AMERICAN BANKRUPTCY INSTITUTE

Midwest Regional Bankruptcy Seminar

CONCURRENT SESSION

Consumer Session

Advising Clients Who Own a Business

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SMALL BUSINESS TRIAGE: IS A CORPORATE FILING NECESSARY
MRBS 2024

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I. HOW TO ANALYZE OPTIONS

A. Gather information regarding Assets and Liabilities (Need Details)

1. Who do they owe personally? (See Personal Asset Analysis)

    a. Mortgage
    b. Car loans
    c. Banks (signature loans)
    d. Credit cards
    e. Medical Bills
    f. Guaranteed loans
    g. Student loans
    h. Taxes
    i. Lawsuits

2. What are your Personal Assets? (See Personal Asset Analysis)

    a. Real Estate
    b. Vehicles
    c. Stocks or bonds
    d. Bank balances
    e. Right to pursue PI claim
    f. Has anyone died with expected inheritance
    g. Gun
    h. Antiques or fine furniture
    i. Collectables
    j. Jewelry
    k. Retirements
    l. Life insurance policies

3. Who do you owe Corporately? (See Business Analysis)

    a. Banks
    b. SBA guaranteed loans
    c. Direct SBA loans (PPP & EIDL)
    d. Taxes
    e. MCA lenders
    f. AP's
    g. Lawsuits
    h. Equipment loans

4. What are your Business Assets? (See Business Analysis)

    a. Real Estate
    b. Vehicles
    c. Equipment
    d. ERC Credit
    e. AR's (Are they collectable)

B. Documents necessary for Analysis (Pers. & Corp.)

    a. All bills
    b. Bank loan documents
    c. MCA loan documents
    d. SBA loan documents
    e. Corporate operating agreement
    f. Retirements details
    g. Vehicle titles
    h. Tax returns for past 2 or 3 years
    i. Profit & loss statements past year (monthly)
    j. Balance sheet
    k. Details of AP's
    l. Details of AR's
    m. Paystubs of owner/details of income or draws

C. Personal Analysis

1. Run personal asset analysis (What assets are exposed) **EXHIBIT 1**
2. Create budget (Sch I & J)
3. What are Exemptions?
4. Means test (Are over 50% of debts business related)

D. Corporate Analysis (Question being What is there to Save?)

1. Run business asset analysis **EXHIBIT 2**
2. Review P&L and balance sheet **EXHIBIT 3**

E. OPTIONS

1. Chapter 7 – straight bankruptcy – 11 USC Chapter 7.

   a. Close business & personal bankruptcy
   b. Should the corporation file Chapter 7
   c. What assets are exposed.

2. Chapter 11 Subchapter V– business or personal reorganization – 11 USC Chapter 11.

   a. What about personal guarantees
   b. Is there a feasible plan

3. Settlement with threat of bankruptcy - prepare bankruptcy, take to other attorney's office and discuss options. Only if 1 or 2 large creditors.

4. Article 9 Sale

5. Close business- Need privity of contract to be liable

II. CHAPTER 7 - BANKRUPTCY

Pros: Discharges all unsecured debts
Stops garnishments
Stops collections
May be able to keep assets if exempt

Cons: On credit for 10 years
Will lose nonexempt assets
Will lose house if not current

A. <u>General Provisions</u>

1. Surrender of non-exempt assets. The federal exemption listed in 11 USC 522 do not apply in Ohio. Ohio has opted out of the federal exemptions and ORC 2329.66 applies. Ky allows state OR federal exemptions.

2. Debtor may only file Chapter 7 once every 8 years. See 11 USC 727(8); i.e. if debtor has no medical or vehicle insurance it is dangerous to file Chapter

7 now. They may be injured or in an accident the next day and the medical bills or damages would not be dischargeable for another 8 years.

3. Creditors may pursue the cosigners or corporation. The Chapter 7 discharge only applies to the individual that files.

4. Nondischargeability problems. Debts which are nondischargeable: student loans, some taxes, credit cards charged over the credit limit, false financial statements, bad checks, DUI accident claims. See Sec. 523 for more specifics.

5. Real Estate. This is probably the most common consideration. The rule is that an individual may file Chapter 7, discharge their debts and still keep their residence home if they meet a three part test:

(1) They must be current on their payments.

(2) They must have insurance on the house.

(3) If the property is deeded in one person's name, they must have less than $ 161,375 in equity in the property ($ 322,750 for two persons); i.e.: Value - $500,000, 1st mort. $200,000, 2nd mort. $ 30,000. Property owned by husband and wife. Equity is $ 270,000 and is totally exempt under ORC 2329.66(A)(1).

6. Mortgaged assets that client wants to keep. Two categories: Cars and Other.

(1) Cars - Debtor must:
(2)
a. Current on the payments
b. Continue to make payments
c. Have full insurance
d. Less than $ 4,450 equity per owner pursuant to ORC 2329.66(A)(2).

(2) Other - Both Purchase Money Security Interests and Non-purchase Money Security Interests - Debtor may redeem or reaffirm on these obligations.

B. Advantages/Disadvantages

1. Advantages:

(1) Most unsecured debts are forgiven, and debtor is given **A Fresh Start**.

(2) Over 90% of the cases are no asset cases and the debtor does not have to surrender any non mortgaged item; i.e. all debtor's property is exempt.

(3) Debtor's employer will not be notified.

(4) Immediately stops garnishments.

2. Disadvantages

(1) Debtor may lose non-exempt assets. ORC 2329.66.

(2) Some debts are not discharged. Sec. 523.

(3) Stays on credit record for 10 years.

(4) Does not protect cosigners.

C. Non Purchase Money Security Interest

The debtor who has collateral in a Non-Purchase Money Security Interest or who has property under a Purchase Money Security Interest may either reaffirm under Sec. 524(c) or redeem under Sec. 722 or avoid the lien under Sec. 522(f).

1. The filing of a Chapter 7 results in a discharge of the listed debts. If the debtor wants to keep the items that they either purchased, or used as collateral for a loan, they must pay the creditor in order to keep the items.

2. Exemptions do not defeat mortgages.

D. Liens

1. Chapter 7 discharges debts, not liens

2. May be able to avoid non consensual liens (certified judgment liens) if it impairs the exemption.

3. Unable to avoid statutory liens

III. CHAPTER 11 SUBCHAPTER V REORGANIZATION

A. General Provisions

1. **ELECTION OF SUBCHAPTER V**

A debtor must elect to proceed under Subchapter V. 11 U.S.C. § 103(i). The official forms have been revised to include this option. A party in interest or the U.S. Trustee may object to the election no later than 30 days after the conclusion of the meeting of creditors. Fed. R. Bankr. P. 1020(b). Courts are split on which party has the burden of proving eligibility, but the majority place the burden on the debtor. Compare *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC),* 638 B.R. 403 (9th Cir. B.A.P. 2022) with *In re Body Transit, Inc.*, 613 B.R. 400, 409 (Bankr. E.D. Pa. 2020).

2. QULAIFICATION/DEBT LIMITS

Initially tied to the limit of $2,725,625 for "small business debtors" in 11 U.S.C. § 101(51D), the maximum amount of non-contingent, liquidated debt allowed for Subchapter V debtors was increased to $7,500,000 on March 27, 2020 by the CARES Act and the limit was extended through March 27, 2022. 11 U.S.C. § 1182(1). As of March 27, 2022 the debt limit reverted to $2,725,625, then increased to $3,024,725 on April 1, 2022. The Bankruptcy Threshold Adjustment and Technical Corrections Act (the "Technical Corrections Act") became effective on June 21, 2022, which retroactively restored the debt limit for Subchapter V debtors at $7,500,000. However, that debt limit sunsets on June 21, 2024 unless it is again extended by Congress. Debt limits only apply to liquidated, noncontingent debts and exclude debts owed to insiders or affiliates. However, if multiple affiliated debtors file Subchapter V, their aggregated debts must be within the $7,500,000 limit. 11 U.S.C. § 1182(1)(B). Finally, fifty (50%) percent of the debts must arise from "commercial or business activities" of a debtor. Additional cases on this topic: *In re Sullivan,* 626 B.R. 326 (Bankr. D. Colo. 2021); *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 (E.D. N.Y. 2022); *In re 305 Petroleum, Inc.,* 622 B.R. 209 (Bankr. N.D. Miss 2020); *In re Parking Management,* 620 B.R. 544 (Bankr. Md. 2020).

3. ENGAGED IN BUSINESS

There is a split in case law on the issue of whether a Subchapter V debtor must be "engaged in commercial or business activities" when the case is filed. The quoted language is from the Code's definition of a small business debtor. Some courts find there is no "currently" engaged in business requirement. *In re Bonert,* 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La.); *In re Wright,* 2020 WL 2193240 (Bankr. D. S.C.).

Other cases find that "engaged in" means actively and currently involved in business. *In re RS Air, LLC,* 633 B.R. 403 (9th Cir. BAP 2022); In *re Thurman*, 625 B.R. 417 (Bankr. W.D. Mo. 2020); *In re Blue,* 630 B.R. 179 (Bankr. M.D. N.C. 2021) (collecting cases); *In re Johnson,* 2021 WL 825156 (Bankr. N.D. Tex.).

Several courts have held that engaging in the winding up of business affairs qualifies as engaging in commercial or business activities. *In re Vertical Mac Construction, LLC,* 2021 WL 3668037 (Bankr. M.D. Fla); *In re Ikalowych,* 629 B.R. 261 (Bankr. D. Colo. 2021); *In re Offer Space,* 629 B.R. 299 (Bankr. D. Utah 2021); *In re Port Arthur Steam Energy, L.P.,* 629 B.R. 233 (Bankr. S.D. Tex. 2021).

4. AFFILIATE OF THE ISSUER

The definition of a "small business debtor" has a limitation in addition to the debt limit, which is that a corporate debtor may not be an affiliate of an "issuer". 11 U.S.C. § 1182(1)(B)(iii). "Issuer" is defined in the Securities Exchange Act of 1934 (15 U.S.C. § 78c) rather than the Bankruptcy Code and is "any person who issues or proposes to issue any security." 15 U.S.C. § 78c(a)(8). In turn, "security" is defined very broadly to include notes, stock, certificates of interest,

mineral leases, warrants, etc. 15 U.S.C. § 78c(a)(10). A bankruptcy judge in the Central District of California found a limited liability company ineligible for Subchapter V relief as its sole member was a Delaware corporation which, by definition, had stockholders. The court found this fell within the definition of an "issuer" and that the debtor was thus ineligible for Subchapter V as an affiliate of an issuer. *In re Phenomenon Marketing & Entertainment, LLC,* 2022 WL 1262001 (Bankr. C.D. Cal.). This outcome was altered by the Technical Corrections Act, which clarified the exclusion applied only to affiliates of publicly-traded securities. 11 U.S.C. Sec. 1182(1)(b)(ii), (iii). For a case finding a debtor ineligible for Subchapter V relief on these grounds, see *In re Serendipity Labs, Inc.,* 620 B.R. 679 (Bankr. N.D. Ga. 2020).

5. PLAN FILING DEADLINE

Only the debtor may file a plan in a Subchapter V case, but the debtor has only 90 days from the order for relief in which to file a plan. 11 U.S.C. § 1189(a), (b). An extension of the 90-day deadline is possible, but "just cause" isn't sufficient. A debtor must show that the needed extension is due to circumstances for which the debtor "should not justly be held accountable." 11 U.S.C. § 1189(b). This is the same standard applied in Chapter 12 cases (11 U.S.C. § 1221) and courts have readily applied Chapter 12 case law to extension requests in Subchapter V cases. *In re Trepetin,* 617 B.R. 841 (Bankr. D. Md. 2020). Courts have found that the negotiation of terms for assumption of a lease or a dispute over a lease were grounds to extend the deadline to file a plan, as well as the impact of the deadline for filing government entity claims and death of a business partner. *In re HBL SNF, LLC,* 635 B.R. 725 (Bankr. S.D. N.Y. 2022); *In re Baker,* 625 B.R. 27 (Bankr. S.D. Tex. 2020). The *Baker* opinion set out four factors to consider when an extension if requested: (1) whether the circumstances were in the debtor's control; (2) whether the debtor has made progress drafting a plan; (3) whether delays in filing are reasonably related to the circumstances outside the debtor's control; and (4) whether there was a pending

motion to dismiss or convert, or any objection to the extension. For cases denying an extension of time to file a plan, see *In re Excellence 2000, Inc.,* 636 B.R. 475 (Bankr. S.D. Tex. 2022); *In re Online King, LLC,* 629 B.R. 340 (Bankr. E.D.N.Y. 2021).

Once a plan is filed, there is no statutory deadline for obtaining confirmation, however courts are mindful of the purpose behind Subchapter V to have cases move expeditiously. *In re Adams,* 2021 WL 1783350 (Bankr. M.D. Fla.).

The unexcused failure to timely file a plan will likely have drastic consequences, as a court is left only with the options of dismissal or conversion. 11 U.S.C. §§ 1104, 1112(b)(1) and 1181(a). See *In re Online King, LLC,* 628 B.R. 340 (Bankr. E.D. N.Y. 2021); *In re Seven Stars on the Hudson Corp.,* 618 B.R. 333 (Bankr. S.D. Fla. 2020).

A debtor may seek conversion to a non-Subchapter V Chapter 11 case if a plan is not timely filed. *In re Majestic Gardens Condominium C. Assoc., Inc.,* 637 B.R. 755 (Bankr. S.D. Fla. 2022). At least one court has expressed displeasure with the filing of a "placeholder" plan. *In re Baker,* 625 B.R. 27 (Bankr. S.D. Tex 2020).

Can the deadline be extended? The text is both stringent and not uniform.

In re Baker, 625 B.R. 27 (Bankr. S.D. Tex. 2020), Court held extension was a fact-driven inquiry, requiring consideration of whether the circumstances were within the debtor's control, what progress towards a plan has been made, whether the deficiencies preventing the draft plan from being filed are reasonably related to the identified circumstances, and whether any party has moved to dismiss or convert, or otherwise opposed the deadline extension. Extension was approved.

In re Online King LLC, 2021 WL 1536415 (Bankr. E.D.N.Y. Jan. 19, 2021) (despite no objection to the untimely request to extend the deadline, the Court denied the extension where the debtor failed to satisfy the stringent burden of demonstrating it was entitled to the extension.

In re Trepetin, 617 B.R. 841 (Bankr. D.Md. 2020) (noting that conversion of case from chapter 7 doesn't change the date of order for relief for purposes of Sections 1188 and

1189, and finding that the standard to extend the plan filing deadline in section 1221 should be the standard under section 1189).

In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug. 7, 2020) (failure to meeting statutory deadline to file plan under 1189(b) is fatal to plan confirmation, and decision to amend petition was within the debtor's control).

But see:

In re Tibbens, 2021 WL 1087260 (Bankr. M.D.N.C. Mar. 19, 2021) (comparing the filing deadline under 1189 with the requirements of 1121(e) and finding the deadlines are "not so unforgiving in a subchapter v case, and the distinctions among 11 U.S.C. §§ 1112(b)(2), 1121(e), 1181(a) and 1189(b) indicate Congress' intent not to have a late filed plan doom a subchapter v case).

In re Wetter, 620 B.R. 243 (Bankr. W.D. Va. 2020) (determining that *Seven Stars* sets "too rigid of a test, and concluding that *Trepetin* "charts a better path").

Given these challenges, how have things worked out in practice? *E.g.* "placeholder" plans (see 11 USC § 1193(a), liberally allowing modifications before confirmation, except that a debtor may not modify the plan so that it fails to meet the requirements of sections 1122 and 1123, with the exception of 1123(a)(8) (requiring individual debtors to commit earnings))

6. CONSENSUAL V. NON-CONSUNSUAL PLAN

A Subchapter V plan can be confirmed just like any other Chapter 11 plan if all impaired classes vote for its acceptance. 11 U.S.C. §§ 1129(a), 1191(a). The author's experience has been that getting all impaired classes to return a ballot (much less vote in favor of a plan) in a smaller Chapter 11 case can be a barrier to a "consensual" plan. While the result varies by jurisdiction, the majority rule is that a failure to vote cannot be deemed acceptance by a class of creditors. *In re Vita Corp.,* 358 B.R. 749 (Bankr. C.D. Ill. 2007). There is some minority support for treating the failure of a

class to vote as acceptance of a plan, but it often centers on advance disclosure or a case where there is overwhelming support by other classes. See *In re Trenton Ridge Investors, LLC,* 461 B.R. 440, 456-7 (Bankr. S.D. Ohio 2011); *In re Robinson,* 2021 WL 3713850 (Bankr. D. Kan.). Consensual approval of a plan provides benefits to a debtor including an end to the involvement of the Subchapter V trustee along with greater control, reduced costs and less chance of litigation over the plan.

Section 1194(b) provides that the Subchapter V trustee "shall" make payments to creditors under a non-consensual plan. However, that provision permits a plan to modify this requirement and as a practical matter, many practitioners including a plan provision that removes this duty from the Subchapter V trustee. The author is unaware of a situation where a Subchapter V trustee has tried to exclude such a plan provision. However, turning over disbursement duties to the Subchapter V trustee in the event of a plan default may be a factor in establishing a remedy for creditors, as discussed in more detail below.

Section 1191(b) allows a court to confirm a "non-consensual" plan if impaired classes do not vote to accept a plan, and even if no impaired class votes to accept a plan. 11 U.S.C. §§ 1181(a), 1191(b). While Section 1129(b) of the Bankruptcy Code is the tool practitioners use to get "cramdown" plans confirmed in regular Chapter 11 cases, it does not apply in Subchapter V cases. 11 U.S.C. § 1181(a). A non-consensual plan must be "fair and equitable" and not discriminate unfairly in order to be confirmed, but the requirement that one impaired class accept the plan does not apply in Subchapter V cases, making confirmation easier. See 11 U.S.C.§ 1191(c). This new Bankruptcy Code provision provides a definition of "fair and equitable: that the plan be feasible, that a debtors' disposable income for at least three years be committed to the plan, and that the plan contain remedies to protect claim holders in case plan payments are not made. If these requirements are met, the SBRA provides that the court "shall" confirm the plan. 11 U.S.C. § 1191(b). A court has an independent duty to determine if a plan satisfies the requirements for confirmation. *In re Lapeer Aviation, Inc.,* 2022 WL 7204871 (Bankr. E.D. Mich.) (citing *In re Trenton Ridge Investors, LLC,* 461 B.R. 440, 458-459 (Bankr. S.D. Ohio 2011)).

7. PLAN FEASABILITY

Feasibility in Subchapter V is arguably no different than in a standard Chapter 11 case where 11 U.S.C. § 1129(a)(11) applies. A thorough and thoughtful exploration of confirmation issues such as good faith, the best interest of creditors test, feasibility, unfair discrimination and fulfilling the "fair and equitable" requirement for non-consensual confirmation may be found in *In re Lapeer Aviation, Inc.,* 2022 WL 7208471 (Bankr. E.D. Mich.). The *Lapeer Aviation* court ultimately denied confirmation of the debtor's Second Amended Plan because it did not satisfy the best interest of creditors test and did discriminate unfairly against one creditor. Subchapter V debtors are often less sophisticated and may not have the ability or expertise to prepare financial projections to support plan feasibility. And, they may not have the financial ability to engage a professional for this purpose. This is an area where the Subchapter V trustee can be an asset for debtors as many of them have a financial background and may be able to offer assistance in preparing or reviewing prior financial results and future projections. In any event, the Subchapter V trustee should review plan feasibility in advance so that the debtor will have an objective third-party to support the debtors' feasibility analysis if it is questioned.

Issues found to preclude confirmation under Subchapter V include a failure to establish that a sale of property required to fund a plan was imminent, *In re Gabbidon Builders, LLC,* 2021 WL 1964544 (Bankr. W.D. N.C.); using outdated revenue data and unrealistic projections, *In re U.S.A. Parts Supply, N.D.,* 630 B.R. 487 (Bankr. N.D. W.Va. 2021); failing to provide a liquidation analysis, *In re Microcurrent Research and Education, LLC,* 626 B.R. 455 (Bankr. M.D. Fla. 2021); and, simply having no assets to liquidate or business to reorganize, *In re BK Technologies, Inc.*, 2021 WL 1230123 (Bankr. N.D. W. Va.).

8. DISPOSABLE INCOME

Another element in assessing if a non-consensual plan is "fair and equitable" is whether the debtor commits to pay its projected disposable income for at least three years under the plan. While it seems clear the burden of calculating disposable income should fall upon the debtor in the first instance, should the Subchapter V trustee review and evaluate that calculation? The requirement to contribute projected disposable income may be met through plan payments **or** distribution of property under the plan. 11 U.S.C. § 1191(c)(2)(A) and (B). At least one court has approved a plan where a debtors' equity owner contributed funds equal to the projected disposable income for three years and the debtor distributed those funds as of the effective date. *In re The Lost Cajun Enterprises, LLC,* 634 B.R. 1063 (Bankr. D. Colo. 2021). The Ninth Circuit BAP affirmed confirmation of a Subchapter V plan which proposed paying actual income rather than projected disposable income because the plan provided for payment from other sources which equaled the present value of the projected disposable income. *In re Orange County Bail Bonds, Inc.,* 638 B.R. 137 (9th Cir. BAP 2022). After reviewing the treatment of "commitment periods" in Chapter 12 and 13 bankruptcies, the Ninth Circuit BAP stated:

Section 1191 does not prescribe a standard by which a bankruptcy court should fix a longer period. By giving the bankruptcy court the sole authority to require a longer commitment period in appropriate cases, subchapter V ensures an efficient confirmation process for small business debtors. *Id.*, at 146. These are just two examples of how a Subchapter V debtor has flexibility to use outside capital, future revenue, disposition of assets, or a combination of them to fulfill the projected disposable income requirement for non-consensual confirmation.

Another example of a Court exercising its authority regarding projected disposable income is *In re Staples,* 2023 WL 119431 (M.D. Fla.). As a condition of approving the pro se debtor's fourth amended plan, the bankruptcy court required the debtor to

file quarterly operating reports and pay unsecured creditors his **actual** disposable income. On appeal the ruling was affirmed, with the District Court holding that the bankruptcy court did not abuse its discretion in imposing the conditions, and that authority to do so emanated from both the All Writs Act, 28 U.S.C. § 1651(a) and the Bankruptcy Code, 11 U.S.C. § 105(a).

Noticeably absent from the non-consensual confirmation requirements is the absolute priority rule found in 11 U.S.C. § 1129(b)(2)(B)(ii). Thus, although a debtor must commit projected disposable income for at least three years, it does not have to worry about being able to retain its equity interest or injecting new value to do so.

9. PLAN MODIFATION

Subchapter V also provides greater flexibility to modify a plan after it is confirmed. For a consensual plan, the debtor can modify a plan any time before substantial consummation if circumstances warrant. 11 U.S.C. § 1193(a). And although 11 U.S.C. § 1127 does not apply, this standard is the same as found in 11 U.S.C. § 1127(b) for standard Chapter 11 plans. The major limitation here is substantial consummation, which is defined in 11 U.S.C. § 1101(2) as transfer of substantially all property as proposed, assumption by the debtor or a successor of the business or property under the plan, and commencement of plan distributions. Practitioners are cautioned that once a consensual plan is substantially consummated, modification is not possible. A recent decision from the Bankruptcy Court for the Eastern District of Kentucky finding that substantial confirmation had not occurred after confirmation of a consensual Subchapter V plan is attached. After substantial consummation of a consensual plan, a corporate Subchapter V debtor is in much the same situation as a regular Chapter 11 debtor. Compare 11 U.S.C. § 1127(b) with 11 U.S.C. § 1193(b). An individual Subchapter V debtor may actually be worse off with a consensual plan confirmation under Subchapter V, as the SBRA does not provide any opportunity to modify an individual debtor's consensual plan after substantial consummation. On the other hand, an individual debtor in a regular Chapter 11 case can modify a plan before

completion of payments under certain circumstances. 11 U.S.C. § 1127(e).
For a non-consensual plan, modification is more readily available, as it may be requested at any time within three years (or 5 years with court approval). 11 U.S.C. § 1193(b). Again, circumstances must warrant the modification and it must comply with the requirements of 11 U.S.C. § 1191(b). This process is similar to that allowed in Chapter 12 and 13 cases, although only the debtor may propose a modification in a Subchapter V case. While it is not possible to know in advance if confirmation will be consensual or non-consensual, practitioners need to be aware of the substantial difference in the ability to modify plans post-confirmation and properly advise their clients. This is particularly important for individual debtors and true reorganization plans, where maximum flexibility over the life of a plan is the goal.

10. SUBCHAPTER V TRUSTEES

The U.S. Trustee's office publishes a handbook and legal manual for Subchapter V trustees, available at this site: https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials. In addition to providing a detailed summary of the primary provisions of the SBRA, it is always helpful to know the framework that has been established for a trustee when you are doing advance planning and as you progress through a case.

A. Pre-confirmation role of the trustee

The duties of a Subchapter V trustee are enumerated in 11 U.S.C. § 1183. The Subchapter V trustee operates more like a trustee in Chapter 12 or 13 cases, to review and assess a plan of reorganization rather than investigating a debtors' financial dealings. Subchapter V trustees are specifically tasked with facilitating a consensual plan. 11 U.S.C. § 1183(b)(7). They are to attend the status conference and hearings related to the value or sale of property and the confirmation or modification of a plan. 11 U.S.C. § 1183(b)(3). A Subchapter V trustee may

receive plan payments prior to confirmation, but nothing in Subchapter V requires such payments to be made, or directly requires any payments prior to confirmation. 11 U.S.C. § 1194(a), (c). While a Subchapter V trustee is not tasked with investigating the financial affairs of a debtor, for cause shown the Court may expand Subchapter V trustee duties to include such an investigation by adding the duties set forth in 11 U.S.C. § 1106(a)(3).

Query whether expanding the trustee duties to include investigation of a debtors' financial affairs is consistent with the duty to facilitate a consensual plan. In many jurisdictions (including Kentucky) some Subchapter V trustees are not attorneys and have accounting or financial backgrounds. They are likely to be more helpful in facilitating a plan by offering to help with financial projections or a liquidation analysis rather than investigating a debtors' prior financial affairs. Nevertheless, if creditors clamor for greater transparency or it appears there may be substantial recoveries through avoidance actions, it may be appropriate to expand the scope of the Subchapter V trustee duties. This should be weighed against the goal of minimizing administrative expenses in Subchapter V cases in order to make them efficient and economical.

B. Postconfirmation role of the trustee

A Subchapter V trustee's job is to knock themselves out of a job, because if they succeed in facilitating a consensual plan, substantial consummation of that plan ends the trustee's service. 11 U.S.C. § 1183(c). If a non-consensual plan is confirmed under 11 U.S.C. § 1191(b), the trustee remains involved and is tasked with making the payments under a plan, unless the plan provides otherwise. 11 U.S.C. § 1194(b). Since you rarely know whether or not a plan will be confirmed consensually, a plan should address the role of a Subchapter V trustee in the event of nonconsensual confirmation. Of course, that role can also be modified or further defined through an order confirming the plan. In addition, 11 U.S.C. §. 1185 remains applicable after confirmation, and if a party in interest requests removal of the debtor from

possession, a Subchapter V trustee could be granted expanded powers, including operating the debtor's business.

11. DEFAULT, DISMISSAL OR CONVERSION

A. Default and Remedies

In a consensual plan, the services of a trustee end upon confirmation, so creditors will need to look to the plan provisions for their available remedies if a debtor defaults. Whether that remedy lies with the bankruptcy court, a state court, or something else will revolve around specific language in the plan so creditors are advised to review plan provisions carefully and negotiate definite terms as part of the confirmation process.

A non-consensual plan is required to include remedies in the event of a plan default, which may include liquidation of nonexempt assets. 11 U.S.C. § 1191(c)(3)(B). Secured creditors often retain their liens after confirmation, and lessors whose leases are assumed will have their contractual remedies. Unsecured creditors are the group most likely to need a remedy upon default, but they may not be numerous or organized enough to negotiate specific remedies in Subchapter V cases. In addition to the liquidation of assets, remedies could include anything from conversion or dismissal to enlarging the role of the trustee after a default, to seeking to remove the debtor from possession. Creditors should evaluate these options carefully if a debtor defaults to determine which option provides for the best chances of a recovery. Query whether a plan could preclude conversion or dismissal of the case as a post-default remedy?

B. Dismissal or Conversion

A party in interest can request dismissal or conversion of a Subchapter V case under 11 U.S.C. § 1112(b)(1), the same as any other chapter 11 case. In a decision converting a case to chapter 7, the Bankruptcy Court for the Southern District of

Texas found ample cause where a debtor filed inaccurate operating reports, overdrew the DIP account and had over $20,000 in unspecified cash withdrawals. Additional cause was found where the debtor's schedules omitted or undervalued numerous assets and inflated liabilities to avoid the perception of a two-party dispute. *In re Ozcelebi,* 639 B.R. 365 (Bankr. S.D. Tex. 2022). The bankruptcy court determined that conversion to chapter 7 would provide supervision to protect the estate and creditors.

A Subchapter V debtor can be removed as a debtor-in-possession for "cause." 11 U.S.C. § 1185(a). If a debtor is removed from possession, 11 U.S.C. § 1183(b)(5) expands the duties of the Subchapter V trustee. Although a Subchapter V trustee's ability to operate a debtor's business was not initially included, Congress chimed in via the Technical Corrections Act to make it clear that a Subchapter V trustee could do so. 11 U.S.C. § 1183(b)(5)(B). Instances where a Subchapter V debtor has been removed and the Subchapter V trustee granted some degree of control include situations where the court found gross mismanagement, dishonesty and bad faith on the part of the debtors and the Subchapter V trustee was familiar with the case, *In re Young,* 2021 WL 1191621 (Bankr. D. N.M.); and, where the debtor failed to comply with a specific order to employ a broker or move to sell real property prior to plan confirmation, *In re Pittner,* 638 B.R. 255 (Bankr. D. Mass. 2022). In *In re Young*, the court justified putting the Subchapter V trustee in control as they were familiar with the case and the assets, while a chapter 7 trustee would have to acquire that knowledge and familiarity. In *In re Pittner,* 638 B.R. 255 (Bankr. D. Mass 2022) the court determined that although Section 1112(b)(1)'s incorporation of the ability to appoint a trustee under Section 1104 did not apply in Subchapter V cases, that replacing the debtor with the Subchapter V trustee to operate the business was a "lesser form of the conversion option" available under 11 U.S.C. § 1112(b)(1) which better served the creditors and the estate. *Id.,* at 259. Query what the ultimate result was in these cases, especially because and a Subchapter V trustee has no sell property of the estate or to file a plan.

For a case where the court found that cause did not exist to remove a Subchapter V debtor from possession, see *In re Neosho Concrete Prod. Co.,* 2021 WL 1821444 (Bankr. W.D. Mo.).

C. Discharge and Exceptions to Discharge

Whether a plan is consensual or nonconsensual also makes a difference in when and how a Subchapter V debtor obtains a discharge. If the plan is consensual, discharge occurs automatically upon confirmation for both individual and corporate debtors. This effects a change for individual debtors, who previously would not receive a discharge until completion of plan payments.

If the plan is nonconsensual, the discharge is governed by 11 U.S.C. § 1192 and takes effect "as soon as practicable" after all plan payments have been completed. The debtor or trustee will need to file a notice of plan completion and may need to request entry of a discharge. The Bankruptcy Court for the Eastern District of Kentucky has created a suggested form for this purpose, available on the Court's website. Debts for administrative claims under 11 U.S.C. § 503 are also included in the discharge in recognition of the fact that such claims may be paid over time under a Subchapter V plan. 11 U.S.C. § 1191(c).

Discharge under a **nonconsensual** plan excludes debts excepted under 11 U.S.C. § 523(a) and any debt where the last payment is due after the term of the plan is complete. Section 1192 does not distinguish between individual and corporate debtors and an issue has arisen as to whether or not the 11 U.S.C. § 523(a) exceptions apply to a corporate debtor that confirms a nonconsensual plan. The only Court of Appeals to address this issue is the Fourth Circuit, which ruled that 523(a) exceptions apply to corporate debtors in Subchapter V, finding that the language of Section 1192 doesn't incorporate all of 523, but says that debts "of the kind" set out in 523(a) are excepted from discharge. *In re Cleary Packaging, LLC,* 36 F.4th 509 (4th Cir. 2022). In dicta, the Fourth Circuit opined that discharge exceptions applying to corporate debtors it is part of the trade-off for not having to comply with the absolute priority

rule.

The majority of cases addressing this issue have ruled that the addition of Section 1192 to the preamble of Section 523 made it clear that exceptions to discharge only apply to individual debtors. See *In re Lapeer Aviation, Inc.*, 2022 WL 111072 (Bankr. E.D. Mich.) (citing pre-SBRA cases); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC),* 635 B.R. 559 (Bankr. D. Idaho 2021); *Gaske v. Satellite Restaurants, Inc. Crabcake Factor USA (In re Satellite Restaurants, Inc. Crabcake Factory USA),* 626 B.R. 871 (Bankr. D. Md. 2021). A recent decision from the Bankruptcy Court for the Middle District of Florida surveyed the case law in this area and employed the rule of statutory construction requiring courts to interpret a statute in a way which will "render every word operative, rather than one which may make some [words] idle and nugatory." *Nutrien Ag Solutions, Inc. v. Hall, et al. (In re Hall)*, 2023 WL 2927164 (Bankr. M.D. Fla. April 13, 2023) (internal citation omitted). Accordingly, while the creditor's nondischargeability claims against the individual debtor Hall could proceed, to the extent they were asserted against the corporate debtor, Spuddog Farm Properties, LLC, they were dismissed.

D. Fee Issues

Section 326(b) of the Bankruptcy Code establishes compensation limits for trustees in chapter 12, 13 and Subchapter V cases. It permits an award of compensation under 11 U.S.C. § 330, but could be read to limit that compensation to five (5%) of funds distributed under a plan. After a careful reading and construction of Section 326, the Bankruptcy Court for the District of Idaho determined that the 5% cap on compensation does not apply to Subchapter V trustees, who are entitled to reasonable compensation under 11 U.S.C. § 330(a). *In re Tri-State Roofing,* 2020 WL 7345741 (Bankr. D. Idaho). Although allowing the Subchapter V trustee's fees as an administrative claim, the *Tri-State Roofing* court noted that the case was dismissed prior to confirmation and it did not appear the trustee was holding any funds, so it was not clear how the Subchapter V trustee would be paid. Accordingly, Subchapter V trustees need to be aware of the

risk of administrative insolvency in Subchapter V cases.

A Subchapter V trustee must also be disinterested. The court removed a Subchapter V trustee where he represented a creditor in a state court lawsuit against the principals of a debtor. The court found the trustee was not disinterested, independent or impartial. In fact, the record revealed the trustee had been "openly and actively adverse" to the debtor. Not only was the trustee removed, his fees were disallowed as not being reasonable or necessary. *In re 218 Jackson LLC,* 631 B.R. 937 (Bankr. M.D. Fla. 2021).

Debtor's counsel must also be disinterested in Subchapter V cases, although being owed prepetition fees up to $10,000 does not disqualify counsel from representing a Subchapter V debtor. 11 U.S.C. § 1195. However, while being owed fees for prepetition work does not disqualify debtor's counsel, how such fees are to be paid is not specified in the Bankruptcy Code. One court has found that debtor's counsel is entitled to pay prepetition fees from a prepetition retainer, as long as they do not exceed the cap in Section 1195. *In re Ozcelebi,* 631 B.R. 629 (Bankr. S.D. Tex. 2021). This held true, despite a creditor's arguments that a) the claim was nothing more than a prepetition, unsecured claim; b) the payment could be avoided under Section 547; and c) payment of the prepetition retainer was itself a fraudulent transfer under Section 548. The court held that it was premature to rule on fraudulent transfer issues or penalize debtor's counsel simply because such transfers were alleged, and that the prepetition retainer was a "security retainer" under applicable state law, mooting the unsecured claim argument. Inasmuch as 11 U.S.C.§ 1195 does not specify how claims for prepetition fees are to be paid, state law regarding property rights controlled and debtor's counsel was allowed to pay itself from the prepetition retainer because the funds were a security retainer.

Additional Resources

Judge Paul W. Bonapfel is a bankruptcy judge for the Northern District of Georgia (Atlanta) who has penned a comprehensive guide to the Small Business Reorganization Act of 2019 (the "SBRA") which created Subchapter V of Chapter 11 of the Bankruptcy Code. Judge Bonapfel's work is available through

the website of the American Bankruptcy Institute (www.abi.org) or the bankruptcy court (https://www.ganb.uscourts.gov/content/honorable-paul-w-bonapfel). The author cannot hope to explore Subchapter V as thoroughly as Judge Bonapfel and these materials are intended as a summary of the main aspects of Subchapter V.

12. PERSONAL OR CORPORATE FIRST

A. Trustee abandonment

B. Can Trustee sell debtors equitable interest to sophisticated creditor?

13. FIRST DAY MOTIONS

A. Cash Collateral

1. UCC security interests

2. Will need a budget

B. Professional Employment

1. Prepetition claim must be less than $ 10,000 (11 USC 1195)

C. Pay employees

D. Critical Vendors

14. ADEQUATE PROTECTION

A. 11 USC 1194 authorizes Trustee to make payments

B. 11 USC 1194(a) states Trustee to retain payments

15. NO ABSOLUTE PRIORITY RULE

16. NO CREDITORS COMMITTEE

17. BENEFITS OF SUBCHAPTERV

A. Plan exclusivity
B. No UST Fees
C. No limitation on auto cramdown
D. Subchapter V Trustee

18. Immunity/Liability Issues

- In *Barton v. Barbour*, 104 US. 126 (1881), the United States Supreme Court held that a party must obtain leave from the appointing court before suing a receiver.

- This has been expanded and is now known as the "Barton" doctrine, which courts normally apply to bankruptcy trustees as well as various kinds of receivers. Accordingly, permission to pursue a bankruptcy trustee must be obtained before initiating an action. *See, e.g., In re VistaCare Group, LLC*, 678 F.3d 218 (3rd Cir. 2012) (joining numerous other circuits).

    - The Barton doctrine serves the principle that the bankruptcy trustee is an officer of the court that appointed him/her, and so the court has a strong interest in protecting the trustee from unjustified personal liability for acts taken within the scope of official duties. *See, e.g., Lebovits v Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996); *see also In re Linton*, 136 F.3d 544 (7th Cir. 1998). It also enables the Bankruptcy Court to maintain better control over the administration of the estate. *See, e.g., Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993).

    - Generally, counsel for the trustee is also entitled to the protection of the Barton doctrine. *See, e.g., Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993). Other bankruptcy-appointed officers are protected as well. *See, e.g., Carter v. Rodgers*, 220 F.3d 1239 (11th Cir. 2000) (applying the Barton doctrine to a suit against the bankruptcy trustee and the court-appointed antiques dealer who conducted sale of estate property).

    - The Barton doctrine applies even after the bankruptcy case is closed. *See, e.g., Muratore v. Darr*, 375 F.3d 140 (1st Cir. 2004); *In re Linton*, 136 F.3d 544 (7th Cir. 1998).

- There is a limited exception to the Barton doctrine, found at 28 U.S.C. 959(a), which provides that trustees, receivers and managers of any property, including debtors in possession, may be sued without leave of court with respect to any acts or transactions in carrying on the business (as distinguished from acts undertaken in connection with liquidation and distribution of assets; *see, e.g., Muratore v. Darr*, 375 F.3d 140 (1st Cir. 2004)).

- Trustees are generally entitled to immunity from liability for their actions taken in their official capacity.

  - Trustees are entitled to *absolute immunity* for all actions taken pursuant to a court order. *See, e.g. In re Ondova Ltd. Co. v. Sherman*, 914 F.3d 990, 993 (5th Cir. 2019).

  - Trustees are entitled to *qualified immunity* for personal harms caused by actions taken within the scope of their official duties. *See, e.g., Ondova*, 914 F.3d at 993; *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 872 F.3d 138 (3rd Cir. 2017) (Bankruptcy trustees are government officials, entitled under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to qualified immunity when they act in their official capacity in a manner that is not contrary to clearly established law.")

    - "Qualified immunity, 'properly applied, … protects all but the plainly incompetent or those who knowingly violate the law.'" *Phoenician*, 872 F.3d at 143 (internal citation omitted).

  - Trustees generally are not immune with respect to *ultra vires* actions, i.e., actions taken outside the scope of their official duties as trustees. *See, e.g., Ondova*, 914 F.3d at 993.

    - With respect to *ultra vires* actions, an injured party may not need to obtain leave of the bankruptcy court before bringing suit if the trustee is acting outside the scope of his/her authority. *See, e.g., Hahnfeldt v. Murphy*, 2017 U.S. Dis. LEXIS 76490 (D.C. Mass. 2017).

- Research reflects that these principles have not been tested with respect to Subchapter V Trustees. However, there seems to be no reason why Subchapter V Trustees, who are authorized by statute, would be treated any differently.

19. DIFFERENCES BETWEEN CHAPTER 11 & CHAPTER 11 SUBCHAPTER V

1. Available to debtors engaged in commercial or business activities; *see* discussion below

2. No committee of unsecured creditors and instead, there is a Sub V Trustee
    a. So no cost for committee professionals, just Sub V Trustee fees, hourly
    b. Experience with total costs of the Trustee
    c. Main function of a Trustee is to facilitate a consensual plan – *see* discussion below

3. No US Trustee fees

4. Quick timelines:

    a. Usually within 24-48 hours, SubV Trustee is appointed
    b. Within 7 days of filing – must file balance sheet, cash flow statement, statement of operations, and tax return
    c. Within 14 days of filing, Debtor must file all required schedules, SOFA, etc. (unless extended by motion for cause shown)
    d. Status conference with SubV trustee and Court within 60 days
    e. 14 days before the conference, debtor must file a report regarding consensual plan attempts
    f. Plan due within 90 days – *see* discussion below re extensions and how this is working in practice (note that there is no deadline for *confirmation*)
    g. What about cases converted from another chapter? *See* discussion below.

5. In plans, the main differences are:

    a. No separate disclosure statement, just include history of operations, liquidation analysis and projections in plan (11 USC § 1190(1))

    b. Plan must provide for the submission of "all or such portion of 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" (11 USC § 1190(2))

        See discussion later about actual versus projected disposable income (11 USC 1191(d)

    c. Plan may modify rights of secured creditors with liens on principal residence of the debtor if new value was received in connection with granting the lien that was not used to acquire the property and was used primarily in connection with the small business of the debtor (11 USC § 1190(3))

d. No one other than the debtor may propose a plan

Challenge: what if Trustee duties are expanded to include taking over the debtor? How best to handle is unclear, includes working with debtor-out-of-possession to submit or modify a filed plan, converting out of SubV, delaying confirmation and selling under section 363 (*In re Jacobson Hotels, Inc.*, Case no. 20-33957 (Bankr. S.D. Tex. 2020)).

e. Can be nonconsensual if it does not discriminate unfairly and is "fair and equitable," no accepting class needed, 11 USC § 1191(b), (c)

f. Absolute priority rule does not apply, so owners can retain interests if plan is confirmed

How has this worked out in practice?

g. The debtor generally makes payments under consensual plans and the SubV trustee's duties are terminated, while the Code contemplates that for nonconsensual plans, the SubV trustee makes the payments under the plan, unless the plan or confirmation order provides otherwise

How has this worked out in practice?

h. Discharge is upon confirmation of consensual plans, but not until completion of payments due under the plan for nonconsensual plans – *see* discussion below

i. Plan may be three – five years; case law is not settled on when a plan needs to be extended past three years

See *In re Walker*, 628 B.R. 9 (Bankr. E.D. PA 2021) (Court declined to require five year plan for the benefit of unsecured creditors as a requirement of good faith under 1129(a)(3), recognizing that neither 11 USC 1191(a) nor 1191(b), (c)(2) mandates a five year plan, where the debtor proposed supplemental funding to the plan and creditors voted to approve it)

j. Acceptance and failure to vote

Section 1191(a) says the Court shall confirm a plan if all of the requirements of § 1129(a) are met, other than § 1129(a)(15) (certain requirements for individual debtors); this includes § 1129(a)(8), acceptance by all impaired classes of claims and interests.

Question: if a creditor does not vote on the plan, can the creditor be deemed to accept the plan? *See* discussion below.

EXHIBIT 1
MR. & MRS. DEBTOR
Asset Analysis

House Monrow, OH (JT)		Value	$ 490,000		
	1st - Flagstar		$ 229,181		
	Costs		$ 40,000		
			$ 269,181		
		Net	$ 220,819		
		Exemption	$ 322,750		
				Equity	**$ 0**
2005 Hornet Camper		Value	$ 500		
				Equity	**$ 500**
2018 Ford F150		Value	$ 25,232		
		Lien	$ 25,342		
				Equity	**$ 0**
2019 Ford F550 (H)		Value	$ 50,000		
		Lien-	$ 50,342		
				Equity	**$ 0**
2022 Ford F250 (H)		Value	$ 35,000		
	Lien		$ 16,107		
	Exemption		$ 4,450		
			$ 20,557		
				Equity	**$ 14,443**
John Deere Utility Tractor & trailer		Value	$ 8,500		
		Lien	$ 9,017		
				Equity	**$ 0**
John Deere Zero Turn Mower		Value	$ 4,000		
		Lien	$ 4,144		
				Equity	**$ 0**

Chase Bank Accounts Checking & Saving	Value Exemption	$ 2,000 $ 1,100		
			Equity	**$ 900**
Household Goods	Value Exemption	$ 4,620 $ 4,620		
			Equity	**$ 0**
Electronics	Value Exemption	$ 1,100 $ 1,100		
			Equity	**$ 0**
Wearing Apparel	Value Exemption	$ 1,000 $ 1,000		
			Equity	**$ 0**
Jewelry	Value Exemption	$ 400 $ 400		
			Equity	**$ 0**
Misc. Pictures	Value Exemption	$ 100 $ 100		
			Equity	**$ 0**
Schwab One Account	Value Exemption	$ 171 $ 171		
			Equity	**$ 0**
Fidelity Rollover IRA	Value Exemption	$ 25,718 100%		
			Equity	**$ 0**
Closed, LLC	Value	$ 0		
			Equity	**$ 0**
Lawn Business, LLC 75% Interest	Value	$ 3,150		
			Equity	**$16,800**

Old Job Pension Plan-payout status	Value	$ 620.82		
	Exemption	100%		
			Equity	**$ 0**
Trust	Value	$ 0		
			Equity	**$ 0**
Fidelity term life policy	Value	$ 0		
Wife beneficiary	Exemption	100%		
			Equity	**$ 0**
State Farm Life Ins.	Value	$ 2,500		
Brother beneficiary				
			Equity	**$ 2,500**

Total Equity $ 35,143

EXHIBIT 2
NUMBER ONE, LLC
Asset Analysis

One member- Owner

ASSETS:

20 Company Vehicles	Value	$ 100,000	
		Equity	**$ 100,000**
2023 Ford F350	Value	$ 55,000	
	Lien	$ 65,000	
		Equity	**$ 0**
FFE	Value	$ 50,000	
		Equity	**$ 50,000**
Bank Balances	Value	$ 80,000	
		Equity	**$ 80,000**
Inventory	Value	$ 100,000	
		Equity	**$ 100,000**
Press	Value	$ 450,000	
	PMSI Lien UCC OH	$ 350,000	
		Equity	**$ 100,000**
AR (6M) (90% collectable)	Value	$ 5,400,000	
		Equity	**$ 5,400,000**
WIP (4M)	Value	$ 0	
		Equity	**$ 0**
	Total Assets	**$ 5,830,000**	

LIABILITIES:

Bank 1 UCC OH PG Owner	$ 5,000,000
Daughter Note dated 5/2023	$ 1,000,000
SBA (EIDL) UCC OH PG Owner	$ 2,000,000
AP's	$ 10,000,000
MCA1	$ 150,000
MCA2	$ 300,000
Total Liabilities	**$ 18,450,000**

Profit & Loss - 2023

	Jan-23		Feb-23		Mar-23		Apr-23		May-23		Jun-23	
Sales												
Sales	1,045,101	84.66%	996,196	87.08%	1,296,970	86.87%	1,047,320	85.31%	1,114,360	85.29%	1,428,514	86.74%
Bar Sales	157,303	12.74%	146,382	12.80%	193,461	12.96%	161,692	13.17%	176,102	13.48%	214,411	13.02%
Other Sales	75,473	6.11%	44,536	3.89%	57,146	3.83%	66,354	5.41%	65,487	5.01%	72,692	4.41%
Comps & Discounts	-45,769	-3.71%	-45,537	-3.98%	-60,213	-4.03%	-48,595	-3.96%	-49,691	-3.80%	-69,233	-4.20%
Total Sales	**1,234,428**	100.00%	**1,143,958**	100.00%	**1,493,006**	100.00%	**1,227,620**	100.00%	**1,306,593**	100.00%	**1,646,848**	100.00%
Prime Cost												
Food Purchases	303,736	24.61%	324,557	28.37%	370,067	24.79%	330,605	26.93%	338,504	25.91%	403,695	24.51%
Bar Purchases	40,540	25.77%	35,859	24.50%	49,829	25.76%	40,693	25.17%	44,846	25.47%	33,953	15.84%
Total Costs	**344,276**	27.89%	**360,417**	31.51%	**419,896**	28.12%	**371,298**	30.25%	**383,350**	29.34%	**437,648**	26.58%
Net	**890,152**		**783,541**		**1,073,110**		**856,322**		**923,243**		**1,209,200**	
Operating Expense												
Payroll Expenses	676,078	54.77%	641,474	56.08%	833,510	55.83%	624,538	50.87%	680,199	52.06%	873,995	53.07%
Repairs and Maintenance	20,669	1.67%	20,422	1.79%	34,758	2.33%	28,902	2.35%	19,232	1.47%	66,171	4.02%
Utilities	46,767	3.79%	38,272	3.35%	45,817	3.07%	35,956	2.93%	33,287	2.55%	42,698	2.59%
Outside Services	18,168	1.47%	23,500	2.05%	31,255	2.09%	22,052	1.80%	16,986	1.30%	60,900	3.70%
Other Controllable Expenses	118,847	9.63%	99,413	8.69%	138,301	9.26%	133,704	10.89%	119,418	9.14%	154,374	9.37%
Miscellaneous Expenses	1,654	0.13%	1,283	0.11%	-2,541	-0.17%	1,661	0.14%	1,914	0.15%	2,314	0.14%
General Administrative Expenses	14,766	1.20%	21,962	1.92%	25,755	1.73%	22,741	1.85%	18,649	1.43%	30,394	1.85%
Advertising / Marketing Fees	28,243	2.29%	36,058	3.15%	48,313	3.24%	20,407	1.66%	29,226	2.24%	32,566	1.98%
Other Miscellaneous Expense-COVID			15	0.00%							25	0.00%
Dues and Subscriptions	4,758	0.39%	10,512	0.92%	19,319	1.29%	13,989	1.14%	8,933	0.68%	13,375	0.81%
Postage and Delivery	-115	-0.01%	-272	-0.02%	-106	-0.01%	-100	-0.01%	-151	-0.01%	-50	0.00%
Office Printing and Supplies	217	0.02%	146	0.01%			27	0.00%	324	0.03%	260	0.02%
Travel	3	0.00%									13	0.00%
Travel Meals			53	0.01%			151	0.01%	734	0.06%	1,965	0.12%
Travel:Lodging/Hotel	1,400	0.11%	742	0.07%	1,621	0.11%	2,909	0.24%			2,717	0.17%
Travel:Air	1,563	0.13%	1,329	0.12%	378	0.03%	3,740	0.31%	1,513	0.12%	584	0.04%
Travel:Transportation	241	0.02%	277	0.02%	290	0.02%	442	0.04%	681	0.05%	466	0.03%
Meals and Entertainment	578	0.05%	515	0.05%	880	0.06%	486	0.04%	1,784	0.14%	217	0.01%
Automobile	16	0.00%	26	0.00%	3,655	0.25%	827	0.07%	159	0.01%	39	0.00%
Gas	4,117	0.33%	2,365	0.21%	1,196	0.08%	3,320	0.27%	1,167	0.09%	2,844	0.17%
Licenses and Permits Expense	2,166	0.18%	655	0.06%					275	0.02%		
Insurance Expense	912	0.07%	347	0.03%	911	0.06%	967	0.08%	1,733	0.13%	2,129	0.13%
General Liability Ins	6,136	0.50%	16,091	1.41%	6,136	0.41%	6,136	0.50%	6,136	0.47%	6,136	0.37%
Misc Oper Expenses			226	0.02%	61	0.00%			1,992	0.15%		
Vendor Discounts	-4,466	-0.36%	-69,668	-6.09%	-4,291	-0.29%	-10,206	-0.83%	-3,914	-0.30%	-4,458	-0.27%
Bank Charges	904	0.07%	145	0.01%	241	0.02%	688	0.06%	663	0.05%	701	0.04%
Credit Card Fees	34,059	2.76%	29,746	2.60%	33,125	2.22%	31,259	2.55%	32,157	2.46%	41,830	2.54%
Uncategorized Credit Card Charges	286	0.02%	1,393	0.12%	721	0.05%			28	0.00%		
Equipment Rental	2,492	0.20%	2,442	0.21%	2,442	0.16%	2,520	0.21%	2,491	0.19%	4,738	0.29%
Interest Expenses	24,000		22,000		25,000		26,000		22,000		25,000	
Rent	35,000		35,000		35,000		35,000		35,000		35,000	
Depreciation	15,000		15,000		15,000		15,000		15,000		15,000	
Total Operating Expense	**1,054,462**	79.43%	**951,470**	76.88%	**1,296,747**	82.09%	**1,023,114**	77.49%	**1,047,615**	75.03%	**1,411,941**	81.45%
Net Operating Income	**-164,311**	100.00%	**-167,929**	100.00%	**-223,637**	100.00%	**-166,792**	100.00%	**-124,372**	100.00%	**-202,741**	100.00%

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Jul-23		Aug-23		Sep-23		Oct-23		Nov-23		Dec-23		Total	
1,302,436	86.32%	1,141,854	88.16%	1,243,321	86.43%	1,100,000	85.39%	1,300,000	85.39%	1,400,000	83.04%	13,703,698	85.91%
210,416	13.95%	164,185	12.68%	189,192	13.15%	134,155	12.16%	147,491	13.22%	189,507	13.20%	2,084,295	13.07%
53,473	3.54%	42,738	3.30%	74,045	5.15%	69,790	6.32%	62,388	5.59%	108,226	7.54%	792,348	4.97%
-55,572	-3.68%	-53,632	-4.14%	-68,146	-4.74%	-42,738	-3.87%	-46,830	-4.20%	-54,155	-3.77%	-640,110	-4.01%
1,510,753	100.00%	**1,295,145**	100.00%	**1,438,411**	100.00%	**1,261,207**	100.00%	**1,463,050**	100.00%	**1,643,578**	100.00%	**15,950,588**	100.00%
366,411	24.28%	340,681	26.30%	364,772	25.36%	279,992	25.37%	288,887	25.89%	349,646	24.35%	4,061,553	25.46%
52,257	24.84%	40,628	24.75%	40,338	21.32%	54,097	40.33%	26,202	17.77%	42,536	22.45%	501,779	24.07%
418,668	27.75%	**381,308**	29.44%	**405,110**	28.16%	**334,090**	30.27%	**315,089**	28.24%	**392,182**	27.31%	**4,563,332**	28.61%
1,092,085		**913,837**		**1,033,301**		**927,117**		**1,147,961**		**1,251,396**		**12,101,264**	
743,486	49.27%	708,364	54.69%	812,341	56.47%	631,453	57.22%	654,427	58.65%	736,573	51.29%	8,616,437	54.02%
36,272	2.40%	22,221	1.72%	23,454	1.63%	31,633	2.87%	29,006	2.60%	44,472	3.10%	377,213	2.36%
38,598	2.56%	39,435	3.05%	50,141	3.49%	44,501	4.03%	37,140	3.33%	45,231	3.15%	497,844	3.12%
45,573	3.02%	41,686	3.22%	32,360	2.25%	41,869	3.79%	35,781	3.21%	42,841	2.98%	412,973	2.59%
117,113	7.76%	119,618	9.24%	141,847	9.86%	134,192	12.16%	137,113	12.29%	145,975	10.17%	1,559,913	9.78%
886	0.06%	1,403	0.11%	3,389	0.24%	2,984	0.27%	6,146	0.55%	2,727	0.19%	23,819	0.15%
9,794	0.65%	22,519	1.74%	41,538	2.89%	12,581	1.14%	27,216	2.44%	32,449	2.26%	280,363	1.76%
29,178	1.93%	64,060	4.95%	55,401	3.85%	60,509	5.48%	43,169	3.87%	74,290	5.17%	521,421	3.27%
				90	0.01%							130	0.00%
15,330	1.02%	10,977	0.85%	29,698	2.06%	10,459	0.95%	12,673	1.14%	13,840	0.96%	163,862	1.03%
-50	0.00%	-150	-0.01%	-100	-0.01%			101	0.01%			-993	-0.01%
113	0.01%	388	0.03%	694	0.05%			1,531	0.14%			3,698	0.02%
												16	0.00%
22	0.00%	49	0.00%	2,617	0.18%	248	0.02%	879	0.08%	360	0.03%	7,075	0.04%
2,955	0.20%	801	0.06%	1,005	0.07%	680	0.06%	789	0.07%	821	0.06%	16,440	0.10%
1,853	0.12%	5,780	0.45%	-478	-0.03%	1,577	0.14%	7	0.00%	1,406	0.10%	19,253	0.12%
635	0.04%	368	0.03%	254	0.02%	498	0.05%	1,853	0.17%	459	0.03%	6,465	0.04%
1,592	0.11%	1,220	0.09%	863	0.06%	1,713	0.16%	653	0.06%	906	0.06%	11,407	0.07%
126	0.01%	220	0.02%			59	0.01%	100	0.01%			5,227	0.03%

2,444	0.16%	2,145	0.17%	2,666	0.19%	1,841	0.17%	3,582	0.32%	1,449	0.10%	29,136	0.18%
						834	0.08%	400	0.04%			4,330	0.03%
786	0.05%	1,677	0.13%	1,069	0.07%	877	0.08%	5,887	0.53%	973	0.07%	18,267	0.11%
6,136	0.41%	6,539	0.51%	6,743	0.47%	6,743	0.61%			26,983	1.88%	99,913	0.63%
188	0.01%			48	0.00%	99	0.01%	116	0.01%			2,730	0.02%
-4,712	-0.31%	-7,216	-0.56%	-69,160	-4.81%	-3,823	-0.35%	-3,776	-0.34%	-3,828	-0.27%	-189,517	-1.19%
724	0.05%	720	0.06%	720	0.05%	1,712	0.16%	659	0.06%	886	0.06%	8,764	0.05%
38,072	2.52%	36,746	2.84%	32,611	2.27%	25,922	2.35%	28,250	2.53%	30,756	2.14%	394,532	2.47%
				61	0.00%							2,489	0.02%
2,423	0.16%	2,423	0.19%	1,428	0.10%	1,731	0.16%	1,731	0.16%	1,731	0.12%	28,593	0.18%
24,000		22,000		23,000		25,000		25,000		25,000		288,000	
35,000		35,000		35,000		35,000		35,000		35,000		420,000	
15,000		15,000		15,000		15,000		15,000		10,000		175,000	
1,163,537	72.38%	**1,153,992**	83.79%	**1,244,299**	81.54%	**1,085,892**	91.69%	**1,100,433**	92.28%	**1,271,298**	83.98%	**12,956,323**	81.23%
-71,452	100.00%	**-240,155**	100.00%	**-210,997**	100.00%	**-158,775**	100.00%	**47,527**	100.00%	**-19,902**	100.00%	**-855,058**	0.00%

Faculty

Michael B. Baker is a solo practitioner with The Baker Firm, PLLC in Covington, Ky., where his practice focuses on bankruptcy, insolvency and workouts for individuals and small businesses. He also routinely represents chapter 7 trustees in a broad range of issues, including lien avoidance, asset recovery, adversary proceedings and appellate work. Previously, Mr. Baker was an attorney with Ziegler & Schneider, PSC. He received his B.A. in English in 1998 from Northern Kentucky University and his J.D. *cum laude* in 2007 from Northern Kentucky University Salmon P. Chase College of Law.

Michael L. Baker practices with the firm of Ziegler & Schneider, P.S.C. in Cincinnati. He has handled both individual consumer and complicated business issues in and out of bankruptcy. Mr. Baker has represented people filing chapters 7, 13, 12 and 11. In addition, he has represented credit unions and financial institutions, as well as individuals who are creditors of those who seek protection in bankruptcy court, and he has represented creditors' committees in chapter 11 proceedings. In addition, Mr. Baker has served as a panel chapter 7 trustee in the Eastern District of Kentucky since 1984. He also has chaired the annual Bankruptcy Seminar for the Northern Kentucky Bar Association for several years and currently serves on the advisory board of ABI's Midwest Regional Bankruptcy Seminar. A frequent speaker, he is admitted to practice in Kentucky and Ohio. Mr. Baker co-authored an article entitled "Title Examinations in Kentucky," which has been published by the Kentucky Bar Association, as well as "The Chapter 7 Bankruptcy Trustee and the Bankruptcy Estate," published by the University of Kentucky in its *Consumer Bankruptcy Practices in Kentucky, Chapter 7 Practice* series. In addition, he authored an article for the Kentucky Bench and Bar titled, "Means Testing - Do the Numbers Add Up?," which was published in the July 2011 issue. He also is a founding member of the Bankruptcy Section of both the Northern Kentucky Bar Association (NKBA) and the Kentucky Bar Association. Mr. Baker received his undergraduate degree from the University of Louisville and his J.D. from Northern Kentucky University Salmon P. Chase College of Law.

Patricia J. Friesinger is an attorney with Coolidge Wall Co., L.P.A. in Dayton, Ohio, and has more than 20 years of experience helping business and corporate clients preserve assets and overcome financial challenges. She handles complex business disputes, asset-protection, out-of-court debt restructurings, creditor/debtor rights and bankruptcy. Ms. Friesinger represents clients in the purchase and sale of distressed assets through Article 9 sales, foreclosures, receiverships and § 363 bankruptcy sales. She also handles traditional corporate matters (such as acquisitions, dispositions, recapitalizations and finance transactions) and complex financial restructuring, which she accomplishes through negotiation and litigation. In her practice, Ms. Friesinger represents chapter 7 bankruptcy trustees, unsecured creditors' committees, secured and unsecured creditors in chapters 7, 11, 12 and 13, and debtors in chapters 7 and 11 of the U.S. Bankruptcy Code. She is rated AV-Preeminent by Martindale-Hubbell, and in January 2019, she became a chapter 7 panel trustee. Mr. Friesinger is a member of ABI and the American Bar Association's Bankruptcy Court Structure and Insolvency Process Committee, Thomas F. Waldron American Bankruptcy Law Forum, Dayton Bar Association, Ohio State Bar Association and the Inn of Court. She also is an advisory board member of ABI's Midwest Regional Bankruptcy Seminar. Ms. Friesinger received her B.A. in 1997 from the University of Toledo and her J.D. in 2000 from the University of Toledo College of Law.

Eric W. Goering is partner with Goering & Goering, LLC in Cincinnati and has more than 20 years of experience in bankruptcy law. His practice concentrates in business and consumer bankruptcy, including loan workouts and commercial loan restructuring for the large business client. He handles an average of 100 cases per month as trustee and debtor's counsel. Mr. Goering was appointed in 2003 as a chapter 7 trustee in the Southern District of Ohio. He is a past president of the Cincinnati Bar Association, a member of the Judicial Liaison Committee, Bankruptcy Local Rules Committee and Volunteer Lawyers, and an advisory board member of ABI's Midwest Regional Bankruptcy Seminar. He is also a frequent lecturer throughout the country regarding chapter 7, 11 and 13 bankruptcy issues. Mr. Goering received his B.A. in economics from Denison University in 1989 and his J.D. from Salmon P. Chase College of Law in 1992.

Nick Wunderlich, CPA is director of M&A Services with Dean Dorton Allen Ford, PLLC in Fort Wright, Ky. Before joining Dean Dorton, he served as vice president at JP Morgan Chase, where he was instrumental in providing direct oversight of $1.3 billion in capital commitments to clients across a variety of industries. Before this role, Mr. Wunderlich spent 12 years in the Mergers and Acquisitions advisory practice at Wells Fargo Securities, spanning locations in Charlotte, N.C., and St. Louis, Mo., from 2004-16. In this capacity, he provided strategic advice to senior management of both publicly traded and privately held companies on matters of mergers and acquisitions, capital markets transactions and strategic alternatives. Mr. Wunderlich received his B.S. in business administration, with a focus in finance and accounting, from Saint Louis University.