

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes "material default by the debtor with respect to a confirmed plan."⁵⁹⁸ Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.⁵⁹⁹

1. Postconfirmation dismissal

The effects of postconfirmation dismissal differ depending on whether the debtor has received a discharge. The timing of the discharge under subchapter V depends on the type of confirmation that occurs.

⁵⁹⁷ § 721.

⁵⁹⁸ § 1112(b)(4)(N).

⁵⁹⁹ § 702(d).

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under §1191(a).⁶⁰⁰ Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.⁶⁰¹

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.⁶⁰² Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the case is dismissed prior to the entry of discharge.⁶⁰³ Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

⁶⁰⁰ See Section X(A).

⁶⁰¹ E.g., *National City Bank v. Troutman Enterprises, Inc.* (*In re Troutman Enterprises, Inc.*), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) (“[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt.”); *In re T&A Holdings, LLC*, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) (“[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan.”); *In re Potts*, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).

⁶⁰² § 1192.

⁶⁰³ Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a “hardship” discharge, §§ 1228, 1328. Chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by BAPCPA. In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. See *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663, 668-69 (M.D. Fla. 2018) (Collecting cases holding that chapter 12 or 13 confirmed plan is no longer binding upon dismissal). But see *Weise v. Community Bank of Central Wisconsin* (*In re Weise*), 552 F.3d 584 (7th Cir. 2009).

The district court in *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663 (M.D. Fla. 2018) addressed the binding effect of a confirmed plan upon dismissal of an individual’s chapter 11 case on remand from the Eleventh Circuit. *First National Bank of Oneida, N.A. v. Brandt*, 887 F.3d 1255 (11th Cir. 2018). The Eleventh Circuit noted that case law in chapter 13 cases dealing with dismissal without a discharge “could perhaps become relevant to a determination of whether and how the dismissal of Brandt’s Chapter 11 case without a discharge affects the enforceability of his confirmed Chapter 11 plan.” *Id.* at 1261. The district court determined that it was, 597 B.R. at 669, and ruled that the confirmed plan was not binding upon dismissal prior to confirmation based on that case law, the provisions of § 349(b), and public policy. *Id.* at 671.

In *Weise v. Community Bank of Central Wisconsin* (*In re Weise*), 552 F.3d 584 (7th Cir. 2009), the bankruptcy court, on the debtors’ motion, dismissed their chapter 12 case after confirmation of their plan that incorporated a settlement between debtors and bank that, among other things, released lender liability claims against the bank. In connection with dismissal, the bankruptcy court determined that, under U.S.C. § 349(b), cause existed for the plan’s terms with regard to the settlement to remain binding on the parties. The Seventh Circuit ruled that the bankruptcy court did not abuse its discretion and that cause existed under § 349(b) to keep some terms of the plan binding on the parties. The Seventh Circuit stated that § 349(b) “explicitly contemplates that the court can choose to keep some terms binding on the parties where there is cause.” *Weise, supra*, 552 F.3d at 591. The court observed, “[N]egotiation alone would not be an acceptable standard for ‘cause,’ since every confirmed plan that required the consent of the creditor would involve some degree of negotiation.” *Id.* at 589.

The district court in *Brandt, supra*, 597 B.R. 663, distinguished *Weise* because the bankruptcy court in dismissing Brandt’s chapter 11 case made no mention of binding the parties to plan provisions and “chose not to keep specified plan terms binding.” *Id.* at 670.

The court in *In re Akamai Physics, Inc.*, 2022 WL 1195631 (Bankr. D. N.M. 2022), addressed the effect of dismissal or conversion after confirmation of a consensual plan under § 1191(a) that deferred discharge until completion of plan payments.⁶⁰⁴ The plan provided for pro rata payments to unsecured creditors from the greater of \$10,000 per month or the debtor’s “Disposable Income as defined in 11 U.S.C. § 1191(d).” *Id.* at *2.

Consensual confirmation occurred after the debtor resolved the objection of the U.S. Trustee that the plan was not feasible by including a provision in the confirmation order for the court to entertain a postconfirmation motion to dismiss or convert if the debtor did not generate any operating income within 120 days after confirmation. *Id.* at *2.

Although the debtor had timely made plan payments (through sales of assets or loans from its principal), it did not generate any operating income within 120 days. After concluding that the U.S. Trustee had not established cause for dismissal or conversion under § 1112(b)(4), *id.* at *3-5, the court considered the effect that the confirmed plan could have on the rights of the parties if it granted the motion, reasoning that the effect of dismissal or conversion is an issue to consider in determining a motion to dismiss or convert. *Id.* at *5.

The court determined that, in a traditional chapter 11 case, confirmation binds the reorganized debtor and creditor to the terms of the plan, 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) reverts property of the estate in the entity in which such property was before the filing of the case.⁶⁰⁵

2. Postconfirmation conversion

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under §1191(a), but not when cramdown confirmation occurs under §1191(b) because §1186 keeps property in the estate.⁶⁰⁶

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not reconvert property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.⁶⁰⁷ Other courts have ruled that property of the estate

⁶⁰⁵ § 349.

⁶⁰⁶ See Section XI(B).

⁶⁰⁷ E.g., *Bell v. Bell (In re Bell)*, 225 F.3d 203, 216 (2d Cir. 2000); *National City Bank v. Troutman Enterprises, Inc. (In re Troutman Enterprises, Inc.)*, 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) (“Property which reverted in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case.”); *Lacy v. Stinky Love, Inc. (In re Lacy)*, 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re L & T Machining, Inc.*, 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re Sundale, Ltd.*, 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re Canal Street Limited Partnership*, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re K*

upon conversion consists of property owned by the debtor at the time of commencement of the case,⁶⁰⁸ on the confirmation date,⁶⁰⁹ or on the date of conversion.⁶¹⁰

Under these principles, property of the estate in a sub V case converted to chapter 7 after *cramdown* confirmation includes all the debtor's property. The result is the same if a consensual plan or the order confirming it provides that property of the estate not vest in the debtor until the occurrence of some later event that has not occurred at the time of conversion.

If property of the estate vested in the debtor at the time of confirmation of a *consensual* plan, however, what constitutes property of the estate at conversion is uncertain. In the first instance, it depends on whether the court applies the vesting principles in existing case law noted above and, if so, which view it adopts.

An alternative argument is that the provision in §1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that §1185(a) requires the revesting of property of the estate upon removal of the debtor in possession after

& M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz. 1997); *Carter v. Peoples Bank and Trust Co.* (*In re BNW, Inc.*), 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.*, 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. “[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor’s preconfirmation 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 conference⁶¹² and the filing of a plan⁶¹³ had expired.

The provisions in the Bankruptcy Threshold Adjustment and Technical Correction Act ("BTATCA")⁶¹⁴ for retroactive application of the \$7.5 million debt limit for subchapter V eligibility present a similar issue when mandatory deadlines have passed in a pending case where a debtor ineligible for subchapter V becomes eligible under BTATCA. As Section III(B) explains, the temporary increase in the debt limit to \$7.5 million under the CARES Act, as amended, expired on March 27, 2022. BTATCA, effective June 21, 2022, reinstated the \$7.5 million. BTATCA provided for application of the \$7.5 million limit (and other technical amendments to the eligibility requirements) in any case commenced on or after March 27, 2020 that was pending on the date of enactment.⁶¹⁵ A debtor otherwise eligible for subchapter V with debts in excess of the debt limit of \$ 3,024,725 applicable on that date but not in excess of \$ 7.5 million who filed a case between March 27 and June 20, 2022 could not elect subchapter V but became an eligible subchapter V debtor on June 21, 2022. The issue is whether the debtor may

⁶¹² See Section VI(C).

⁶¹³ See Section VI(D).

⁶¹⁴ Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").

⁶¹⁵ BTATCA § 2(h)(2).

amend the petition to elect subchapter V in cases filed during this time if a mandatory deadline has passed.

A number of cases have addressed retroactive application of SBRA. This caselaw may provide guidance in the determination of retroactive application of the BTATCA amendments.

One court rejected the debtor's argument that SBRA applied retroactively to pending cases, concluding, "Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect."⁶¹⁶ The court observed that to rule otherwise would create a "procedural quagmire" in that the debtor would be unable to comply with the statute's requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA's effective date. The debtor's failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.⁶¹⁷

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.⁶¹⁸ Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor's amendment to the petition to elect subchapter V in an existing case means

⁶¹⁶ *In re Double H Transportation, LLC*, 614 B.R. 553 (Bankr. W.D. Tex. 2020).

⁶¹⁷ *Id.* at 554.

⁶¹⁸ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re Moore Properties of Person County, LLC*, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re Progressive Solutions, Inc.*, 615 B.R. 894 (Bankr. C.D. Cal. 2020). *Accord*, *In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La. 2020); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

that the case proceeds under subchapter V unless and until the court orders otherwise;⁶¹⁹ the court need not approve the election.⁶²⁰

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.⁶²¹

⁶¹⁹ See Section III(A).

⁶²⁰ *In re Body Transit, Inc.*, 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020) (treating objection to debtor's motion for authority to proceed under subchapter V as an objection to amendment of the petition to make the election); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 900-01 (Bankr. C.D. Cal. 2020).

⁶²¹ *In re Ventura*, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022) ("Given that the Debtor's case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor."); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 899-900 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord, In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020).

In *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020), the court considered whether to extend the statutory deadlines for the debtor's report, status conference, and filing of a plan after it had granted the debtor's motion to convert his pre-SBRA chapter 7 case to chapter 11. In permitting the debtor to proceed under subchapter V and extending the deadlines, the court reasoned, *id.* at *6-7:

The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.

The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor's conduct and potential prejudice to creditors.

Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to

The opposite view is that the inability of a debtor to meet the statutory deadlines when it elects subchapter V after they have expired is not due to a circumstance beyond its control. Because the debtor makes the election after the deadlines expired, the circumstances are within the debtor's control.⁶²² If the debtor makes the election after expiration of the deadlines and the court does not extend them, the election is nevertheless effective, and the debtor is in default of the deadlines. Thus, the court may dismiss the case under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.⁶²³

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC*.⁶²⁴ The *Moore Properties* court and others⁶²⁵ have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*⁶²⁶ in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case. The court in *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020), concluded that the *Trepetin* approach to extension of the deadlines in a case converted from chapter 7 to chapter 11 was the proper one. The court denied the debtor's motion to convert to chapter 11, however, because under that approach the court would decline to extend the time to file a plan. In *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable. *Id.* at *9.

⁶²² *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020).

⁶²³ *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020). Query whether a debtor may amend the petition to withdraw the election in this situation.

⁶²⁴ *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).

⁶²⁵ *In re Ventura*, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re Body Transit, Inc.*, 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020).

⁶²⁶ *Landgraf v. USI Film Products*, 511 U.S. 244, 264-71 (1994).

One canon, said the *Landgraf* Court, is that “a court is to apply the law in effect at the time it renders its decision.”⁶²⁷ The conflicting one is that “[r]etroactivity is not favored in the law,” and “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”⁶²⁸

The *Landgraf* Court explained that the presumption against retroactive application arises from “[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly,” and from the principle that “settled expectations should not be lightly disrupted.”⁶²⁹ The presumption against retroactivity particularly applies, the Court reasoned, to “new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.”⁶³⁰ The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee’s appeal after a bench trial was pending, did not apply to the employee’s action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank*.⁶³¹ At issue in *Security Industrial Bank* was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest in exempt personal property.⁶³² The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

⁶²⁷ *Id.* at 264, *quoting* *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974).

⁶²⁸ *Id.* at 264, *quoting* *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

⁶²⁹ *Id.* at 265.

⁶³⁰ *Id.* at 271. Among other cases, the Court cited *United States v. Security Industrial Bank*, 459 U.S. 70, 79-82 (1982), which the text discusses next.

⁶³¹ *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

⁶³² 11 U.S.C. § 522(f)(1)(B).

The Court in *Security Industrial Bank* recognized that the Constitution’s bankruptcy clause⁶³³ “has been regularly construed to authorize the retrospective impairment of contractual obligations”⁶³⁴ but that the bankruptcy power could not be exercised “to defeat traditional property interests” because the bankruptcy power is subject to the Fifth Amendment’s prohibition against taking private property without compensation.⁶³⁵ The Court thus recognized a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.⁶³⁶

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that “[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.”⁶³⁷

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created “none of the taking or retroactivity concerns” that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank*.⁶³⁸ With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not “alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights.”⁶³⁹

⁶³³ U.S. Const. Art. I, § 8, cl. 4.

⁶³⁴ *United States v. Security Industrial Bank*, 459 U.S. 70, 74 (1982), *citing* *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

⁶³⁵ *Id.* at 75, *citing* *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935).

⁶³⁶ *Id.*

⁶³⁷ *Id.* at 81, *citing* *Holt v. Henley*, 232 U.S. 637 (1913) and *Auffm’ordt v. Rasin*, 102 U.S. 620 (1881).

⁶³⁸ *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).

⁶³⁹ *Id.*

The *Moore Properties* court explained that the modification of prepetition contractual relationships in a chapter 11 case occurs through a plan. The court then set out the changes that subchapter V made to existing requirements for the contents of the plan and for its confirmation and concluded that none of them amounted to an impermissible retroactive taking.

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. Section 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.⁶⁴⁰ The third change is that § 1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.⁶⁴¹

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.⁶⁴²

⁶⁴⁰ See Section VII(A).

⁶⁴¹ See Section VII(B).

⁶⁴² *In re Moore Properties of Person County, LLC*, 2020 WL 995444, at *4 (Bankr. M.D.N.C. 2020).

In a footnote, the court observed that § 1190(2), which requires any debtor to contribute earnings as necessary for execution of the plan, rendered § 1123(a)(8) superfluous and that § 1123(c) is inapplicable because only the debtor can propose a plan. *Id.* at *4 n. 13.

In another footnote, the court explained that the exception to the antimodification provision did not prohibit the availability of subchapter V in the case before it for two reasons. First, the exception could not apply because the debtor was an artificial entity with no principal residence. Second, even if it did apply, the question would be whether its application would constitute an impermissible taking. If it did, the court said, it would not apply the exception rather than declare the entirety of subchapter V inapplicable, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). *Id.* at *4, n. 14.

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under § 1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.⁶⁴³

Section 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of “fair and equitable” for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.⁶⁴⁴

The court concluded, “The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking.”⁶⁴⁵

The court acknowledged that, if a case were pending for an extended period of time on SBRA’s effective date, the case “could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights.”⁶⁴⁶ In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider “the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make

⁶⁴³ *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.

⁶⁴⁴ *Id.* See Section VIII(B)(3), (4).

⁶⁴⁵ *Id.*

⁶⁴⁶ *Id.*

its application offend ‘[e]lementary considerations of fairness’ such that the parties ‘have an opportunity to know what the law is and to conform their conduct accordingly.’”⁶⁴⁷

Because the application of new subchapter V in the existing case did not violate the Supreme Court’s rulings in *Landgraf* or *Security Industrial Bank*, the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.⁶⁴⁸

The bankruptcy court in *In re Body Transit*⁶⁴⁹ applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA’s effective date to reject the secured creditor’s contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor’s argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor’s assets and business, would also have the right to file a plan.⁶⁵⁰

The *Body Transit* court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.⁶⁵¹ In addition, the court noted that a debtor’s ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would

⁶⁴⁷ *Id.*, quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), and citing *In re Progressive Solutions, Inc.*, 615 B.R. 894 (Bankr. E.D. Cal. 2020).

⁶⁴⁸ *Id.*

⁶⁴⁹ *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020).

⁶⁵⁰ The court had scheduled a hearing on the creditor’s motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.

⁶⁵¹ *Id.* at 408.

unduly prejudice a party.⁶⁵² The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.⁶⁵³

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its burden of showing prejudice in the case before it.⁶⁵⁴ The court summarized, "[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor's right to amend its petition under [Bankruptcy Rule] 1009."⁶⁵⁵

In *In re Ventura*,⁶⁵⁶ an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA's effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a "residence" based on her use of it as a bed and breakfast. After the bankruptcy court had ruled that the exception applied as long as the debtor used any part of the property for her

⁶⁵² *Id.* at 408-09, citing *In re Cudeyo*, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re Brooks*, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re Romano*, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re Bendi, Inc.*, 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).

⁶⁵³ 213 B.R. at 409.

⁶⁵⁴ *Id.* at 409.

⁶⁵⁵ *Id.* at 410.

⁶⁵⁶ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022). .

residence,⁶⁵⁷ it scheduled a hearing on confirmation of the lender's plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA's effective date.⁶⁵⁸

The bankruptcy court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had vested rights at the time of the amendment in that its plan was ripe for confirmation.⁶⁵⁹ The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

⁶⁵⁷ Other courts have accepted the debtor's position. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE, § 5:42 (2d ed. 2019).

⁶⁵⁸ *In re Ventura*, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020), *rev'd sub nom.* Gregory Funding v. Ventura (*In re Ventura*), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

⁶⁵⁹ *Id.* at 11. The debtor in the current case and in two previous bankruptcy cases had asserted that her debts were "primarily consumer debts." *Id.* at 8. The debtor owed \$ 1,678,664.80 on the mortgage, and the property was worth no more than \$ 1,200,000. *Id.* at 9. Although the opinion does not reflect what other debts the debtor has, the context indicates that she had other unsecured debt that were relatively small.

The lender asserted that, in these circumstances, the debtor did not qualify as a small business debtor, and that, even if she did, she should be judicially estopped from amending her petition to designate herself as a small business debtor based on her representations in the previous and current cases.

The court acknowledged that a purchase money mortgage on a residence is generally a consumer debt, but ruled that "the fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is a consumer debt." *Id.* at 19. The test, the court explained, is whether a debt is incurred with an eye toward profit. "Courts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction," the court stated. *Id.*, quoting *In re Martin*, 2013 WL 54233954, at *6 (S.D. Tex. 2013) and citing *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988) (debt incurred with an eye toward profit is a business debt, rather than a consumer debt).

The court found that the property was the debtor's residence but that the primary purpose of purchasing it was to own and operate a bed and breakfast. The court concluded that the mortgage was a business debt and that she qualified as a small business debtor. *Id.* at 20.

The court declined to apply judicial estoppel to bar her amendment to designate herself as a small business debtor. The court ruled that her amendment to describe the mortgage as a business debt was not necessarily with her prior descriptions of the debt. She had referred to it as a bed and breakfast and described it on her Schedule A/B as a "B & B Inn" rather than as a "single-family" home. Moreover, the court had taken no action in any of the cases based on the description of the mortgage debt as a consumer debt, so it was not misled. Nor had the debtor taken unfair advantage of the lender by changing the description of her debt to fit within a statute that did not exist when she filed her cases. *Id.* at 20-22.

The *Ventura* bankruptcy court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit*. In addition, the court concluded that the revision of the definition of “small business debtor” does not appear to affect contractual or vested property rights.⁶⁶⁰

The bankruptcy court then addressed whether the exception in §1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender’s property rights that vested prior to SBRA’s effective date. The court held that, because the debtor had discharged her personal liability in her previous chapter 7 case, application of §1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the bankruptcy court observed, even if the debt had not been discharged, §1190(3) might not “raise significant Constitutional doubts to warrant only prospective application.”⁶⁶¹ Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of § 1190(3) to modify the mortgage would not violate the lender’s Fifth Amendment rights.⁶⁶² The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.⁶⁶³

The *Ventura* bankruptcy court found no prejudice to the lender based on the history of the case, including the fact that the lender’s plan was before the court for confirmation. The court

⁶⁶⁰ *Id.* at 16-17, citing *Moore Properties of Person County, LLC*, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).

⁶⁶¹ *Id.* at 17.

⁶⁶² *Id.* at 17.

⁶⁶³ *Id.* at 24-25. Section VII(B) discusses this aspect of the court’s ruling in connection with consideration of § 1190(3).

saw no Constitutional issues and declined to treat its prior rulings as creating “vested” rights. The bankruptcy court reasoned, “Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender].”⁶⁶⁴

The district court reversed, concluding that the bankruptcy court had not properly considered the substantial prejudice that the creditor faced due to the belated amendment to elect subchapter V. *Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (E.D. N.Y. 2022). The district court noted that the amendment did not occur until 16 months after the filing of the chapter 11 case and that allowing it caused “substantial prejudice” to the creditor. The district court observed, *id.* at 505 (emphasis in original; interior punctuation and citation omitted):

By [the time of the amendment], both the parties and the Bankruptcy Court spent considerable time to get to a point in which [the creditor] was posed to confirm its plan. The Bankruptcy Court held numerous hearings and the parties, after significant negotiations, agreed [the creditor] could pursue its unopposed plan of reorganization if the Debtor failed to submit a plan by September 30, 2019. In reliance on this agreement and on the Debtor’s representation that her petition would proceed under Chapter 11, [the creditor] Filed its plan of reorganization, solicited the necessary votes, and was on the cusp of confirming it when the Debtor sought to amend her petition. Moreover, because the SBRA grants the Debtor the sole right to confirm a plan of reorganization, the Debtor’s amendment had the further prejudicial effect of terminating [the creditor’s] right to pass *any* plan, thereby completing changing the rights of [the creditor] as a creditor and resetting the litigation posture of the proceedings.

⁶⁶⁴ *Id.* at 18.

The district court in *Ventura* concluded that the amendment to elect subchapter V “cannot be allowed to cause such prejudice.” 638 B.R. at 505. In addition, the court observed, prejudice to the debtor did not outweigh prejudice to the creditor because “she remains in the Chapter 11 process. While this may prevent her from accessing some of the tools afforded by Subchapter V, the Debtor’s interests are still protected by Chapter 11, which requires [the creditor’s plan] to be ‘fair and equitable,’ 11 U.S.C. § 1191(c), proposed in good faith, deemed to be ‘reasonable,’ and in comportment with existing law. *Id.* § 1129(a).”⁶⁶⁵ 638 B.R. at 505. Accordingly, the court held that the bankruptcy court abused its discretion by overruling the creditor’s objection to the debtor’s amendment of her petition to proceed under subchapter V.

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a subchapter V debtor under SBRA’s revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.⁶⁶⁶ Another court refused to permit a debtor to proceed under subchapter V in a case filed a month before its effective date. The court determined that the debtor had waited too

⁶⁶⁵ *Id.* It is unlikely that the requirements for confirmation the court referenced would provide any material protection for the interests of the debtor as compared to the provisions of her plan.

⁶⁶⁶ *In re Body Transit, Inc.*, 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).

long to make the sub V election and had amended its petition to do so only after two attempts to confirm a traditional chapter 11 plan had failed.⁶⁶⁷

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to \$ 7.5 million.⁶⁶⁸ Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than \$ 7.5 million cannot amend its petition to elect application of subchapter V.⁶⁶⁹ Although the CARES Act provided for the increased debt limit to expire on year after its enactment, the Covid-19 Bankruptcy Relief Extension Act of 2021⁶⁷⁰ amended the CARES Act to extend the increased debt limit for an additional year.

A possible alternative for a debtor in a pre-subchapter V case who wants to be in a subchapter V case is to obtain dismissal of the pending case and then file a new one in which it elects subchapter V. In *In re Slidebelts, Inc.*, 2020 WL 3816290 (Bankr. E.D. Cal. 2020), the court permitted dismissal of a chapter 11 case for this purpose. The court in *In re Twin Pines, LLC*, 2020 WL 5576957 at * 6 (Bankr. D. N.M. 2020), noted that a debtor could, upon dismissal of the pending case, file a new one and elect subchapter V in exercising its discretion to extend the deadlines for the status conference and filing of a plan so that the debtor could proceed under subchapter V.

⁶⁶⁷ *In re Greater Blessed Assurance Apostolic Temple, Inc.*, 624 B.R. 742 (Bankr. M.D. Fla. 2020). *Cf. In re Tibbens*, 2021 WL 1087260 at * 9 (Bankr. M.D.N.C. 2021) (After denial of confirmation of two chapter 13 plans, the debtor sought to convert to chapter 11 and elect subchapter V after the deadline for the filing of a plan had expired; the court converted the case to chapter 11 but declined to extend the deadline because of numerous delays in the chapter 13 case that were within the debtor’s control and for which the debtor should be held accountable.).

⁶⁶⁸ Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See* Section III(B).

⁶⁶⁹ *See In re Peak Serum*, 623 B.R. 609 (Bankr. D. Col. 2020) (Debtors in pending chapter 11 cases may not elect application of subchapter V upon becoming eligible for subchapter V under the increase in the debt limit upon enactment of the CARES Act; increased debt limit applies only in cases filed after enactment.)

⁶⁷⁰ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

In *In re Peak Serum*, 623 B.R. 609 (Bankr. D. Col. 2020), a corporation and its principal, in response to a creditor's motion to appoint a trustee in their jointly administered cases, moved to dismiss them to permit their re-filing as subchapter V cases after the CARES Act increased the debt limit so that they became eligible to proceed under subchapter V. The court found cause to appoint a trustee in the corporate case and concluded that the facts warranted appointment of a trustee. Because the creditor failed to establish cause for appointment of a trustee in the individual case, however, the court dismissed it, observing that subchapter V contained sufficient protections for creditors such that a re-filed case under subchapter V would not unduly prejudice creditors.

The strategy did not work well for the individual debtors in *In re Crilly*, 2020 WL 3549848 (Bankr. W.D. Okla. 2020). A few hours after dismissal of their chapter 11 case filed in 2018 for cause, the individual debtors filed a new case and elected subchapter V. The debtors filed a motion to extend the automatic stay, which under § 362(c)(3) would expire 30 days after filing the second case unless extended based on a showing that the second case was filed in good faith. Under § 362(c)(3)(C)(i)(III), a filing is presumptively not in good faith if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the previous case.

The court concluded that no change of circumstances had occurred between the filing of their two cases that would permit them to avoid the presumption. The availability of subchapter V in the new case, the court explained, could not supply such a change because it was in effect at the time of the dismissal and filing of the cases. The court for a variety of reasons refused to extend the automatic stay beyond 30 days.

In *In re Hunts Point Enterprises, LLC*, 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss it. The court ruled that the debtor's debts did not exceed the eligibility limit but concluded that allowing the case to proceed under subchapter V would be an abuse of its provisions because only the debtor could file a plan, and its request for dismissal demonstrated that it no longer wanted to do so. The court concluded that cause existed for its dismissal and prohibited the debtor from filing another bankruptcy petition for a year unless the debtor sought and obtained relief from that prohibition based on changed circumstances or good cause shown.

Lists of Sections of Bankruptcy Code and Title 28 Affected or Amended By The Small Business Reorganization Act of 2019

Enacted August 23, 2019, Effective February 19, 2020

(As Amended By The CARES Act, Enacted and Effective March 27, 2020; The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act for an additional year.)

May 2020

	Sections of The Small Business Reorganization Act of 2019	
SBRA § 1	Short Title – “The Small Business Reorganization Act of 2019”	
SBRA § 2	Enacts Subchapter V of Chapter 11 of the Bankruptcy Code, new §§ 1181—1195.	
SBRA § 3(a)	Amends 11 U.S.C. § 547(b) to provide that trustee’s avoidance of preferential transfer must be “based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses” under § 547(c). Applicable in all bankruptcy cases.	
SBRA § 3(b)	Amends 28 U.S.C. § 1409(b) to provide for venue only in the district of the defendant, for a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than \$ 25,000. Applicable in all bankruptcy cases.	
SBRA § 4(a)	Conforming amendments to the Bankruptcy Code.	
SBRA § 4(b)	Conforming amendments to Title 28.	
SBRA § 5	Effective date.	
SBRA § 6	Determination of budgetary effects.	
11 U.S.C.	Amendments Relating to Cases of All Small Business Debtors	SBRA
§ 101(51C)	New definition of “small business case” as a case in which a small business debtor (defined in § 101(51D)) does not elect application of subchapter V	§ 4(a)(1)(A)
§ 101(51D)	Revised definition of “small business debtor”; CARES Act makes technical correction dealing with exclusion of public companies	§ 4(a)(1)(B); CARES Act § 1113(a)(4)(A)

§ 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 whose primary activity is the business of owning single asset real estate or operating real property or	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than \$7,500,000 (will return to \$2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below \$10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below \$2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); §

¹ Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

	conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is “an affiliate of an issuer” under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of \$2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over \$2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a “small business debtor” hinges, at least in part, upon whether a creditor’s committee is appointed, and on how much that creditor’s committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor’s committee thereby extinguishing	§ 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below \$10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B). Family farmer must be engaged in a farming operation, including “farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.” § 101(21).	1113, CARES Act.
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	debtor's small business status. The UST appoints any such committee. <i>Id.</i> Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.			
Filing Fees	\$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	\$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	\$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is \$325 for disbursements up to \$15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first \$450,000 paid under the plan, and 3% of any payments in excess of \$450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

	final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.			
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. <i>See</i> § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. <i>See In re SFW, Inc.</i> 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11	A disinterested trustee is appointed in every ch. 13 case. § 1302.

	Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the	A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."
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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).	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	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).			
	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.

	claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123. Plans <i>may</i>: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2). Plans <i>may</i>: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222. Under § 1222(b)(1)-(12), the plan <i>may</i> designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322. Under § 1322(b)(1)-(11), the plan <i>may</i> designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 <i>debtors in possession</i> may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable		Ch. 12 debtors in possession <i>and</i> trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which	Ch. 13 <i>debtors</i> may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of

	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; <i>or</i> 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		applies only in ch. 12, allows <i>trustees</i> under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; <i>or</i> 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 <i>pro rata</i>) distribution amongst unsecured claimants.	
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Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. <i>In re Rogers</i>, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income.	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).
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	as their larger ch. 11 counterparts.		Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, <i>and</i> finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), <i>and</i> the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has

				experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. <i>See In re Campbell</i>, 313 B.R. 871 (B.A.P. 10th Cir. 2004), <i>and see In re Ridgely</i>, 93 B.R. 683 (Bankr. E.D. Mo. 1988); <i>but cf. In re Feely</i>, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch.	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the

	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.
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Key Events in the Timeline of Subchapter V Cases¹

Benjamin A. Kahn²
Samantha M. Ruben³

- Election to Have Subchapter V Apply
 - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).⁴
 - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor or a debtor as defined under § 1182(1), and if so, whether it elects to have subchapter V apply. Interim Rule 1020(a).⁵

¹ A chart containing more detailed subchapter V deadlines follows.

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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 Hearing⁶
 - 28 days’ notice must be given for the deadline to accept or reject and file objections to a proposed plan, and for the hearing to consider confirmation of the proposed plan.⁷ Rule 2002(b). The court fixes the date for the confirmation hearing. Rule 3017.2(c).
- Appointment and Termination of Service of Trustee
 - The United States Trustee shall appoint a standing trustee for subchapter V cases, appoint one disinterested person to serve as trustee, or may serve as trustee. 11 U.S.C. § 1183(a).
 - If the plan is consensually confirmed under 11 U.S.C. § 1191(a), the service of the trustee is terminated when the plan is substantially consummated. However, the United

⁶ No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

⁷ Section 1129(e), which requires that the court confirm a plan in a small business case within 45 days after the plan is filed, does not apply to cases under subchapter V. See 11 U.S.C. § 1181(a); see also 11 U.S.C. 101(51C) (excluding any case in which a debtor elects to have subchapter V apply from the definition of “small business case”).

States Trustee may reappoint the trustee for modification of the plan or if the debtor is removed from possession. 11 U.S.C. § 1183(c)(1).

- If the plan is non-consensually confirmed, the trustee will make all payments under the plan, unless the plan or the order confirming the plan provides otherwise. 11 U.S.C. § 1194(b).

- Discharge

- Consensually Confirmed Plans Under 11 U.S.C. § 1191(a). If a plan is consensually confirmed under 11 U.S.C. § 1191(a), then the general discharge provisions under 11 U.S.C. § 1141(d)(1)-(4) shall apply. See 11 U.S.C. § 1181(a), (c). Therefore, in a non-liquidating subchapter V case, discharge will occur on confirmation of a consensual plan. See 11 U.S.C. § 1141(d)(1).⁸
- Non-consensually Confirmed Plans Under 11 U.S.C. § 1191(b). If a plan is confirmed under 11 U.S.C. § 1191(b), then the timing provisions for entry of discharge under 11 U.S.C. § 1141(d) shall not apply. See 11 U.S.C. § 1181(c). In such a case, discharge will be entered after completion of all payments due “within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix . . .” 11 U.S.C. § 1192.⁹

- Modification of a Plan

- The debtor may modify a plan at any time prior to confirmation. 11 U.S.C. § 1193(a).
- After confirmation, the debtor may modify a plan consensually confirmed under § 1191(a) prior to substantial consummation of the plan. 11 U.S.C. § 1193(b).¹⁰
- After confirmation, the debtor may modify a plan confirmed under § 1191(b) at any time within 3 years, or such longer period not to exceed 5 years, as fixed by the court. 11 U.S.C. § 1193(c).

- Plan Term

- Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a

⁸ Section 1141(d)(5), which delays discharge until the completion of payments under a plan in an individual case unless otherwise ordered by the court, does not apply in subchapter V cases. 11 U.S.C. 1181(a).

⁹ Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.

¹⁰ A consensually confirmed plan only may be modified by consent. 11 U.S.C. § 1193(b).

non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

- Timing of Payments

- The court may authorize the trustee to make payments to the holder of a secured claim prior to confirmation for purposes of providing adequate protection. 11 U.S.C. § 1194(c).

Subchapter V Deadlines¹¹

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	Deadline	Act to Be Performed	Code or 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 <u>if</u> the court has ordered that 11 U.S.C. 1125 will apply ¹⁷	Rule 3016(b)

¹⁵ Under §1188(b), the court may extend the time for holding a status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

¹⁶ The court may extend the 90-day period if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.

¹⁷ No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility

Class Including Secured Creditor	Date fixed by the court	Make the election under § 1111(b)	Rule 3014
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time fixed for filing objections and the hearing to consider approval of a disclosure statement, if applicable. <u>See note 17, infra.</u>	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of hearing on disclosure statement and objections in a chapter 11 case, if applicable. <u>See note 17, infra.</u>	Rule 3017(a)
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of time for filing objections to an injunction provided in a chapter 11 plan	Rule 3017(f)(1)
The court	No deadline	Fix a date for the hearing on confirmation.	Rule 3017.2(c)
Holders of claims or interests	Time fixed by the court	Accept or reject the plan	Rule 3017.2(a)
Equity security holder	Time fixed by the court	Record date for eligibility to accept or reject the plan	Rule 3017.2(b)

projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

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 mortgage⁴ and that require certain secured claims to be paid in full, regardless of the value of the collateral. For example, a Chapter 13 debtor cannot “strip down” a claim secured by a purchase-money security interest in a vehicle purchased within 910 days of the filing of the petition under the so-called “hanging paragraph” to § 1325(a)(5), which prohibits bifurcation under § 506(a) of such claims.⁵

In a Subchapter V case, § 1190(3) permits modification of a residential mortgage if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was “not used primarily to acquire the real property.” Subparagraph (B) requires that the new value have been “used primarily in connection with the small business of the debtor.”

For example, assume that the debtor’s principal residence is worth \$ 300,000 and is encumbered by a first mortgage in the amount of \$ 270,000 and a second mortgage that secures a debt of \$ 100,000 that the debtor incurred for use in the debtor’s business. A debtor cannot

⁴ § 1322(b)(5). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:26.

⁵ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:20.

reduce the secured portion of the business debt to \$ 30,000 in a chapter 13 case but can do so in a Subchapter V case.

Subchapter V does not contain a special provision like the “hanging paragraph” that prohibits bifurcation of certain secured claims. Thus, for example, if the debtor owns a motor vehicle subject to the “hanging paragraph” worth \$ 15,000 encumbered by a \$ 25,000 debt, the Subchapter V debtor may pay the value of the vehicle, with interest, and treat the \$ 10,000 deficiency as an unsecured claim. In a Chapter 13 case, the debtor must treat the entire claim as secured.

On the other hand, the § 1111(b)(2) election is applicable in a Subchapter V case. It permits an undersecured creditor to elect to treat its claim as fully secured, unless the collateral is of “inconsequential value.”⁶ In this circumstance, if the debtor is retaining the property, cramdown requires that the creditor retain its lien⁷ and receive payments over time that (1) have a value that equals the value of the collateral and (2) total the amount of the entire claim.⁸

⁶ SBRA Guide § VIII(E)(1).

⁷ § 1129(b)(2)(A)(i)(I), applicable under § 1191(b)(1).

⁸ § 1129(b)(2)(A)(i)(II), applicable under § 1191(b)(1).

In the mortgage example, assuming an interest rate of six percent, a monthly payment of \$ 1,667 for five years,⁹ or \$ 883 for ten years,¹⁰ meets the payment requirement. Monthly payments are \$ 555 over 15 years and \$ 417 over 20.¹¹

In a Chapter 13 case, the plan generally must provide for a secured claim either by (1) curing prepetition arrearages during the term of the plan and providing for the continuation of regular postpetition payments, which may extend beyond the term of the plan under § 1322(b)(5) or (2) paying the amount of the allowed secured claim, with interest, over the term of the plan, which may not exceed five years,¹² under § 1325(a)(5)(B).¹³ The second alternative requires that the monthly payments be in equal amounts.

Subchapter V, however, does not have a restriction on the term of the plan or a requirement for equal monthly payments.

⁹ The value of the collateral is \$ 30,000. The monthly payment to amortize that amount over five years with six percent interest is \$ 580, a total of \$ 34,800. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another \$ 65,200, which can be paid in monthly payments over five years of \$ 1,067. The total monthly payment is \$ 1,667 (\$ 580 + \$ 1,067).

¹⁰ The value of the collateral is \$ 30,000. The monthly payment to amortize that amount over ten years with six percent interest is \$ 333, a total of \$ 39,968. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another \$ 60,032, which can be paid in monthly payments over ten years of \$ 500. The total monthly payment is \$ 833 (\$ 333 + \$ 500).

¹¹ SBRA Guide VIII(E)(1) contains a table that shows calculations for monthly payments for the terms stated in the text and for terms of 25 years (\$ 333), and 30 years (\$ 278). Amortization of \$ 30,000 with interest at six percent over 53 years requires monthly payments of \$ 156.43, which results in payments that total \$ 100,113.

¹² § 1322(d). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:9

¹³ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman CHAPTER 13 PRACTICE AND PROCEDURE § 5:10, 5:13.

The Subchapter V PDI test is more favorable to debtors

Both Chapter 13 and Subchapter V have “projected disposable income” (“PDI”) tests, but they differ.

In a Chapter 13 case, if a plan provides for less than full payment of unsecured claims, a debtor must pay “projected disposable income” to unsecured creditors if the trustee or a creditor objects to confirmation. § 1325(b). (The Chapter 13 trustee always objects.)

The PDI requirement in a Sub V case applies only in the cramdown situation. If all classes of impaired creditors accept the plan, the PDI requirement is not applicable.¹⁴ In a cramdown case, the requirement is applicable regardless of whether an objection is filed.

Subchapter V has a different method for the calculation of disposable income. In a Chapter 13 case, the calculation of disposable income is based on the debtor’s “current monthly income,”¹⁵ and an “above-median” debtor¹⁶ must use the so-called “means test” standards in calculating permissible deductions.¹⁷

In a Subchapter V case, § 1191(d) defines disposable income as “income that is received by the debtor and that is not reasonably necessary to be expended” for support, payment of

¹⁴ See *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8). In *Walker*, the debtor’s plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan, but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate. The creditor urged the court to extend the time for payment of PDI to five years. The court on the facts held that the creditor had not shown a lack of good faith.

¹⁵ Section 101(10A) defines “current monthly income.” It is the average of the debtor’s income (as the statute defines it) in the full six months preceding the filing of the petition. See generally W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:8, 8:9, 8:10.

¹⁶ W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12.

¹⁷ W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:30.

domestic support obligations, and business expenditures. The PDI definition in subchapter V does not use “current monthly income,” and it does not require the “means test” standards.¹⁸

The “applicable commitment period” for the payment of projected disposable income in a Chapter 13 case under § 1325(b)(4) is three years for a “below-median” debtor and five years for an “above-median” debtor. The required time for payment of PDI in a Sub V case is a minimum of three years and a maximum of five years. § 1191(c)(2). The court determines the length of the period, but the statute provides no standards for making the decision.¹⁹ For an above-median debtor, therefore, the *maximum* period for payment of PDI in a Sub V case is five years, the *minimum* (and only) period in a Chapter 13 case.

Finally, a debtor cannot “prepay” PDI in a Chapter 13 case and end the case; the case must remain open for the entire applicable commitment period.²⁰ The Sub V PDI test permits the debtor to pay the value of projected disposable income, thus permitting payment in a lump sum or over a shorter period. § 1191(c)(2)(B).

Times for filing of plan and commencement of payments

In a Chapter 13 case, the debtor must file the plan within 14 days of the filing of the petition (or the date of conversion to Chapter 13, if originally filed under another chapter), Bankruptcy Rule 3015(b), and must commence payments under the plan within 30 days, § 1326(a), unless the court orders otherwise.

¹⁸ SBRA Guide VIII(B)(4)(i).

¹⁹ SBRA Guide VIII(B)(4)(ii).

²⁰ *E.g.*, *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873 (11th Cir. 2010) (Above-median debtor with no disposable income must remain in Chapter 13 case for five years.). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:66.

The time for the filing of a Sub V plan is 90 days, unless the court extends it. § 1189(b). Subchapter V does not require payments before confirmation.

Payment of administrative and priority claims under the plan; interest on priority tax debts.

Chapter 13 permits payment of administrative and priority claims in deferred payments over the term of the plan. § 1322(b)(2). The debtor does not have to pay postpetition interest on unsecured priority tax claims.²¹

In a Chapter 11 case, a plan must pay administrative and priority claims, other than priority tax claims, in full on the effective date, unless the creditor agrees to different treatment, § 1129(a)(9)(A), (B), except that, in the case of cramdown confirmation of a plan in a subchapter V case, the plan may provide for payment of administrative expenses under the plan. § 1191(e). For example, although a Chapter 13 plan may provide for payment of a prepetition domestic support obligation over the term of the plan, a Sub V debtor must pay it in cash on the effective date.

Section 1129(a)(9)(C) permits payment of a priority tax claim in installments but requires payment of interest at the applicable governmental rate.

Only the debtor may propose a postconfirmation modification of the plan in a Sub V case

The Chapter 13 trustee or a creditor, as well as the debtor, may propose a postconfirmation modification of a plan. § 1329(a). The trustee or a creditor may do so, for example, to require the debtor to increase payments based on higher earnings or reduced

²¹ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 6:16.

expenses or the debtor's receipt of proceeds from the postpetition sale of an asset.²² Only the debtor may propose a postconfirmation modification in a Sub V case. § 1193(b), (c).²³

Postpetition assets and earnings as property of the estate

In a Chapter 13 case, postpetition assets and earnings are property of the estate under § 1306(a). Depending on the terms of the plan and the confirmation order and the court's interpretation of the vesting provisions of § 1327(b), postpetition assets and earnings may continue to be property of the estate after confirmation.²⁴

Postpetition assets and earnings are not property of the estate in a Sub V case when it is filed.²⁵ If the court confirms a plan under the "cramdown" provisions of § 1191(b), however, postpetition assets and earnings are included in property of the estate. § 1186(a).

An important consequence of these rules is what happens in the event of conversion of the case to Chapter 7.

In a Chapter 13 case converted to Chapter 7, postpetition assets and earnings are not property of the Chapter 7 estate, § 348(f)(1)(A), unless the case is converted in bad faith. § 348(f)(2).²⁶ Absent bad faith, therefore, a Chapter 13 debtor retains all postpetition earnings and assets upon conversion to Chapter 7, regardless of whether conversion occurs before or after confirmation.

²² See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 11:12, 11:13.

²³ SBRA Guide VIII(C).

²⁴ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:19, 10:11, 10:12.

²⁵ SBRA Guide XI.

²⁶ W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 20:11.

Preconfirmation conversion of a Sub V case has the same consequence, except that the debtor's bad faith is not a consideration. Conversion to Chapter 7 after confirmation of a *consensual* plan has the same result, because confirmation of a consensual plan does not put postpetition assets and earnings into the estate.

When conversion of a Sub V case occurs after cramdown confirmation under § 1191(b), the issue is more complicated. Section 1186(a) states that, if a plan is confirmed under § 1191(b), property of the estate includes postpetition assets and earnings. Accordingly, the Chapter 7 estate at the time of conversion would include the debtor's postpetition assets and earnings.

Section 1141(b), however, provides that confirmation of a Chapter 11 plan vests property of the estate in the debtor, unless the plan or confirmation order provides otherwise. If property of the estate vested in the debtor at confirmation, that property would remain property of the debtor upon postconfirmation conversion to Chapter 7. SBRA did not change the applicability of § 1141(b) in Sub V cases.

Section § 1141(b) conflicts with § 1186(a). Presumably, the later and more specific provisions of § 1186(a) prevail over § 1141(b) in a Sub V case.²⁷ Under this view, the debtor's postpetition assets and earnings are property of the Chapter 7 estate upon conversion.

Timing and scope of discharge

Discharge in a Chapter 13 case occurs under § 1328(a) after the debtor completes payments or under § 1328(b) if the court at the end of the case permits a hardship discharge based on the debtor's justified inability to complete plan payments.

In a Subchapter V case, discharge occurs upon confirmation of a consensual plan.²⁸

²⁷ SBRA Guide XI(B)(1).

²⁸ SBRA Guide X(A).

In the cramdown situation, discharge does not occur until the debtor completes payments due within the first three to five years of the plan, as the court determines. § 1192.²⁹ A chapter 13 discharge after completion of plan payments under § 1328(a) applies to more debts than a discharge in a Chapter 7 case,³⁰ and a Sub V discharge is subject to the same exceptions as a Chapter 7 discharge.³¹ The § 1328(a) discharge, therefore, discharges some debts that are excepted in a Sub V case.

Under § 1328(c), the exceptions to a “hardship discharge” under § 1328(b) are the same as in a Chapter 7 or Subchapter V case.

III. Subchapter V vs. Chapter 11 Small Business Case

If a debtor eligible for Subchapter V has debts less than \$ 3,024,725, the Chapter 11 case of a debtor who does not elect Subchapter V will be a “small business case.”

A. Advantages of Small Business Case

A small business case offers some advantages for the debtor.

There is no trustee. The debtor has a longer time to file a plan, 300 days instead of 90.

“Cramdown” confirmation in a small business case does not require satisfaction of the projected disposable income test for an entity. (A creditor’s objection in the case of an individual will trigger a PDI requirement. § 1129(a)(15)).

A small business debtor that is an entity receives its discharge upon confirmation of the plan, regardless of whether it is consensual or cramdown. § 1141(d)(1). The same rule applies in a subchapter V case when the court confirms a consensual plan under § 1191(a).³² Upon

²⁹ SBRA Guide X(B).

³⁰ See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 21:16, 21:18.

³¹ SBRA Guide X.

³² SBRA Guide X(A).

cramdown confirmation of a plan, however, the Sub V debtor does not get a discharge until completion of payments for three to five years, as the court determines. § 1192.³³ In addition, it is clear that the exceptions to discharge in § 523(a) do not apply to an entity in a small business case or in a Sub V case when consensual confirmation occurs.³⁴, whereas courts disagree as to whether the exceptions apply in the case of an entity.³⁵

B. Disadvantages of Small Business Case

A small business case has significant disadvantages for a debtor, especially an individual.

Requirement of § 1125 disclosure statement

Section 1125 requires the proponent of a Chapter 11 plan to provide a disclosure statement to creditors prior to the solicitation of votes on the plan containing “adequate information” to enable creditors to make an informed judgment about the plan. The court must approve the disclosure statement after notice and a hearing.

In a small business case, § 1125(f) permits the court to determine that the plan itself provides “adequate information” and allows the court to conditionally approve the disclosure statement, with a hearing on final approval occurring at the confirmation hearing.

Section 1125 does not apply in a Sub V case unless the court orders otherwise. Instead, Subchapter V requires only that the plan contain a brief history of the business operations of the debtor, a liquidation analysis, and projections regarding the ability of the debtor to make payments under the proposed plan. § 1190(1). The Sub V plan does not have to include “adequate information,” and the court’s approval of the information is not required.

³³ SBRA Guide X(B).

³⁴ SBRA Guide X(A).

³⁵ SBRA Guide X(B).

Presumably, materially inaccurate or misleading information could result in a court finding that the plan is not proposed in good faith.

Deadline for confirmation

In a small business case, the court must confirm the plan within 45 days of its filing under § 1129(f), unless the court extends the time under § 1121(e)(3). The order extending time must be signed before the deadline expires. § 1121(e)(3)(C). Subchapter V contains no deadline for confirmation.

Cramdown confirmation is more difficult for a debtor in a small business case

Confirmation in a Chapter 11 case requires that at least one impaired class of creditors, determined without regard to the votes of insiders, accept the plan. § 1129(a)(10).

If this requirement is met but one or more classes do not accept the plan, § 1129(b) permits cramdown if the plan is “fair and equitable.” With regard to a class of unsecured creditors, § 1129(b)(2)(B) contains the “absolute priority rule.” The absolute priority rule provides that, unless the claims are paid in full, holders of equity interests may not receive or retain anything under the plan.

Neither obstacle exists in a Sub V case. The court may confirm a plan even if no impaired class of creditors accepts, and the absolute priority rule is eliminated. § 1191(b), (c).³⁶

Instead, cramdown requires satisfaction of a projected disposable income test,³⁷ a heightened feasibility finding,³⁸ and the inclusion in the plan of “appropriate remedies” for creditors in the event of default.³⁹ The projected disposable income rules apply to cramdown confirmation in the case of an entity as well as in the case of an individual.

³⁶ SBRA Guide VIII(B).

³⁷ §1191(c)(2). SBRA Guide VIII(B)(4)

³⁸ § 1191(c)(3)(A). SBRA Guide VIII(B)(5).

³⁹ § 1191(c)(3)(B). SBRA Guide VIII(B)(5).

Provisions with regard to the cramdown of secured claims are the same. § 1191(c)(1).

Subchapter V permits modification of a residential mortgage in some circumstances

In a traditional Chapter 11 case, as in a Chapter 13 case, a plan cannot modify a claim secured only by real estate that is the debtor's principal residence. § 1123(b)(5). Accordingly, a plan may not "strip down" a residential mortgage claim to the value of the collateral and treat the deficiency claim as unsecured.

In a Sub V case, § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value have been "used primarily in connection with the small business of the debtor."⁴⁰

Only the debtor may file a plan in a Sub V case

In a small business case, a party other than the debtor may file a plan after the expiration of the debtor's exclusivity period of 180 days. § 1121(e). The court may extend the period or order otherwise for cause. Only the debtor may file a plan in a Sub V case. § 1189(a).

⁴⁰ Query whether an individual whose debts exceed the limits for qualification as a "small business debtor" under § 101(51D)(A) but who qualifies for subchapter V under the temporary \$ 7.5 million debt limit under the CARES Act and BTATCA meets the requirement in (B) for use of loan proceeds for the debtor's "small business" because such a debtor is not a "small business debtor."

In an individual small business case, property of the estate includes postpetition assets and earnings

In a traditional Chapter 11 case, § 1115(a) includes postpetition assets and earnings in the estate of an individual.⁴¹ An important consequence for the debtor is that, if the case converts to Chapter 7, the Chapter 7 estate includes postpetition assets and earnings.⁴²

Section 1115(a) is not applicable in a Sub V case. § 1181(a). Section 1186(a) provides, however, that if the court confirms a plan under the cramdown provisions of § 1191(b), property of the estate includes postpetition assets and earnings.

If a Sub V case of an individual is converted to Chapter 7 prior to confirmation, it is clear that the Chapter 7 estate does not include postpetition earnings and assets. As the earlier discussion of the issue in connection with Chapter 13 cases indicates, however, it is likely that postpetition assets and earnings will be property of the Chapter 7 estate if conversion occurs after cramdown confirmation.

A single unsecured creditor may invoke the PDI requirement in an individual's small business case

Section 1129(a)(15) provides that confirmation of a plan in an individual case requires the debtor to commit projected disposable income to the plan if a creditor objects, unless the plan provides for payment in full. The requirement is applicable if a single creditor objects, even if the class of unsecured creditors has accepted the plan. If the PDI requirement is applicable, the debtor must use PDI to make plan payments for the longer of five years or the term of the plan.

Section 1129(a)(15) is inapplicable in Subchapter V cases. §§ 1181(a), 1191(a), 1191(b). Thus, the PDI requirement is not applicable at all if all impaired classes accept the

⁴¹ SBRA Guide XI(A).

⁴² *Id.*

plan.⁴³ Moreover, when the PDI requirement applies in the cramdown situation, the *maximum* period for the payment of PDI is five years, even if the plan extends for a longer period.

Discharge of an individual in a Subchapter V case occurs at confirmation of a consensual plan

In a Chapter 11 case, discharge of an individual does not occur until completion of payments under the plan under § 1141(d)(5)(A), or the court grants a “hardship” discharge at the end of the case under § 1141(d)(5)(B).

Section 1141(d)(5) does not apply in a Sub V case. § 1181(a). Accordingly, if the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation. As a result, an individual gets a discharge upon confirmation of a consensual plan.

If cramdown confirmation occurs, the debtor’s discharge does not occur until completion of payments for three to five years, as the court determines, under § 1192.

Sub V does not contain a provision for a hardship discharge. It is not necessary in the case of consensual confirmation because discharge occurs at confirmation. In the case of cramdown confirmation, the debtor may seek postconfirmation modification of the plan under § 1193(b) to deal with postconfirmation inability to make payments.

Automatic stay is effective in later case filed by Subchapter V debtor, but not by debtor in a small business case

Section 362(n) generally provides that the automatic stay of § 362(a) does not apply in a case in which the debtor was the debtor in a small business case that was dismissed in the two years preceding the filing of the current case or in which a plan was confirmed during that

⁴³ See *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8) and *supra* note 14.

period. Because it applies to a debtor in a “small business case,” it does not apply to a debtor in a Sub V case.

V. Subchapter V vs. Traditional Chapter 11

If a debtor eligible for Subchapter V is not a small business debtor, it will be in a traditional chapter 11 case if it does not elect application of Subchapter V.

A traditional Chapter 11 case generally has the same advantages and disadvantages for a debtor as a small business case, with these differences.

1. No deadline for confirmation exists in a traditional Chapter 11 case.
2. The modifications to the disclosure statement rules applicable in a small business case under § 1125(f) do not apply.
3. The exclusivity period for the debtor to file a plan is 120 days, rather than 180.
§ 1121(b).
4. The rules in § 1116 for the filing and reporting of financial and other information that govern a small business case, which apply in a Sub V case, § 1187(a), do not apply in a traditional Chapter 11 case.
5. The provision for elimination of creditors’ committees unless the court orders otherwise apply only in Subchapter V and small business cases.