receive a discharge. The same prohibition exists in a chapter 11 case when a corporation liquidates assets and does not remain in business. § 1141(d)(3).

An entity cannot receive a chapter 13 discharge because an entity cannot be a chapter 13 debtor under § 109(e).[546] Chapter 13 distinguishes between entities and individuals by making only individuals eligible for chapter 13, not through a discharge provision.

The distinctions in the operation of the discharge provisions of chapter 7 and 13 between individuals and entities, therefore, shed no light on the interpretation of chapter 11 and subchapter V provisions that deal with exceptions to discharge.

A review of the structure of the discharge provisions of § 1141(d) and § 1192(2) helps to understand the Fourth Circuit's point about distinctions between exceptions to discharge for individuals and debtors in chapter 11 and subchapter V cases.

Section 1141(d) provides for a discharge in a traditional case (and after consensual confirmation in a sub V case) upon confirmation in one paragraph applicable to all debtors (§ 1141(d)(1)(A)) and excepts debts specified in § 523(a) from an individuals' discharge in another. (§ 1141(d)(2)). In a subchapter V case, § 1192(2) excepts debts in § 523(a) without limiting its application to individuals. The Fourth Circuit's conclusion is that Congress must have intended that the § 523(a) exceptions apply to all debtors because § 1192(2) did not limit the exceptions to individuals as § 1141(d)(2) does.

The structures of § 1141(d) and § 1192(2) support the Fourth Circuit's interpretation but they do not compel it. The legislative history of subchapter V and the history of the enactment of Chapter 11 without any exceptions to a corporation's discharge that the bankruptcy courts

[546] *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 12:6.

examined demonstrate that Congress did not intend that § 1192 apply to all debtors in a way that is materially different from the way that the discharge provisions of § 1141(d) apply to all debtors, as later text discusses in more detail.

Fourth Circuit's concern about reconciliation with § 1141(d)(6)

The Fourth Circuit's second point is that the bankruptcy court's interpretation would "create difficulty in reconciling § 523(a) with § 1141(d)(6)." 36 F.4th at 516. The Fourth Circuit did not elaborate on its concern.

Section 1141(d)(6) provides that the discharge does not discharge an entity[547] from any debt: (A) of the kind specified in § 523(a)(2)(A) or (B)[548] that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (B) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid (§ 1141(d)(6)(B)). Although § 1141(d)(6) does not apply to an individual, the debts it excepts in § 1141(d)(6)(A) are debts that are nondischargeable in an individual case under § 523(a)(2), and the debts in § 1141(d)(6)(B) are identical to debts excepted under § 523(a)(1)(C).

Two possible concerns involving § 1141(d)(6) arise from the bankruptcy court's interpretation.

First, if § 1192(2) does not except debts of an entity after cramdown discharge, the discharge will discharge debts that § 1141(d)(6) excepts, because § 1141(d) does not apply in the

[547] Section 1141(d)(6) uses the term "corporation." Section 101(9) broadly defines "corporation" to include most business entities.

[548] § 523(a)(2) applies to debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by: (A) false pretenses, false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition or (B) use of a written statement respecting the debtor's or an insider's financial condition that is materially false, on which the creditor relied, and that the debtor made or published with intent to deceive.

case of cramdown confirmation under § 1181(c). If consensual confirmation occurs, however, such debts are excepted because § 1141(d) governs the discharge.

The fact that an entity could escape nondischargeability of a § 1141(d)(6) debt through cramdown confirmation but not through consensual confirmation supports the conclusion that the § 523(a) exceptions must apply after cramdown confirmation because the § 523(a) exceptions encompass debts described in § 1141(d)(6). In this situation, under the bankruptcy court's interpretation, an entity has an incentive to seek cramdown confirmation rather than consensual confirmation so that it receives a broader discharge.

This anomalous result with regard to limited types of debts does not provide a persuasive basis for concluding that Congress intended to except *all* types of § 523(a) debts from discharge in order to preserve exceptions for a few. While § 1141(d)(6) debts rarely arisen in reported chapter 11 cases, the problem of exceptions to discharge in entity cases is widespread. The fact that the bankruptcy court's interpretation gives an entity a broader discharge in cramdown cases with regard to types of debts that rarely arise does not indicate that Congress intended to depart from the intentional and deliberate elimination of exceptions to discharge in entity cases, as later text explains.

The second issue involves the specific language of § 1141(d)(6)(A). That subparagraph provides that it does not discharge debts owed to certain creditors "of the kind specified" in § 523(a)(2)(A) or (B).

Again, a review of the statutes helps to clarify the issue.

Section 523(a) states that a discharge under § 1141 and § 1192 (and others) does not discharge an individual debtor from the listed debts. Section 1192(2) excludes debts "of the kind

specified" in § 523(a). Under the bankruptcy court's interpretation, the inclusion of § 1192 in § 523(a)(2) means that §1192(2) does not except debts of an entity.

Application of the bankruptcy court's interpretation to § 1141(d)(6)(A) would mean that § 1141(d)(6) likewise does not except debts of an entity from a discharge in a traditional chapter 11 case under the following syllogism:

1. Both § 1192(2) and § 1141(d)(6)(A) except debts "of the kind specified" in § 523(a).

2. Section 523(a) states that discharges under the listed sections, including § 1141 and § 1192, do not discharge "an individual debtor" from the debts it lists.

3. The bankruptcy court's conclusion that the exception to a § 1192 discharge for debts "of the kind specified" in § 523(a) does not apply to an entity because § 523(a) applies only to the discharge of an individual also applies to a § 1141 discharge.

A determination that § 1141(d)(6) does not except debts of an entity contradicts its express language that it excepts the listed debts from the discharge of a corporation. Accordingly, the conclusion from this exercise is that the bankruptcy court's interpretation of § 523(a) as limiting exceptions to discharge in § 1192(2) to individuals cannot be correct because the same interpretation makes no sense when applied to § 1141(d)(6)(A).

The bankruptcy courts do not discuss the point, but their interpretation does not necessarily require the result that the foregoing discussion posits. Section 1141(d)(6) expressly states that it provides exceptions to the debts of corporations and was enacted as a stand-alone amendment to § 1141(d). The bankruptcy court's interpretation cannot override the express provisions of § 1141(d)(6)(A) to except the debts it describes by reference to § 523(a) from a corporate discharge.

Further, the bankruptcy courts' interpretation can be reconciled with § 1141(d)(6)(A) based on differences in the context of § 1141(d)(6)(A) and in the circumstances of its enactment and the enactment of amendments to § 523(a) in 1986 and 2019 that added, respectively, the discharge provisions of chapter 12 and subchapter V. Context of the statutes and the circumstances of their enactment make it appropriate to interpret the same words differently in § 1141(d)(6)(A) than in § 1192(2).

As originally enacted in 1978, § 523(a) referenced only a chapter 7 discharge, a chapter 11 discharge, and the so-called "hardship" discharge in a chapter 13 case under § 1328(b).[549] The limitation of the exceptions to debts of an individual at that time had no effect on the discharge of an entity. An entity could not be a chapter 13 debtor, and it could not get a chapter 7 discharge. Section 1141(d)(2) specifically excepted debts in § 523(a) only from the chapter 11 discharge of an individual. Chapter 12 did not exist.

In 1986, Congress enacted chapter 12 as a temporary provision[550] and amended § 523(a) to include the chapter 12 discharge provisions.[551] Chapter 12 was modelled on chapter 13,[552]

[549] In a chapter 13 case, a debtor receives a discharge under § 1328(a) upon completion of plan payments. As originally enacted, § 1328(a) excepted only one type of debt listed in § 523(a) from discharge, obligations for alimony and other support in § 523(a)(5). It was, therefore, called a "superdischarge" because only one exception to discharge applied. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.*

[550] Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 255, Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986). After several extensions, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made it a permanent part of the Bankruptcy Code.

[551] Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 257(n), Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986).

[552] Chapter 12 closely resembles chapter 13. In both chapters 12 and 13, creditors do not vote. The confirmation standards are similar, but different from those in chapter 11. Limits on the term of the plan exist in both chapters. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due. § 1322(b)(5) (chapter 13); § 1222(b)(5) and (9). Although a chapter 11 plan may provide for the cure of a default, it does not contain specific provisions for payments on long-term debt beyond the term of the plan. In fact, chapter 11 contains no limit on the term of the plan.

and its provisions for the exception of debts from discharge tracked the two exceptions to a chapter 13 discharge.[553]

One exception is for certain long-term debts on which the final payment is due after the final payment under the plan.[554] Because the debtor has a continuing obligation to make payments on such debts after completion of plan payments and discharge, such debts are excepted from discharge.

The second exception is for debts "of a kind specified" in § 523(a).

Under the chapter 12 discharge provisions standing alone, the § 523(a) exceptions to discharge in chapter 12 cases are not limited to discharges of individuals. But Congress also enacted, in the same legislation, an amendment to § 523(a) to add the chapter 12 discharge

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Sections 1222(b)(5) and 1322(b)(5) are the same. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due.

In chapter 12 cases, § 1222(b)(9) permits payment of allowed secured claims "consistent with" § 1225(a), but over a period of time longer than the term of the plan. Section 1225(a) is the chapter 12 analog of § 1325(a)(5) in chapter 13 cases. Both permit payment of an allowed secured claim with payments having a value of the allowed amount of the secured claim. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 5:10, 5:14. In a chapter 13 case, however, payments under this type of treatment must be completed within the plan term. *Id.* § 5:13.

[553] More precisely, the exceptions in the chapter 12 discharge provisions are the same as the exceptions to the "hardship discharge" in chapter 13, with one exception based on a different provision in chapter 12 that permits payment of allowed secured claims beyond the term of the plan.

In a chapter 13 case at the time of temporary enactment of chapter 12, a debtor received a so-called "superdischarge" upon completion of plan payments in a chapter 13 case under § 1328(a), subject to only one exception in § 523(a)(5) for alimony and support obligations. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.* §§ 21:13, 21:16, 21:17.

A chapter 13 debtor who did not complete all plan payments could receive a so-called "hardship" discharge under § 1328(b) under certain conditions. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 21:8. Under § 1328(c), the hardship discharge of § 1328(b) is subject to exceptions for all of the debts in § 523(a). See *id.* § 21:18.

Like chapter 13, chapter 12 provides for both "completion" and "hardship" discharges. § 1228(a) (completion discharge); § 1228(b) (hardship discharge). Unlike chapter 13, however, both chapter 12 discharges are subject to all exceptions in § 523(a). § 1228(a)(2) (completion discharge); § 1228(c)(2) (hardship discharge).

The chapter 12 discharge provision differs from the chapter 13 hardship discharge provision in that it also excepts debts "provided for" in the plan under § 1222(b)(9), discussed *supra* note 552. These provisions recognize that, if a debtor will make payments on a debt beyond the term of the plan and after discharge, the debtor must remain liable on such a debt.

[554] § 1228(a)(1) (completion discharge); § 1228(c)(1) (hardship discharge). See *supra* note 552.

sections to the list of discharges. As amended, therefore, § 523(a) stated that a chapter 12 discharge "does not discharge an individual debtor from any debt" that it lists.

In enacting subchapter V, Congress did the same thing with respect to the cramdown discharge in § 1192. First, it modelled the exceptions to the cramdown discharge on the exceptions in chapter 12. Specifically, § 1192(1) excepts debts on which the last payment is due after the plan's term (which is when entry of discharge occurs after cramdown confirmation), and § 1192(2) excepts debts "of the kind specified" in § 523(a). Second, it added § 1192 to the list in § 523(a).

The bankruptcy courts' interpretation in the subchapter V context is that the addition of § 523(a) must mean something, and what it means is that only debts of an individual are excepted from discharge. The same analysis means that the 1986 chapter 12 legislation also resulted in application of the exceptions in § 523(a) only to individuals (contrary to the rulings of two bankruptcy courts in chapter 12 cases discussed above).

The bankruptcy courts' interpretation is subject to debate for other reasons, but its interpretation is not irreconcilable with § 1141(d)(6)(A).

The Fourth Circuit's correct premise is that this reading of "of the kind specified" in § 1192 makes no sense when applying § 1141(d)(6)(A). But this does not mean that the same words must have the same effect in § 1141(d)(6)(A), or even that the meaning of the words that makes sense in § 1141(d)(6)(A) requires that they be interpreted the same way in § 1192 (or in the chapter 12 discharge provisions).

The reason is that § 1141(d)(6)(A) was enacted in 2019 as a stand-alone provision that makes a specific exception to the chapter 11 discharge of a corporation. It clearly states an exception that is applicable to a corporation regardless of how it describes the debts that are

excepted. It addressed a specific problem involving a specific category of debts to be excepted from a corporate discharge.

In contrast, § 1192(2) was enacted in connection with an amendment to § 523(a) in the same way that § 523(a) had been amended in 1986 upon enactment of chapter 12. Although enactment of § 1192(2) and the accompanying amendment to § 523(a) occurred after enactment of § 1141(d)(6)(A), its purpose and effect are the same as those in the chapter 12 legislation enacted in 1986. Determination of the meaning of the subchapter V legislation, therefore, properly involves consideration of the meaning of chapter 12 legislation that preceded § 1141(d)(6)(A), without regard to how the same language applies in § 1141(d)(6)(A).

The chapter 12 discharge provisions in § 1228 and corresponding amendment to § 523(a) were part of comprehensive legislation to deal with the reorganization of family farmers that, unlike chapter 13, permitted entities to file such cases. The similar subchapter V provisions were a part of comprehensive legislation to facilitate the reorganization of small businesses that modified important aspects of chapter 11. How congress used the same words in another specific context does not properly inform their interpretation in the context of comprehensive legislation. Conversely, the meaning of the words in the comprehensive legislation does not require the same meaning in a statute with limited effect where a different meaning is clear.

In other words, the bankruptcy courts' reading of the effect of the limitation of exceptions in § 523(a) to individuals with regard to the general effect of discharges that it lists does not mean that the same reading is applicable when a specific statute – § 1141(d)(6)(A) – references specific subparagraphs of § 523(a)(2) to describe debts that are clearly intended to be excepted from a corporate discharge.

Fourth Circuit's discussion of exceptions in chapter 12 cases

The third structural point the Fourth Circuit advances, which it describes as "more telling," is "Congress's importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings." 36 F.4th at 516. Citing the chapter 12 cases that earlier text discusses,[555] the Fourth Circuit observed that, under the language of the chapter 12 discharge provisions materially identical to § 1192, those courts had determined that the § 523(a) exceptions applied to an entity's chapter 12 discharge.

The proposition that subchapter V is "conceptually similar" to chapter 12 is imprecise. Although subchapter V resembles chapter 12 in some ways, it is significantly different in others.[556] Critically, subchapter V is part of chapter 11, and its requirements for confirmation incorporate most of the requirements of § 1129(a). Thus, more accurately, subchapter V uses chapter 11 as its base and then incorporates some of chapter 12's structure.[557]

Nevertheless, because the language of the discharge exceptions in chapter 12 and § 1192(2) is identical, the holdings in the chapter 12 cases support the Fourth Circuit's ruling. In fact, the Fourth's Circuit's textual analysis is similar to the textual analysis those courts used. Otherwise, the cases add little enlightenment about the proper interpretation of the statutes in question. All they do is reach the same result as the Fourth Circuit for the same reasons.

The bankruptcy court in *Cleary Packaging* addressed the chapter 12 cases and distinguished them based on two important differences between chapter 12 and subchapter V.

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[555] *In re* Breezy Ridge Farms, Inc., 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re* JRB Consol., Inc., 188 B.R. 373 (Bankr. W.D. Tex. 1995).

[556] See Part I.

[557] As the court observed in *In re Trepetin,* 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020):
Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

630 B.R. at 472 & n. 9.[558] First, subchapter V is an alternative for a business entity and applies to a much broader array of entities than those eligible for chapter 12 as family farmers and fishers. Second, subchapter V incorporates the discharge provisions of § 1141(d) in the context of a consensual plan. Unlike the chapter 12 discharge provision, § 1141(d) distinguishes between individual and corporate discharges.

The *Cleary Packaging* bankruptcy court concluded, "The lack of such distinction within Chapter 12 considered in conjunction with the narrowly circumscribed type of entity that may be a Chapter 12 debtor renders analogy between the two discharge provisions unpersuasive." 630 B.R. at 472, n. 9, *quoting United States ex rel. Minge v. Hawker Beechcraft, Inc. (In re Hawker Beechraft, Inc.),* 515 B.R. 416, 430 (S.D.N.Y. 2014).

Further, the bankruptcy court in *Cleary Packaging* noted that the plain language of the chapter 12 provision "could support a result different that that reached by the courts" in the chapter 12 cases. 630 B.R. at 472.

In short, although the chapter 12 cases support the Fourth Circuit's decision in the sense that they are consistent with it, they provide no additional basis for it. They support the Fourth Circuit's ruling only if their textual analysis is correct – the question before the Fourth Circuit – and if their reasoning and holdings appropriately apply in the subchapter V context. The much wider availability of subchapter V than chapter 12 requires a fresh examination of the statutory language in the subchapter V context.

Fourth Circuit's consideration of purposes of subchapter V

[558] The court in *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA),* 626 B.R. 871, 877 (Bankr. D. Md. 2021) similarly distinguished the chapter 12 cases.

The fourth point in the Fourth Circuit's review of context and structure is the consideration of subchapter V's "juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter." 36 F.4th at 517. The court observed that a primary goal of subchapter V is to simplify chapter 11 for small businesses and to reduce administrative costs for them. To do so, the court said, "Congress deliberately altered the general provisions of traditional Chapter 11 proceedings by, among other things, eliminating the absolute priority rule and limiting the applicability of § 1141(d) to Subchapter V proceedings." *Id.*

The Fourth Circuit followed this statement with three sentences dealing with discharge provisions. The sentences, with commentary, are:

1. "Section 1141(d), in particular, sets forth debts that are eligible for discharge in a traditional Chapter 11 proceeding, making distinctions between individual debtors and corporate debtors." 36 F.4th at 517.

Specifically, § 1141(d)(1)(A) describes the debts that are discharged, and § 1141(d)(2) states that the discharge does not discharge an individual debtor from any debt excepted from discharge under § 523.[559] The distinction reflects the simple proposition that an individual should not be able to use chapter 11 to obtain benefits that are not available in other chapters.

[559] Section1141(d)(5) makes three other distinctions between the discharge of individual and entity debts. Section 11141(d)(5), which does not apply in subchapter V, § 1181(1), deals only with individual debtors and provides for (1) deferral of discharge until completion of plan payments; (2) the grant of a so-called "hardship discharge" under certain conditions for a debtor who has not completed plan payments; and (3) the court to grant the discharge if it finds no reasonable cause to believe that § 522(q)(1) is applicable and that no proceeding is pending in which the debtor may be found guilty of a felony as described in § 522(q)(1)(A) or liable for a debt as described in § 522(q)(1)(B). Similar provisions with regard to § 522(q) apply to the grant of a discharges under chapters 7 (§ 727(a)(12)), 12 (§ 1228(f)), and 13 (§ 1328(h). For a discussion of the chapter 13 provision, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:5.

Section 522(q)(1) limits the value of the exemption an individual debtor utilizing the nonbankruptcy exemptions under § 522(b)(3)(A) may take in a residence, homestead, of burial plot if the debtor has committed a felony that, under the circumstances, demonstrates that the filing of the case is an abuse of the Bankruptcy Code or

2. "In contrast, § 1192 provides benefits to small business debtors, regardless of whether they are individuals or corporations." *Id.*

This correctly states the operation of § 1192 as the court interpreted it. But whether the benefits are or should be the *same* is the issue before the court. Logic does not permit a premise that is the result of the reasoning.

3. "Thus, an important purpose for Subchapter V would be frustrated were we to adopt [the bankruptcy court's] interpretation of §§ 1192(2) and 523(a), which would treat individuals and corporations differently." *Id.*

This conclusion raises two questions. What is the "important purpose" for subchapter V that concerns the court? How is it frustrated by different provisions for the discharge of debts?

The Fourth Circuit's opinion states earlier that Congress enacted subchapter V "with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses." 36 F.4th at 517. This is the universally recognized objective of subchapter V.

But if that is the "important purpose," it is clear that making an entity's discharge subject to exceptions frustrates, rather than furthers, that purpose. As later text explains, the reasons that led Congress to eliminate exceptions to discharge of an entity when it enacted chapter 11 in 1978 require the same result in a subchapter V case.

The implication of the Fourth Circuit's reasoning, however, is that the court considers the "important purpose" to be that the same discharge exceptions in § 1192(2) apply to individuals

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if the debtor owes a debt arising from a violation of state or federal securities laws, from any civil remedy under 18 U.S.C. § 1964, or from any criminal act, intentional tort, or willful misconduct that caused serious physical injury or death to another individual, in the preceding five years.

and entities alike. If so, a ruling that different exceptions apply to entities obviously frustrates that purpose.

Again, however, whether § 1192(2) makes a distinction is the issue before the court. The court is deciding that the same treatment is an important purpose, but the fact that its ruling *has* that result does not provide a reason *why* that should be the result or why the same treatment is important. In other words, logic requires that a conclusion that an important purpose of § 1192 is identical treatment of individuals and entities rest on something more than the determination that § 1192 has that result.

Fourth Circuit's consideration of "equity and fairness" and elimination of the absolute priority rule

The Fourth Circuit also supported application of the § 523(a) exceptions to discharge to a corporation based on considerations of "equity and fairness" arising from elimination of the absolute priority rule. 36 F.4th at 517. After noting that elimination of the absolute priority rule allows an entity's owners in a subchapter V case to retain their ownership interests "at the expense of and over the objection of creditors," the court stated, *id.* (original emphasis):

> Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor. To this end, *all subchapter V debtors* are textually subject to the discharge limitations described in § 523(a), not just individual Subchapter V debtors.

The Fourth Circuit then concluded, *id.*

> To make a distinction between individuals and corporations for how Subchapter V is applied would not only undermine that balance, but would also make no sense and indeed would create perverse incentives.

The Fourth Circuit thus connected the cramdown discharge provision with elimination of the absolute priority rule and concluded that making a distinction with regard to exceptions to

discharge would (1) undermine the balancing of its elimination by adding an additional layer of fairness and equity; (2) make no sense; and (3) create perverse incentives.

Discussion of the Fourth Circuit's analysis of subchapter V's juxtaposition with traditional chapter 11 provisions and its related consideration of fairness and equity requires a review of related economic and legal issues that the business reorganization of an entity presents, including the operation and effect of the absolute priority rule and its elimination in subchapter V cases and the discharge of an entity.

Review of reorganization, absolute priority rule, and exception to discharge principles

A reorganization case under any chapter involves two basic economic issues that inform analysis of confirmation and discharge matters. The first is how much money can the debtor generate to pay creditors. The second is how that money is allocated among them. Bankruptcy principles require allocation to pay the value of secured claims, to pay administrative and priority claims in full, and to pay unsecured creditors what is left. A fundamental principle is equal treatment of similarly situated creditors.

Theoretically, the amount that an entity can pay is unlimited: it can just keep making payments until everyone is paid in full. In the meantime, however, the entity has a financial structure that makes no sense because it remains insolvent, and equity has no prospect of any return for the time it takes to pay its debts in full.

Reorganization solves an *entity's* financial structure by restructuring the balance sheet to reduce debt to a manageable amount. If the proposed restructuring is unacceptable to a class of unsecured creditors, the theory of the absolute priority rule is that the reorganized entity's value is then allocated among its stakeholders – creditors and owners – in accordance with their

priorities.[560] Because creditors have priority over owners, creditors under the absolute priority rule receive the ownership interests to the exclusion of existing owners, except in the rare instance where the reorganized entity is worth more than the amount of the debt.

Reorganization under these principles does not work if the reorganized entity remains liable for a nondischargeable debt. Professor Brubaker summarized the problem of exceptions to the discharge of a corporation in reorganization cases under chapter XI (one of the predecessors of chapter 11):[561]

> A corporate debtor could be denied a chapter XI discharge [under the prior Bankruptcy Act] altogether if the debtor had "been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of an individual] bankrupt." Moreover, chapter XI provided that confirmation of a plan of arrangement discharged a corporate debtor "from all ... unsecured debts and liabilities provided for by the arrangement," but expressly excluded from this discharge "such debts as ... are not dischargeable" in an individual debtor's ordinary bankruptcy case.
>
> The corporate discharge exceptions in chapter XI – particularly the discharge exception for fraud debts – posed a substantial impediment to the ability of certain debtors to reorganize under that chapter. Of course, cases precipitated by massive fraud (where the debtor's fraud liability could easily exceed the going concern value of the debtor's business) could not be successfully prosecuted under chapter XI, as the non-dischargeability of fraud debt would preclude any attempt to even address the source of the business's financial distress. Even more significantly, though, the presence of the discharge exceptions supplied, to any creditor who could assert colorable allegations of fraud, a credible threat to "opt out" of the chapter XI restructuring, in an attempt to receive a greater recovery than other creditors. Consequently, the chapter XI discharge exceptions invited holdout creditor problems of the sort that plague non-bankruptcy workouts and that are the very impetus for a federal bankruptcy reorganization process (that can fully bind dissenters to a restructuring plan).

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[560] The priority discussion here involves only the priority of unsecured creditors over equity interests. Although a secured creditor has a "priority" over unsecured creditors in that it has collateral to secure its debt, and unsecured creditors in a liquidation case cannot generally be paid from that liquidation of a creditor's collateral until the secured creditor receives full payment, that type of "priority" is irrelevant to the absolute priority rule. Priority claims under § 507 are likewise irrelevant to the issue because they must be paid in full. § 1129(a)(9). For simplicity, the discussion does not include consideration of issues that arise when one class of unsecured creditors is subordinated to the claims of another unsecured class.

[561] Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions,* 13 Am. Bankr. Inst. L. Rev. 757, 764 (2005) (internal notes and citations omitted).

As previous text discusses, and as the bankruptcy court in *Cleary Packaging* recognized, Congress enacted chapter 11 in 1978 with no exceptions to the discharge of a corporation's debts because *any* corporate discharge exception "would leave an undesirable uncertainty surrounding reorganizations that is unacceptable."[562]

The existence of nondischargeable debts of an entity, therefore, is related to the basic economic questions of how much a debtor can pay and how it is allocated. If the nondischargeable debt is large enough that the debtor cannot generate enough money to pay it within a reasonable time, reorganization is not possible. If reorganization is possible, the need to pay the nondischargeable debt in full affects the allocation of the money available to pay debts.

The absolute priority rule is only tangentially related to the question of what the debtor can pay. It does not apply if what the debtor can pay is enough to be acceptable to the class of unsecured creditors so that their acceptance makes it inapplicable. It is not related at all to the allocation of available money among creditors. The absolute priority rule, rather, involves allocation of the debtor's value between creditors and owners.

What the absolute priority rule affects is the ability of a debtor, especially a small business, to reorganize.

In one sense, ownership interests in an insolvent entity have no value because the entity's assets exceed its value. If a reorganization plan obligates the debtor to pay creditors an amount for *pro rata* distribution equal to the net liquidation value of the company (*i.e.,* the value of the debtor as a going concern less the amount of secured and priority debt), the reorganized debtor

[562] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 474 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022), *quoting* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions,* 13 Am. Bankr. Inst. L. Rev. 757, 764-66 (2005).

has a net worth of zero. Creditors arguably lose nothing if existing owners retain the ownership interests that have no value.

Absolute priority rule principles, however, prescribe value to ownership interests in an insolvent entity and require that, in the absence of payment in full, the creditors become the owners of the reorganized debtor even in the circumstances just described unless – as a class – they accept a plan that provides otherwise.

Creditor ownership of a publicly-traded corporation is one thing. Creditor ownership of a private small business is another. It is unlikely that a market for the equity interests in a privately held business will exist. Creditors typically are not interested in holding a minority interest in a private company that they cannot readily turn into cash.

Moreover, the owners of a small business are usually its managers. In many instances, the value of a small business is dependent on the services that they provide. If reorganization means that they will lose their ownership interests, they may elect not to pursue reorganization in the first place. And if they do but are unable to restructure without retaining ownership, they may well abandon the effort or let the creditors as the new owners manage the business.

These real-life considerations are the bases for elimination of the absolute priority rule in entity cases under subchapter V. Simply put, its elimination permits the reorganization of small businesses that would otherwise not be possible or even attempted.

In accordance with the underlying premises of the absolute priority rule that equity in an insolvent entity has value and that creditors are its equitable owners, subchapter V substitutes the projected disposable income requirement for it. At bottom, the value of a corporation is its earning capacity. Instead of giving creditors the right to own the entity if they reject the plan, subchapter V gives them its earnings for a three to five year period, as the court determines. As

such, it turns the ownership interest that unsecured creditors could otherwise claim under the absolute priority rule into cash in a way that could not be accomplished under the absolute priority rule in a small business context.

Analysis of the Fourth Circuit's "fairness and equity" rationale

These principles guide analysis of the Fourth Circuit's conclusion that considerations of fairness and equity require exceptions to an entity's discharge in view of elimination of the absolute priority rule.

The Fourth Circuit's consideration of equity and fairness and its connection of exceptions to discharge with elimination of the absolute priority rule begins with the premise that elimination of the absolute priority rule allows an entity's owners to retain their ownership interests "at the expense of and over the objection of creditors." 36 F.4th at 517.

The court's premise is partially correct in that it is true that elimination of the absolute priority rule means that a *class* of creditors in a subchapter V case no longer has the ability to insist on full payment as a condition of the owners' retention of their interests. But a *single* creditor never had the right to invoke the absolute priority rule unless its claim was large enough to control the class vote.

Elimination of the absolute priority rule in subchapter V cases does not necessarily mean that owners retain their interests "at the expense" of creditors. In a subchapter V case, as earlier text discusses, ownership interests in the debtor are likely to have no realizable value. Reorganization usually depends on continued management by existing owners and therefore requires their retention of ownership. The liquidation value of assets often is less than the amount of debt that the assets secure. Retention of ownership interests that have no realizable value hardly comes at the expense of creditors.

In its consideration of fairness and equity, the Fourth Circuit connected elimination of the absolute priority rule to exceptions to an entity's discharge and concluded that treating an entity's discharge differently from an individual's would (1) undermine the balance of elimination of the absolute priority rule by adding an additional layer of fairness and equity; (2) make no sense; and (3) create perverse incentives. 36 F.4th at 517.

The connection of discharge exceptions to elimination of the absolute priority rule is not an appropriate one.

Recall that the absolute priority rule is a requirement in traditional cases that unsecured creditors may invoke collectively if their class rejects that plan. A creditor cannot invoke it on its own behalf if its class of creditors accepts the plan. It protects classes of creditors, not individual one creditor.

In contrast, nondischargeable debt involves only the creditor who holds it. Nondischargeability of a creditor's debt may improve *that* creditor's position, but it provides no benefits to *other* creditors.

Limitations on dischargeability of debts that favor some creditors does not balance the elimination of the absolute priority rule that affects all creditors.

Moreover, elimination of distinctions between individuals and entities for the exception of debts from discharge cannot possibly add an "additional layer of fairness and equity" for any creditors except those with nondischargeable debts. Nondischargeability of a particular debt does not affect determination of the debtor's PDI – the key determinant of how much the debtor must pay unsecured creditors. All it does is leave the debtor with an obligation to pay the nondischargeable debt because it cannot restructure it.

Indeed, the existence of a nondischargeable debt in a reorganization case is in most circumstances adverse to the interests of unsecured creditors generally.

First, it results in competition for available funds between unsecured creditors with dischargeable debts and those with nondischargeable debts. In general, any chapter 11 plan (including all subchapter V plans, whether consensual or cramdown) must treat similarly situated creditors the same. The fact that a debt is nondischargeable presumably will not increase its share of projected disposable income in a subchapter V case.[563] At best, the plan may be able to deal with the nondischargeable debt by payment of the remaining balance after application of its pro rata share of PDI in payments that begin when the period for payment of PDI ends.

This situation creates an incentive for a debtor to minimize payments to creditors with dischargeable debts. Every dollar not paid to creditors generally is a dollar that is available to pay the nondischargeable debt. Conversely, every dollar paid on the nondischargeable debt in excess of a *pro rata* share of disposable income is a dollar that is not paid to unsecured creditors generally.

Second, the existence of nondischargeable debt increases the probability of liquidation. When a feasible plan is otherwise possible, liquidation generally results in a lower recovery for unsecured creditors than payments under a plan.

To the extent that application of exceptions to discharge in subchapter V affects any balance, it tips the scale in favor of the creditor whose debt is excepted from discharge and against creditors whose debts are not dischargeable.

[563] The general rule in chapter 13 cases is that a plan must treat a nondischargeable claim in the same manner as other unsecured claims. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 7:10 – 7:14.

The Fourth Circuit did not elaborate on its observation that the discharge of an entity's debts with no exceptions "would make no sense and indeed would create adverse incentives." As earlier text explains, discharge without exceptions furthers the prospects for a successful reorganization and results in equality of treatment for creditors in a traditional case. For these reasons, Congress eliminated exceptions to the discharge of an entity when it enacted chapter 11 in 1978.

A subchapter V case is no different. Depending on the amount of a nondischargeable debt, its existence is likely to doom reorganization of a small business and result in its liquidation.

A subchapter V debtor may be able to manage nondischargeable debts if, collectively, they are relatively immaterial in relation to its total debts. For example, assume a debtor with $300,000 of unsecured debt that will pay $ 75,000 in projected disposable income over three years to unsecured creditors – a 25 percent distribution.

This debtor could probably pay a nondischargeable debt of, say, $ 50,000. The debtor could pay the unpaid balance of $ 37,500 by continuing PDI payments at the same level for an additional year and a half. Owners may elect to pursue reorganization in this situation, reasoning that retention of ownership rather than liquidation is worth the additional cost.

On the other hand, it is arguable that this debtor should be required to pay projected disposable income to creditors for five years rather than three, thereby increasing what they receive. The additional money that unsecured creditors receive is money that would otherwise be paid on the nondischargeable debt, so it increases the cost of the reorganization from the owners' standpoint. At some point, owners will decide that it is better for them to start over in other employment or a new venture than to devote the fruits of their efforts to payment of debt.

In contrast, assume that a debtor has $ 5 million in unsecured debt, including a nondischargeable judgment of $4.7 million, and projected disposable income over five years of $280,000. Creditors receive a distribution of about 5.6 percent, and the nondischargeable debt is reduced to about $4,436,800. It would take this debtor over 16 years to pay the rest of the nondischargeable debt based on its currently projected income. It is not realistic to expect that owners will sign on for this type of work. Liquidation is inevitable.

For creditors with the objective of putting the debtor out of business, that is a welcome result. It is a disaster for owners who have invested their time and money in the business, and it adversely affects employees who lose their jobs, customers who rely on the business, and creditors who will be paid less (and often nothing) when liquidation occurs.

The same result can occur with regard to relatively small nondischargeable debts if there are enough of them. Further, once a creditor's strategy of asserting a nondischargeable debt succeeds, the predictable result is that more creditors will assert such claims. Indeed, creditors will have a significant incentive to do so. A debtor must defend even non-meritorious claims, increasing administrative expenses and, necessarily, what creditors receive.

The Fourth Circuit's conclusion that discharge of a subchapter V entity without exceptions would "make no sense" and "create perverse incentives" is, therefore, suspect.

The availability of exceptions to an entity's discharge threatens the ability of a debtor to reorganize. It encourages the assertion and prosecution of exceptions to discharge, resulting in litigation that requires time that could otherwise be devoted to reorganization efforts and money for attorney's fees and expenses that would otherwise be available for creditors.

Moreover, if the result of a nondischargeable judgment is liquidation, the nondischargeable debt receives only its pro rata share of any net proceeds of liquidation.

Anecdotal experience teaches that the liquidation of a small business most often results in pennies on the dollar for unsecured creditors and, in many cases, nothing at all.[564] The entire nondischargeability dispute becomes meaningless.

The bankruptcy courts' interpretation is the better one

The interpretations of the statute by the bankruptcy courts and the Fourth Circuit are both plausible, as the Fourth Circuit acknowledged in describing the question as a "close one."[565] Based on the legislative history of subchapter V and the historical background of the treatment of exceptions to the discharge of a corporation in traditional chapter 11 cases, the interpretation of the bankruptcy courts is the better one because it accurately reflects Congressional intent.

Exceptions to an entity's discharge in a subchapter V case create the same problems as exception of debts from a traditional chapter 11 discharge, whether the plan is consensual or not, that Congress addressed in 1978 by eliminating exceptions to an entity's discharge in a chapter 11 reorganization.

Perhaps Congress in 2019 had a different view of exceptions to an entity's discharge in the case of cramdown confirmation in a subchapter V case than the Congress in 1978. But it is difficult to conclude that, in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of small businesses by, among other things, eliminating the absolute priority rule in a cramdown situation, Congress in 2019 intended to re-introduce all the problems with exceptions to the discharge of a corporation that it eliminated over 50 years earlier.

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[564] This consideration may have been of no concern to the creditor in *Cleary Packaging.* An employee of the creditor, apparently related to some of the creditor's former owners, left to organize the debtor and compete with it, resulting in litigation and a judgment against the debtor and the former employee for over $4.7 million. The creditor's objective in the subchapter V case could have been to put a competitor out of business through liquidation.
[565] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 36 F.4th 509, 512 (4th Cir. 2022).

Rather, in view of the facts that nothing in the legislative history of subchapter V mentions such a drastic change and parts of it indicate, to the contrary, that the existing structure would be continued, the better conclusion is that Congress did not intend that the exceptions to discharge in § 523(a) apply to the discharge of an entity under § 1192.

Two final observations about the effect of a subchapter V cramdown discharge without exceptions are appropriate.

First, a concern underlying the issue is the legitimate notion that a debtor should not be able to escape the consequences of fraud or other misconduct through the subchapter V process. After all, the classic formulation of the "fresh start" policy of the bankruptcy laws recognizes that bankruptcy relief is for the "honest but unfortunate debtor."[566] The same question exists in traditional chapter 11 cases, but Congress nevertheless provided for the elimination of nondischargeable debts when it enacted chapter 11, with one later exception in § 1141(d)(6).

The response is that an entity's discharge in a reorganization case serves a different function than the "fresh start" discharge that an individual receives. In short, discharge of an entity without exceptions rests on the need for finality of a confirmed plan. Discharge without exceptions is essential for the reorganization of the entity, rather than its liquidation, in accordance with chapter 11's creditor equality principles that require equal treatment of similarly situated creditors.[567]

Second, as earlier text discusses, a conclusion that an entity's debt is excepted from an entity's discharge does not mean that it will be paid in full. If reorganization fails for reasons discussed above and liquidation occurs, the creditor will receive only its *pro* rata share of the

[566] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
[567] *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions,* 13 Am. Bankr. Inst. L. Rev. 757, 761 (2005) Professor Brubaker discusses this point in detail. *Id.* at 761-62.

proceeds from liquidation after satisfaction of secured claims, administrative claims, and priority claims.

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

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.[568] Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, §1186 provides that, if the court confirms a plan under the cramdown provisions of §1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.[569] Section 1186 applies to debtors that are entities as well as individuals.

Discussion of the effects of these changes begins with a summary of postpetition property and earnings under pre-SBRA law.

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

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).[570]

[568] § 1181(a).
[569] § 1186.
[570] § 541.

Section 541(a)(7) provides that any interest in property that the *estate* acquires after the commencement of the case is property of the estate.

In the case of an entity, the debtor in possession (or trustee) controls the entity and all its property and acts on behalf of the estate. Bankruptcy does not recognize any distinction between the property interests of an entity debtor and those of the estate. Any interest in property that an entity acquires after the commencement of the case (including any postpetition earnings) must be property that the estate acquires and is property of the estate under § 541(a)(7).

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,[571] unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).[572] Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.[573] In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.[574]

The rules in chapter 11 cases of individuals were the same as in chapter 7 cases before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA.") Thus, property that an individual chapter 11 debtor acquired after the filing of the case and earnings from postpetition services were not property of the estate (with limited exceptions as noted above).

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[571] Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.
[572] § 541(a)(6).
[573] *Id.*
[574] §§ 1207(a), 1306(a).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,[575] and earnings from postpetition services,[576] both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.[577] Section 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).[578] Section 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of

[575] § 1115(a)(1).
[576] § 1115(a)(2).
[577] § 1181(a).
[578] § 1186(a)

creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

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

Section 1115(a) does not apply to an entity, so its inapplicability in a sub V case has no effect on the property of the estate in a sub V case of an entity.

Section 1186 deals with property of the estate when cramdown confirmation occurs under §1191(b). It provides that property of the estate consists of property of the estate under § 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of §1186 when it applies begins with an explanation of what happens when it does not, *i.e.,* when the court confirms a consensual plan under §1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.[579]

The vesting of property of the estate in the debtor means that the automatic stay regarding acts against property terminates. Section 362(c)(1) provides, "[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate."[580] Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.[581]

[579] §§ 1227(b), 1327(b).
[580] § 362(c)(1).
[581] § 1141(b).

In the cramdown situation, §1186 provides that property of the estate consists of property of the estate under § 541 (which covers all the debtor's property at the time of confirmation, as earlier text explains) and any postpetition assets and earnings. This means that the automatic stay does not terminate at confirmation under § 362(c)(1) because all property of the debtor and all its earnings remain property of the estate.

Section 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1141(b) provides for vesting of property of the estate in the debtor upon confirmation. Section 1186, however, keeps the property in the estate when cramdown confirmation occurs.

The purpose seems to be to maintain judicial supervision of a debtor's assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation[582] and makes payments under the plan,[583] and discharge does not occur until the debtor has completed payments for the specified period.[584]

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.[585] Section 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these

[582] *See* Section IV(D)(1).
[583] *See* Section IX(B).
[584] *See* Section X(B).
[585] "[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statues should prevail over older or more general ones." United States v. Lara, 181 F.3d 183, 198 (1st Cir. 1999) (*citing* HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) and Morton v. Mancari, 417 U.S. 535, 550-51 (1974)); *accord, e.g., In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); Tug Allie-B, Inc., v. United States, 273 F.3d 936, 941, 948 (11th Cir. 2001); Southern Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373 (11th Cir. 1999); *In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); *see* 2B Sutherland Statutory Construction § 51:2 (7th ed. 2019-20 Supp.).

concepts, the provisions of §1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

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

SBRA's new rules governing property of the estate just discussed apply in the case of an individual sub V debtor.

Because § 1115(a) does not apply, postpetition assets and earnings of an individual are not property of the estate. The pre-BAPCPA rule recognizing the distinction between property of the estate and property of the debtor comes back into play.

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.[586] The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

The exclusion of postpetition assets and income from property of the estate of an individual in a sub V case raises questions. In a chapter 7 case, an individual is free to use postpetition assets and earnings without restriction or judicial approval. That is the same rule that governed pre-BAPCPA chapter 11 cases of individuals, and it now applies in a sub V case. Does this mean, for example, that an individual who acquires assets postpetition, or has earnings

[586] *E.g.*, *In re* Copeland, 609 B.R. 834 (D. Ariz. 2019); *In re* Meier, 550 B.R. 384 (N.D. Ill. 2016); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re* Hoyle, 2013 WL 3294273 (Bankr. D. Idaho June 28, 2013); *In re* Tolkin, 2011 WL 1302191 (Bankr. E.D.N.Y. Apr. 5, 2011), *aff'd sub nom.* Pagano v. Pergament, 2012 WL 1828854 (E.D.N.Y. May 16, 2012); *accord, e.g., In re* Lincoln, 2017 WL 535259 (Bankr. E.D. La. Feb. 8, 2017); *In re* Gorniak, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re* Vilaro Colón, 2016 WL 5819783 (Bankr. D.P.R. Oct. 5, 2016). *Contra, e.g., In re* Markosian, 506 B.R. 273, 275-77 (9th Cir. BAP 2014); *In re* Evans, 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. 2021), answered this question affirmatively. There, the U.S. Trustee sought dismissal of the individual's sub V case because the debtor lost $ 4,000 playing slot machines during the first month after he filed the case. At the time of the hearing, the debtor had filed a plan that all classes of creditors had accepted. The debtor testified that he would no longer be gambling while he was in bankruptcy because, once his plan payments began, he would have no disposable income to do so.

The court concluded that the postpetition gambling did not constitute gross mismanagement of the estate that would provide cause for dismissal under § 1112(b)(4)(B) because the debtor had disclosed it in his monthly report and because nothing showed that the loss was material or had an adverse impact on the estate or its creditors. *Id.* at *7-8.

The court then observed that the gambling loss could not be gross management of the estate because, in a subchapter V case, the debtor's postpetition earnings were not property of the estate. *Id.*

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?[587]

[587] Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate. May the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, §1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.[588]

One consequence of the addition of postpetition assets and earnings to the estate is that, if conversion to chapter 7 occurs after cramdown confirmation, postconfirmation property and earnings will be property of the chapter 7 estate. If the court confirms a consensual plan, such property may not be property of the estate because neither § 1115(a) nor §1186 applies. Sections XII(C) and (D) further discuss this issue.

Issues may arise because of the retroactive nature of the operation of §1186: Property that was not property of the estate becomes property of the estate upon cramdown confirmation. For example, what happens if, at the time of the confirmation hearing, an individual debtor has disposed of postpetition assets or earnings, which the debtor had the right to do when the property was not property of the estate? A creditor opposing confirmation could argue that the court cannot confirm the plan because the estate will not have all the property that §1186 requires it to have.

[588] § 1186.

XII. Default and Remedies After Confirmation

If a debtor defaults after confirmation of a plan, creditors must decide what remedies are available and how to invoke them. If the court confirmed the plan under the cramdown provisions of §1191(b), the sub V trustee must also decide what to do if a default occurs.

A. Remedies for Default in the Confirmed Plan

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan's provisions for default and remedies control. In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. Secured creditors and lessors are unlikely to accept a plan unless it includes acceptable remedies in the plan that allow them to exercise their remedies if the debtor defaults. Unsecured creditors and tax claimants often do not participate actively in the case of a small business debtor, but if they do, they likewise have the opportunity to negotiate acceptable terms to deal with defaults.

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in §1191(c)(3)(B)(ii) may provide the source of remedies for default. When the court concludes only that there is a "reasonable likelihood" that the debtor will be able to make plan payments, cramdown confirmation under § 1191(c)(3)(B)(ii) requires that the plan provide "appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made."[589] The only specific remedy in § 1191(c)(3)(B)(ii) is "the liquidation of nonexempt assets." The requirement for appropriate remedies does not apply if the court finds that the debtor *will* be able to make

[589] See Section III(B)(5).

plan payments, but debtors who seek cramdown confirmation of a plan that does not contain them subject themselves to the higher feasibility standard.[590]

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of § 1191(c)(3)(B)(ii), creditors will want remedies that will protect their rights to recover.

For secured creditors and lessors who have property rights in specific assets, the primary objective is to recover possession of the encumbered or leased property and to exercise their rights promptly upon the debtor's default. Secured creditors and lessors will want provisions in the plan that recognize their rights to proceed against the debtor's property and that confirm that neither the automatic stay nor the discharge injunction will apply to their efforts to do so.

An unsecured creditor can subject the debtor's assets to its debt only through judicial process, a somewhat cumbersome and potentially lengthy process with uncertain results and expense that may not justify the effort. An effective remedy for unsecured creditors might include conversion to chapter 7 to permit a trustee to liquidate the assets. Later text in Section XII(C) discusses issues that arise upon postconfirmation conversion to chapter 7 that the plan might appropriately address to protect unsecured creditors.

[590] See Section III(B)(5).

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

Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or "for failure to perform the obligations of the debtor under a plan confirmed under this subchapter."[591] If removal of the debtor in possession occurs after the trustee's service has been terminated upon substantial consummation[592] of a consensual plan confirmed under §1191(a), §1183(c)(1) provides for reappointment of the trustee.

Section 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. Section 1183(c)(5)(B) authorizes the trustee to operate the business of the debtor, but the trustee's duties do not include liquidation of the debtor's assets. Nothing in subchapter V appears to authorize the trustee to do so.

The trustee's operation of the business will be difficult, if not impossible, if secured creditors or lessors take possession of assets on account of the debtor's defaults. Even if the trustee can operate the business, its future is unclear. Perhaps the plan will have provisions for the cure of defaults and the trustee can manage the business to cure defaults so that the plan can go forward. If not, the plan will remain in default, and the trustee may be able to do nothing more than observe as creditors exercise their remedies under the plan unless the plan is modified or the case is converted to chapter 7.

Property of the estate issues arise when reappointment of the trustee based on the debtor's default occurs after confirmation of a consensual plan under §1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan

[591] § 1185(a). Section V(C) discusses removal for cause.
[592] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

or confirmation order provides otherwise.[593] If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no "debtor in possession" to be removed.

Under this view, §1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the estate remains property of the estate under §1186[594]) or because the plan or confirmation order so provides.

It is arguable that Congress did not intend to limit the operation of §1185(a) based on how property vests at confirmation. One possible interpretation of §1185(a), therefore, is that it impliedly authorizes the trustee to take possession of property of the debtor. Another potential interpretation is that it impliedly revests the debtor's assets into the estate.

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.[595] Moreover, if the plan was a consensual one confirmed under §1191(a), postconfirmation modification under §1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan).[596] Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

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[593] *See* Section XI(B).
[594] *See* Section XI(B).
[595] § 1193(b).
[596] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.[597]

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes "material default by the debtor with respect to a confirmed plan."[598] Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.[599]

1. Postconfirmation dismissal

The effects of postconfirmation dismissal differ depending on whether the debtor has received a discharge. The timing of the discharge under subchapter V depends on the type of confirmation that occurs.

[597] § 721.
[598] § 1112(b)(4)(N).
[599] § 702(d).

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under §1191(a).[600] Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.[601]

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.[602] Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the case is dismissed prior to the entry of discharge.[603] Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

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[600] *See* Section X(A).

[601] *E.g.,* National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt."); *In re* T&A Holdings, LLC, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) ("[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan."); *In re* Potts, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).

[602] § 1192.

[603] Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a "hardship" discharge, §§ 1228, 1328. Chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by BAPCPA. In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. *See* First National Bank of Oneida, N.A. v. Brandt, 597 B.R. 663, 668-69 (M.D. Fla. 2018) (Collecting cases holding that chapter 12 or 13 confirmed plan is no longer binding upon dismissal). *But see* Weise v. Community Bank of Central Wisconsin (*In re* Weise), 552 F.3d 584 (7th Cir. 2009).

The district court in *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663 (M.D. Fla. 2018) addressed the binding effect of a confirmed plan upon dismissal of an individual's chapter 11 case on remand from the Eleventh Circuit. First National Bank of Oneida, N.A. v. Brandt, 887 F.3d 1255 (11th Cir. 2018). The Eleventh Circuit noted that case law in chapter 13 cases dealing with dismissal without a discharge "could perhaps become relevant to a determination of whether and how the dismissal of Brandt's Chapter 11 case without a discharge affects the enforceability of his confirmed Chapter 11 plan." *Id.* at 1261. The district court determined that it was, 597 B.R. at 669, and ruled that the confirmed plan was not binding upon dismissal prior to confirmation based on that case law, the provisions of § 349(b), and public policy. *Id.* at 671.

In *Weise v. Community Bank of Central Wisconsin (In re Weise*), 552 F.3d 584 (7th Cir. 2009), the bankruptcy court, on the debtors' motion, dismissed their chapter 12 case after confirmation of their plan that incorporated a settlement between debtors and bank that, among other things, released lender liability claims against the bank. In connection with dismissal, the bankruptcy court determined that, under U.S.C. § 349(b), cause existed for the plan's terms with regard to the settlement to remain binding on the parties. The Seventh Circuit ruled that the bankruptcy court did not abuse its discretion and that cause existed under § 349(b) to keep some terms of the plan binding on the parties. The Seventh Circuit stated that § 349(b) "explicitly contemplates that the court can choose to keep some terms binding on the parties where there is cause." *Weise, supra,* 552 F3d at 591. The court observed, "[N]egotiation alone would not be an acceptable standard for 'cause,' since every confirmed plan that required the consent of the creditor would involve some degree of negotiation." *Id.* at 589.

The district court in *Brandt, supra*, 597 B.R. 663, distinguished *Weise* because the bankruptcy court in dismissing Brandt's chapter 11 case made no mention of binding the parties to plan provisions and "chose not to keep specified plan terms binding." *Id*. at 670.

The court in *In re Akamai Physics, Inc.,* 2022 WL 1195631 (Bankr. D. N.M. 2022), addressed the effect of dismissal or conversion after confirmation of a consensual plan under § 1191(a) that deferred discharge until completion of plan payments.[604] The plan provided for pro rata payments to unsecured creditors from the greater of $10,000 per month or the debtor's "Disposable Income as defined in 11 U.S.C. § 1191(d)." *Id.* at *2.

Consensual confirmation occurred after the debtor resolved the objection of the U.S. Trustee that the plan was not feasible by including a provision in the confirmation order for the court to entertain a postconfirmation motion to dismiss or convert if the debtor did not generate any operating income within 120 days after confirmation. *Id.* at *2.

Although the debtor had timely made plan payments (through sales of assets or loans from its principal), it did not generate any operating income within 120 days. After concluding that the U.S. Trustee had not established cause for dismissal or conversion under § 1112(b)(4), *id.* at *3-5, the court considered the effect that the confirmed plan could have on the rights of the parties if it granted the motion, reasoning that the effect of dismissal or conversion is an issue to consider in determining a motion to dismiss or convert. *Id.* at *5.

The court determined that, in a traditional chapter 11 case, confirmation binds the reorganized debtor and creditor to the terms of the plan, revests property of the estate in the reorganized debtor, and discharges preconfirmation claims. The chapter 7 estate after conversion, therefore, has no assets because the plan vested all estate property in the debtor, the court explained, so conversion does not help creditors. Dismissal, the court continued, has no materially greater benefit because it does not "undo" the plan, which remains binding. *Id.* at *5.

[604] When the court confirms a consensual subchapter V plan under § 1191(a), § 1141(d) governs the discharge. See Section X(A). Section 1141(d)(1)(A) provides that confirmation discharges the debtor unless the plan or confirmation order provides otherwise.

The court concluded, *id.* at *6:

> In most standard chapter 11 cases with confirmed plans of reorganization, neither conversion nor dismissal materially benefits creditors. Instead, a creditor's remedy is to sue the debtor in state court to enforce the creditor's rights under the chapter 11 plan.

The *Akamai Physics* court then noted that a different rule applies to confirmed plans under chapters 12 and 13 and in individual cases under chapter 11, in which dismissal or conversion "negates the confirmation order and the plan, restoring parties to the *status quo ante.* *Id.* at 6. The court advanced two policy reasons for the distinction.

First, substituting disposable income for the absolute priority rule and other creditor protections in chapter 11 is a major benefit to creditors. If the debtor fails to make payments as the plan requires, the plan should not be binding. *Id.*

Second, discharge does not occur upon dismissal or conversion of such cases unless the debtor has completed plan payments. *Id.*

The court reasoned that a subchapter V cramdown plan is similar to plans in chapters 11, 12, and 13 that require payment of projected disposable income and deferral of discharge until completion of plan payments. The court suggested, therefore, that dismissal or conversion of a subchapter V case after cramdown confirmation might negate the plan. *Id.* at *6.

The court concluded that no reason existed "to think that 'consensual' subchapter V plans would be treated differently than typical chapter 11 plans." *Id.* at *7. In the case before it, however, the plan deferred discharge until completion of all plan payments, a key provision that also exists in disposable income plans under other chapters. Later dismissal or conversion, the court stated, might require it to determine whether such a "hybrid" plan would survive or be negated. *Id.*

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause: (1) § 349(b)(1) provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and (2) § 349(c) revests property of the estate in the entity in which such property was before the filing of the case.[605]

2. Postconfirmation conversion

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under §1191(a), but not when cramdown confirmation occurs under §1191(b) because §1186 keeps property in the estate.[606]

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not revest property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.[607] Other courts have ruled that property of the estate

[605] § 349.
[606] *See* Section XI(B).
[607] *E.g.,* Bell v. Bell (*In re* Bell), 225 F.3d 203, 216 (2d Cir. 2000); National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("Property which revested in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case."); Lacy v. Stinky Love, Inc. (*In re* Lacy), 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re* L & T Machining, Inc., 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re* Sundale, Ltd., 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re* Canal Street Limited Partnership, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re* K

upon conversion consists of property owned by the debtor at the time of commencement of the case,[608] on the confirmation date,[609] or on the date of conversion.[610]

Under these principles, property of the estate in a sub V case converted to chapter 7 after *cramdown* confirmation includes all the debtor's property. The result is the same if a consensual plan or the order confirming it provides that property of the estate not vest in the debtor until the occurrence of some later event that has not occurred at the time of conversion.

If property of the estate vested in the debtor at the time of confirmation of a *consensual* plan, however, what constitutes property of the estate at conversion is uncertain. In the first instance, it depends on whether the court applies the vesting principles in existing case law noted above and, if so, which view it adopts.

An alternative argument is that the provision in §1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that §1185(a) requires the revesting of property of the estate upon removal of the debtor in possession after

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& M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz 1997); Carter v. Peoples Bank and Trust Co. (*In re* BNW, Inc.), 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.,* 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. "[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor's pre-confirmation estate. . . ."); *In re* TSP Indus., Inc., 117 B.R. 375 (Bankr. N.D. Ill. 1990). *See also* Pioneer Liquidating Corp. v. United States Trustee (*In re* Consol. Pioneer Mortgage Entities), 264 F.3d 803 (9th Cir. 2001) (holding that "language and purpose" of liquidating plan demonstrated that assets vested in debtor upon confirmation revested in estate upon conversion); 6 NORTON BANKRUPTCY LAW AND PRACTICE § 114:13 (discussing different approaches to revesting of assets upon conversion after confirmation).

Property of the estate that vests in a chapter 11 debtor at confirmation may not include avoidance actions. *See* Still v. Rossville Bank (*In re* Wholesale Antiques, Inc.), 930 F.2d 458 (6th Cir. 1991) (Trustee in case converted to chapter 7 may recover unauthorized postpetition transfers under § 549 that occurred prior to confirmation.); *In re* Sundale, Ltd., 471 B.R. 300, 307 n. 15 (Bankr. S.D. Fla. 2012); *In re T. S. Note Co.,* 140 B.R. 812, 813 (Bankr. D. Kan. 1992).

[608] Smith v. Lee (*In re* Smith), 201 B.R. 267 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9th Cir. 1998).

[609] Carey v. Flintridge Lumber Sales, Incl (*In re* RJW Lumber Co.), 262 B.R. 91 (Bankr. N.D. Ca. 2001).

[610] *In re* Midway, Inc., 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

default under a consensual plan; otherwise, § 1185(a) has no effective operation in that circumstance. If so, the same result follows if conversion occurs.

In *In re Akamai Physics, Inc.,* 2022 WL 1195631 (Bankr. D. N.M. 2022), discussed in detail in Section XII(C)(1), the court suggested that property of the estate that vests in the debtor under a consensual plan in a subchapter V case confirmed under § 1191(a) is not property of the chapter 7 estate upon postconfirmation conversion. With regard to conversion after cramdown confirmation under § 1191(b), however, the court suggested that conversion negates the binding effect of the plan because discharge does not occur until the completion of plan payments. *Id.* at *6.

To avoid these potential issues and to ensure that the estate has property at the time of conversion, creditors negotiating a consensual plan may want to insist on a provision in the plan that will keep assets as property of the estate until the debtor completes payments or meets some other milestone.

XIII. Effective Dates and Retroactive Application of Subchapter V

Section 5 of SBRA provides:

> This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

This language does not restrict application of subchapter V to cases filed on or after the effective date of February 19, 2020. It thus differs from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which provided that most of its provisions did not apply "with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act."[611]

[611] Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).

Debtors in pending chapter 11 cases at the time of SBRA's enactment sought to amend their petitions after SBRA's effective date to elect application of subchapter V. They argued that Bankruptcy Rule 1009(a) permitted amendment of a petition "as a matter of course at any time before the case is closed" and that SBRA did not restrict application of subchapter V to cases filed after its enactment.

As later text discusses, courts upon enactment of SBRA had to decide whether SBRA applied retroactively and, if so, whether a debtor could amend its petition to elect subchapter V when mandatory deadlines for the status conference[612] and the filing of a plan[613] had expired.

The provisions in the Bankruptcy Threshold Adjustment and Technical Correction Act ("BTATCA")[614] for retroactive application of the $7.5 million debt limit for subchapter V eligibility present a similar issue when mandatory deadlines have passed in a pending case where a debtor ineligible for subchapter V becomes eligible under BTATCA. As Section III(B) explains, the temporary increase in the debt limit to $7.5 million under the CARES Act, as amended, expired on March 27, 2022. BTATCA, effective June 21, 2024, reinstated the $7.5 million. BTATCA provided for application of the $7.5 million limit (and other technical amendments to the eligibility requirements) in any case commenced on or after March 27, 2020 that was pending on the date of enactment.[615] A debtor otherwise eligible for subchapter V with debts in excess of the debt limit of $ 3,024,725 applicable on that date but not in excess of $ 7.5 million who filed a case between March 27 and June 20, 2022 could not elect subchapter V but became an eligible subchapter V debtor on June 21, 2022. The issue is whether the debtor may

[612] See Section VI(C).
[613] See Section VI(D).
[614] Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").
[615] BTATCA § 2(h)(2).

amend the petition to elect subchapter V in cases filed during this time if a mandatory deadline has passed.

A number of cases have addressed retroactive application of SBRA. This caselaw may provide guidance in the determination of retroactive application of the BTATCA amendments.

One court rejected the debtor's argument that SBRA applied retroactively to pending cases, concluding, "Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect."[616] The court observed that to rule otherwise would create a "procedural quagmire" in that the debtor would be unable to comply with the statute's requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA's effective date. The debtor's failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[617]

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.[618] Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor's amendment to the petition to elect subchapter V in an existing case means

[616] *In re* Double H Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. 2020).
[617] *Id.* at 554.
[618] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re* Moore Properties of Person County, LLC, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re* Progressive Solutions, Inc., 615 B.R. 894 (Bankr. C.D. Cal. 2020). *Accord, In re Easter,* 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC,* 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re* Blanchard, 2020 WL 4032411 (Bankr. E.D. La. 2020); *In re* Trepetin, 617 B.R. 841 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re* Bonert, 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re* Bello, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

that the case proceeds under subchapter V unless and until the court orders otherwise;[619] the court need not approve the election.[620]

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.[621]

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[619] *See* Section III(A).

[620] *In re* Body Transit, Inc., 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020) (treating objection to debtor's motion for authority to proceed under subchapter V as an objection to amendment of the petition to make the election); *In re* Progressive Solutions, Inc., 615 B.R. 894, 900-01 (Bankr. C.D. Cal. 2020).

[621] *In re* Ventura, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022) ("Given that the Debtor's case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor."); *In re* Progressive Solutions, Inc., 615 B.R. 894, 899-900 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord, In re Easter,* 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC,* 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan);
In re Trepetin, 617 B.R. 841 (Bankr. D. Md. 2020).

In *In re Trepetin,* 617 B.R. 841 (Bankr. D. Md. 2020), the court considered whether to extend the statutory deadlines for the debtor's report, status conference, and filing of a plan after it had granted the debtor's motion to convert his pre-SBRA chapter 7 case to chapter 11. In permitting the debtor to proceed under subchapter V and extending the deadlines, the court reasoned, *id.* at *6-7:

> The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.
>
> The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor's conduct and potential prejudice to creditors.
>
> Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to

The opposite view is that the inability of a debtor to meet the statutory deadlines when it elects subchapter V after they have expired is not due to a circumstance beyond its control. Because the debtor makes the election after the deadlines expired, the circumstances are within the debtor's control.[622] If the debtor makes the election after expiration of the deadlines and the court does not extend them, the election is nevertheless effective, and the debtor is in default of the deadlines. Thus, the court may dismiss the case under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[623]

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC.*[624] The *Moore Properties* court and others[625] have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*[626] in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case. The court in *In re Wetter,* 620 B.R. 243 (Bankr. W.D. Va. 2020), concluded that the *Trepetin* approach to extension of the deadlines in a case converted from chapter 7 to chapter 11 was the proper one. The court denied the debtor's motion to convert to chapter 11, however, because under that approach the court would decline to extend the time to file a plan. In *In re Tibbens,* 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable. *Id.* at *9.

[622] *In re* Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. 2020).

[623] *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020). Query whether a debtor may amend the petition to withdraw the election in this situation.

[624] *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).

[625] *In re* Ventura, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re* Body Transit, Inc., 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020)

[626] Landgraf v. USI Film Products, 511 U.S. 244, 264-71 (1994).

One canon, said the *Landgraf* Court, is that "a court is to apply the law in effect at the time it renders its decision."[627] The conflicting one is that "[r]etroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[628]

The *Landgraf* Court explained that the presumption against retroactive application arises from "[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and from the principle that "settled expectations should not be lightly disrupted."[629] The presumption against retroactivity particularly applies, the Court reasoned, to "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance."[630] The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee's appeal after a bench trial was pending, did not apply to the employee's action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank.*[631] At issue in *Security Industrial* Bank was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest in exempt personal property.[632] The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

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[627] *Id.* at 264, *quoting* Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974).
[628] *Id.* at 264, *quoting* Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988).
[629] *Id.* at 265.
[630] *Id.* at 271. Among other cases, the Court cited United States v. Security Industrial Bank, 459 U.S. 70, 79-82 (1982), which the text discusses next.
[631] United States v. Security Industrial Bank, 459 U.S. 70 (1982).
[632] 11 U.S.C. § 522(f)(1)(B).

The Court in *Security Industrial Bank* recognized that the Constitution's bankruptcy clause[633] "has been regularly construed to authorize the retrospective impairment of contractual obligations"[634] but that the bankruptcy power could not be exercised "to defeat traditional property interests" because the bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.[635] The Court thus recognized a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.[636]

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."[637]

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created "none of the taking or retroactivity concerns" that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank.* [638] With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not "alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights."[639]

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[633] U.S. Const. Art. I, § 8, cl. 4.
[634] United States v. Security Industrial Bank, 459 U.S. 70, 74 (1982), *citing* Hanover National Bank v. Moyses, 186 U.S. 181 (1902).
[635] *Id.* at 75, *citing* Louisville Joint Stock Bank v. Radford, 295 U.S. 555 (1935).
[636] *Id.*
[637] *Id.* at 81, *citing* Holt v. Henley, 232 U.S. 637 (1913) and Auffm'ordt v. Rasin, 102 U.S. 620 (1881).
[638] *In re Moore Properties of Person County, LLC,* 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).
[639] *Id.*

The *Moore Properties* court explained that the modification of prepetition contractual relationships in a chapter 11 case occurs through a plan. The court then set out the changes that subchapter V made to existing requirements for the contents of the plan and for its confirmation and concluded that none of them amounted to an impermissible retroactive taking.

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. Section 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.[640] The third change is that §1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.[641]

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.[642]

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[640] See Section VII(A).

[641] See Section VII(B).

[642] *In re* Moore Properties of Person County, LLC, 2020 WL 995444, at *4 (Bankr. M.D.N.C. 2020).

In a footnote, the court observed that § 1190(2), which requires any debtor to contribute earnings as necessary for execution of the plan, rendered § 1123(a)(8) superfluous and that § 1123(c) is inapplicable because only the debtor can propose a plan. *Id.* at *4 n. 13.

In another footnote, the court explained that the exception to the antimodification provision did not prohibit the availability of subchapter V in the case before it for two reasons. First, the exception could not apply because the debtor was an artificial entity with no principal residence. Second, even if it did apply, the question would be whether its application would constitute an impermissible taking. If it did, the court said, it would not apply the exception rather than declare the entirety of subchapter V inapplicable, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). *Id.* at *4, n. 14.

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under §1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.[643]

Section 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of "fair and equitable" for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.[644]

The court concluded, "The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking."[645]

The court acknowledged that, if a case were pending for an extended period of time on SBRA's effective date, the case "could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights."[646] In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider "the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make

[643] *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.
[644] *Id.* See Section VIII(B)(3), (4).
[645] *Id.*
[646] *Id.*

its application offend '[e]lementary considerations of fairness' such that the parties 'have an opportunity to know what the law is and to conform their conduct accordingly.'"[647]

Because the application of new subchapter V in the existing case did not violate the Supreme Court's rulings in *Landgraf* or *Security Industrial Bank,* the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.[648]

The bankruptcy court in *In re Body Transit*[649] applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA's effective date to reject the secured creditor's contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor's argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor's assets and business, would also have the right to file a plan.[650]

The *Body Transit* court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.[651] In addition, the court noted that a debtor's ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would

[647] *Id., quoting* Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994), and *citing In re* Progressive Solutions, Inc., 615 B.R. 894 (Bankr. E.D. Cal. 2020).
[648] *Id.*
[649] *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020).
[650] The court had scheduled a hearing on the creditor's motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.
[651] *Id.* at 408.

unduly prejudice a party.[652] The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.[653]

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its burden of showing prejudice in the case before it.[654] The court summarized, "[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor's right to amend its petition under [Bankruptcy Rule] 1009."[655]

In *In re Ventura,*[656] an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA's effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a "residence" based on her use of it as a bed and breakfast. After the bankruptcy court had ruled that the exception applied as long as the debtor used any party of the property for her

[652] *Id.* at 408-09, *citing In re* Cudeyo, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re* Brooks, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re* Romano, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re* Bendi, Inc., 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).
[653] 213 B,R. at 409.
[654] *Id.* at 409.
[655] *Id.* at 410.
[656] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022). .

residence,[657] it scheduled a hearing on confirmation of the lender's plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA's effective date.[658]

The bankruptcy court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had vested rights at the time of the amendment in that its plan was ripe for confirmation.[659] The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

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[657] Other courts have accepted the debtor's position. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE, § 5:42 (2d ed. 2019).

[658] *In re* Ventura, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020), *rev'd sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

[659] *Id.* at 11. The debtor in the current case and in two previous bankruptcy cases had asserted that her debts were "primarily consumer debts." *Id.* at 8. The debtor owed $ 1,678.664.80 on the mortgage, and the property was worth no more than $ 1,200,000. *Id.* at 9. Although the opinion does not reflect what other debts the debtor has, the context indicates that she had other unsecured debt that were relatively small.

The lender asserted that, in these circumstances, the debtor did not qualify as a small business debtor, and that, even if she did, she should be judicially estopped from amending her petition to designate herself as a small business debtor based on her representations in the previous and current cases.

The court acknowledged that a purchase money mortgage on a residence is generally a consumer debt, but ruled that "the fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is a consumer debt." *Id.* at 19. The test, the court explained, is whether a debt is incurred with an eye toward profit. "Courts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction," the court stated. *Id., quoting In re* Martin, 2013 WL 54233954, at *6 (S.D. Tex. 2013) and *citing In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988) (debt incurred with an eye toward profit is a business debt, rather than a consumer debt).

The court found that the property was the debtor's residence but that the primary purpose of purchasing it was to own and operate a bed and breakfast. The court concluded that the mortgage was a business debt and that she qualified as a small business debtor. *Id.* at 20.

The court declined to apply judicial estoppel to bar her amendment to designate herself as a small business debtor. The court ruled that her amendment to describe the mortgage as a business debt was not necessarily with her prior descriptions of the debt. She had referred to it as a bed and breakfast and described it on her Schedule A/B as a "B & B Inn" rather than as a "single-family" home. Moreover, the court had taken no action in any of the cases based on the description of the mortgage debt as a consumer debt, so it was not misled. Nor had the debtor taken unfair advantage of the lender by changing the description of her debt to fit within a statute that did not exist when she filed her cases. *Id.* at 20-22.

The *Ventura* bankruptcy court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit.* In addition, the court concluded that the revision of the definition of "small business debtor" does not appear to affect contractual or vested property rights.[660]

The bankruptcy court then addressed whether the exception in §1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender's property rights that vested prior to SBRA's effective date. The court held that, because the debtor had discharged her personal liability in her previous chapter 7 case, application of §1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the bankruptcy court observed, even if the debt had not been discharged, §1190(3) might not "raise significant Constitutional doubts to warrant only prospective application."[661] Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of § 1190(3) to modify the mortgage would not violate the lender's Fifth Amendment rights.[662] The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.[663]

The *Ventura* bankruptcy court found no prejudice to the lender based on the history of the case, including the fact that the lender's plan was before the court for confirmation. The court

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[660] *Id.* at 16-17, *citing* Moore Properties of Person County, LLC, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).
[661] *Id.* at 17.
[662] *Id.* at 17.
[663] *Id.* at 24-25. Section VII(B) discusses this aspect of the court's ruling in connection with consideration of § 1190(3).

saw no Constitutional issues and declined to treat its prior rulings as creating "vested" rights. The bankruptcy court reasoned, "Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender]."[664]

The district court reversed, concluding that the bankruptcy court had not properly considered the substantial prejudice that the creditor faced due to the belated amendment to elect subchapter V. *Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (E.D. N.Y. 2022). The district court noted that the amendment did not occur until 16 months after the filing of the chapter 11 case and that allowing it caused "substantial prejudice" to the creditor. The district court observed, *id.* at 505 (emphasis in original; interior punctuation and citation omitted):

> By [the time of the amendment], both the parties and the Bankruptcy Court spent considerable time to get to a point in which [the creditor] was posed to confirm its plan. The Bankruptcy Court held numerous hearings and the parties, after significant negotiations, agreed [the creditor] could pursue its unopposed plan of reorganization if the Debtor failed to submit a plan by September 30, 2019. In reliance on this agreement and on the Debtor's representation that her petition would proceed under Chapter 11, [the creditor] Filed its plan of reorganization, solicited the necessary votes, and was on the cusp of confirming it when the Debtor sought to amend her petition. Moreover, because the SBRA grants the Debtor the sole right to confirm a plan of reorganization, the Debtor's amendment had the further prejudicial effect of terminating [the creditor's] right to pass *any* plan, thereby completing changing the rights of [the creditor] as a creditor and resetting the litigation posture of the proceedings.

[664] *Id.* at 18.

The district court in *Ventura* concluded that the amendment to elect subchapter V "cannot be allowed to cause such prejudice." 638 B.R. at 505. In addition, the court observed, prejudice to the debtor did not outweigh prejudice to the creditor because "she remains in the Chapter 11 process. While this may prevent her from accessing some of the tools afforded by Subchapter V, the Debtor's interests are still protected by Chapter 11, which requires [the creditor's plan] to be 'fair and equitable,' 11 U.S.C. § 1191(c), proposed in good faith, deemed to be 'reasonable,' and in comportment with existing law. *Id.* § 1129(a)."[665] 638 B.R. at 505. Accordingly, the court held that the bankruptcy court abused its discretion by overruling the creditor's objection to the debtor's amendment of her petition to proceed under subchapter V.

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a subchapter V debtor under SBRA's revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.[666] Another court refused to permit a debtor to proceed under subchapter V in a case filed a month before its effective date. The court determined that the debtor had waited too

[665] *Id.* It is unlikely that the requirements for confirmation the court referenced would provide any material protection for the interests of the debtor as compared to the provisions of her plan.
[666] *In re* Body Transit, Inc., 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).

long to make the sub V election and had amended its petition to do so only after two attempts to confirm a traditional chapter 11 plan had failed.[667]

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to $ 7.5 million.[668] Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than $ 7.5 million cannot amend its petition to elect application of subchapter V.[669] Although the CARES Act provided for the increased debt limit to expire on year after its enactment, the Covid-19 Bankruptcy Relief Extension Act of 2021[670] amended the CARES Act to extend the increased debt limit for an additional year.

A possible alternative for a debtor in a pre-subchapter V case who wants to be in a subchapter V case is to obtain dismissal of the pending case and then file a new one in which it elects subchapter V. In *In re Slidebelts, Inc.,* 2020 WL 3816290 (Bankr. E.D. Cal. 2020), the court permitted dismissal of a chapter 11 case for this purpose. The court in *In re Twin Pines, LLC,* 2020 WL 5576957 at * 6 (Bankr. D. N.M. 2020), noted that a debtor could, upon dismissal of the pending case, file a new one and elect subchapter V in exercising its discretion to extend the deadlines for the status conference and filing of a plan so that the debtor could proceed under subchapter V.

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[667] *In re* Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. 2020). *Cf. In re* Tibbens, 2021 WL 1087260 at * 9 (Bankr. M.D.N.C. 2021) (After denial of confirmation of two chapter 13 plans, the debtor sought to convert to chapter 11 and elect subchapter V after the deadline for the filing of a plan had expired; the court converted the case to chapter 11 but declined to extend the deadline because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable.).
[668] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See* Section III(B).
[669] See In *In re* Peak Serum*,* 623 B.R. 609 (Bankr. D. Col. 2020) (Debtors in pending chapter 11 cases may not elect application of subchapter V upon becoming eligible for subchapter V under the increase in the debt limit upon enactment of the CARES Act; increased debt limit applies only in cases filed after enactment.)
[670] Covid-19 Bankruptcy Relief Extension Act of 2021§ 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

In *In re Peak Serum,* 623 B.R. 609 (Bankr. D. Col. 2020), a corporation and its principal, in response to a creditor's motion to appoint a trustee in their jointly administered cases, moved to dismiss them to permit their re-filing as subchapter V cases after the CARES Act increased the debt limit so that they became eligible to proceed under subchapter V. The court found cause to appoint a trustee in the corporate case and concluded that the facts warranted appointment of a trustee. Because the creditor failed to establish cause for appointment of a trustee in the individual case, however, the court dismissed it, observing that subchapter V contained sufficient protections for creditors such that a re-filed case under subchapter V would not unduly prejudice creditors.

The strategy did not work well for the individual debtors in *In re Crilly,* 2020 WL 3549848 (Bankr. W.D. Okla. 2020). A few hours after dismissal of their chapter 11 case filed in 2018 for cause, the individual debtors filed a new case and elected subchapter V. The debtors filed a motion to extend the automatic stay, which under § 362(c)(3) would expire 30 days after filing the second case unless extended based on a showing that the second case was filed in good faith. Under § 362(c)(3)(C)(i)(III), a filing is presumptively not in good faith if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the previous case.

The court concluded that no change of circumstances had occurred between the filing of their two cases that would permit them to avoid the presumption. The availability of subchapter V in the new case, the court explained, could not supply such a change because it was in effect at the time of the dismissal and filing of the cases. The court for a variety of reasons refused to extend the automatic stay beyond 30 days.

In *In re Hunts Point Enterprises, LLC,* 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss it. The court ruled that the debtor's debts did not exceed the eligibility limit but concluded that allowing the case to proceed under subchapter V would be an abuse of its provisions because only the debtor could file a plan, and its request for dismissal demonstrated that it no longer wanted to do so. The court concluded that cause existed for its dismissal and prohibited the debtor from filing another bankruptcy petition for a year unless the debtor sought and obtained relief from that prohibition based on changed circumstances or good cause shown.

Lists of Sections of Bankruptcy Code and Title 28 Affected or Amended By The Small Business Reorganization Act of 2019

Enacted August 23, 2019, Effective February 19, 2020

(As Amended By The CARES Act, Enacted and Effective March 27, 2020; The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act for an additional year.)

May 2020

	Sections of The Small Business Reorganization Act of 2019	
SBRA § 1	Short Title – "The Small Business Reorganization Act of 2019"	
SBRA § 2	Enacts Subchapter V of Chapter 11 of the Bankruptcy Code, new §§ 1181—1195.	
SBRA § 3(a)	Amends 11 U.S.C. § 547(b) to provide that trustee's avoidance of preferential transfer must be "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c). Applicable in all bankruptcy cases.	
SBRA § 3(b)	Amends 28 U.S.C. § 1409(b) to provide for venue only in the district of the defendant, for a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than $ 25,000. Applicable in all bankruptcy cases.	
SBRA § 4(a)	Conforming amendments to the Bankruptcy Code.	
SBRA § 4(b)	Conforming amendments to Title 28.	
SBRA § 5	Effective date.	
SBRA § 6	Determination of budgetary effects.	
11 U.S.C.	**Amendments Relating to Cases of All Small Business Debtors**	SBRA
§ 101(51C)	New definition of "small business case" as a case in which a small business debtor (defined in § 101(51D)) does not elect application of subchapter V	§ 4(a)(1)(A)
§ 101(51D)	Revised definition of "small business debtor"; CARES Act makes technical correction dealing with exclusion of public companies	§ 4(a)(1)(B); CARES Act § 1113(a)(4)(A)

§ 103(*i*)	New subsection (*i*) provides that subchapter V applies only to a case in which a small business debtor elects its application CARES Act amendment provides that subchapter V applies only to a case in which a "debtor (as defined in section 1182)" elects its application.	§ 4(a)(2); CARES Act § 1113(a)(2)
§1102(a)(3)	No committee of unsecured creditors will be appointed in the case of a small business debtor (regardless of election), unless the court orders otherwise	§ 4(a)(11)

11 U.S.C.	**Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases**	New Subchapter V Section
§ 105(d)	§ 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it.	New § 1181(a)
§ 327(a)	New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than $ 10,000.	New § 1195(a)
§ 365(d)(3)	The Consolidated Appropriations Act, 2021, temporarily added provisions to extend time for debtor as lessee under a nonresidential lease of real property to comply with its obligations under the lease based on financial hardship arising from COVID-19.	
§ 1101(1)	§ 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2).	New § 1181(a)
§ 1102(a) § 1102(b) § 1103	Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees. These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise.	New § 1181(b)
§ 1104 § 1105	Provisions for appointment of trustee (§ 1104) and termination of trustee's appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession)	New § 1181(a)
§ 1106	§ 1106 specification of duties of trustee and examiner is inapplicable. New § 1183(b) states the trustee's duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new	New § 1181(a)

	§ 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).	
§ 1107	§ 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties. § 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional's representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than § 10,000 impliedly has the same effect.	New § 1181(a)
§ 1108	§ 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business)	New § 1181(a)
§ 1115	§ 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor.	New § 1181(a)
§ 1116	§ 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties.	New § 1181(a)
§ 1121	Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1123(a)(8)	Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1123(c)	Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1125	Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c).	New § 1181(b)

§ 1127	Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193.	New § 1181(a)
§ 1129(a)(9)(A)	Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b).	New § 1191(e)
§ 1129(a)(15)	Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1129(b)	"Cramdown" provisions are not applicable. New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met. New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is "fair and equitable with respect to" each impaired, nonaccepting class. The "fair and equitable" requirement in subchapter V does not include the absolute priority rule. For a secured creditor, the "fair and equitable" requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1). To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3).	New § 1181(a)
§ 1129(c)	Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1129(e)	Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time) but does not contain a deadline for confirmation.	New § 1181(a)

§ 1141(d)	Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs. In the cramdown context, discharge does not occur under new § 1192 until the debtor has completed payments under the plan for three years, or such longer period not to exceed five years as the court determines. The new § 1192 discharge applies to (1) debts listed in § 1141(d)(1)(A) and (2) all other debts allowed under § 503 and provided for in the plan, except for debts (x) on which the last payment is due after the applicable three to five year period and (y) of the kind specified in § 523(a).	New § 1181(c)
	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V	
11 U.S.C.		SBRA
§ 322(a)	Amended to make its provisions for qualification of trustee in a case applicable to a subchapter V trustee appointed under new § 1183.	§ 4(a)(3)
§ 326(a)	Excepts subchapter V trustee appointed under new § 1183 from percentage limitations on compensation applicable to trustees in chapter 11 (and chapter 7) cases.	§ 4(a)(4)(A)
§ 326(b)	Provides that standing subchapter V trustee (like standing chapter 12 and 13 trustees) cannot receive compensation under § 330. (Standing trustees receive compensation under 28 U.S.C. § 586(e), as amended to include standing subchapter V trustees.)	§ 4(a)(4)(B)
§ 347	Current § 347(a) provides for a chapter 7, 12, or 13 trustee to pay into the court, for disposition under chapter 129 of title 28, funds that remain unclaimed 90 days after final distribution under § 726, § 1226, or § 1326. It thus does not apply in chapter 11 cases. SBRA § 4(a)(5)(a) adds subchapter V to the list of trustees and adds new § 1194 to the list of sections providing for distributions. New § 1194 provides for the subchapter V trustee to make distributions under a plan confirmed under the cramdown provisions of new § 1191(b). Current § 347(b) provides that unclaimed property in a case under chapter 9, 11, or 12 at the expiration of the time for presentation of a security or performance of any other act as a condition to participate under any plan confirmed under § 1129, § 1173, or § 1225 becomes property of the debtor or any entity acquiring the debtor's assets under the plan. SBRA § 4(a)(5)(B) added new § 1194 to the list of plans confirmed, but the CARES Act made a technical correction to change this to § 1191. Accordingly, § 347(b) as amended and corrected provides for property that is distributed	§ 4(a)(5); CARES Act § 1113(a)(4)(B)

	under a confirmed plan and that is unclaimed to become property of the debtor. It is unclear under these amendments what happens to funds that a trustee disburses under a confirmed plan that a creditor does not claim. Amended § 347(a) directs the trustee to pay them into court, but amended § 347(b) makes them property of the debtor. Perhaps the intended result is that unclaimed disbursements that a trustee makes become unclaimed funds subject to § 347(a) whereas unclaimed disbursements that a debtor makes become the debtor's property under § 347(b).	
§ 363(c)(1)	Extends provisions authorizing trustee who is authorized to conduct business to enter into transactions in the ordinary course of business without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 363 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(6)
§ 364(a)	Extends provisions authorizing trustee who is authorized to conduct business to obtain unsecured credit and incur unsecured debt without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 364 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(7)
§ 523(a)	Applies exceptions to discharge to discharge of individual subchapter V debtor under new § 1192 (which is the discharge that a debtor receives when a plan is confirmed under the cramdown provisions of new § 1191(b)). It is unclear whether under new § 1192 the exceptions apply to the discharge of a debtor that is not an individual. If the court confirms a consensual plan under new § 1191(a), the debtor receives a discharge under § 1141(d)(1)-(4), under which the § 523(a) discharge exceptions apply only in cases of individuals.	§ 4(a)(8)
§ 524(a)(1)	Makes discharge injunction applicable to discharge granted under new § 1192.	§ 4(a)(9)(A)(i)
§ 524(a)(3)	Makes discharge provisions relating to community claims applicable to discharge under new § 1192.	§ 4(a)(9)(A)(ii)
§ 524(c)(1) § 524(d)	Extends provisions governing reaffirmation of debt and for hearing on proposed reaffirmation (which apply to a discharge under § 1141(d)) to discharge granted under new § 1192.	§ 4(a)(9)
§ 557(d)(3)	Makes provisions for expedited consideration of appointment of trustee and for retention and compensation of professionals subject to § 1183 in cases of debtors that own or operate grain storage facilities	§ 4(a)(10)
§ 1146(a)	Prohibition on taxation of issuance, transfer, or exchange, or of the making or delivery of an instrument of transfer, under a plan confirmed under § 1129 is extended to a plan confirmed under § 1191.	§4(a)(12)

	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter	SBRA
28 U.S.C. § 586(a)(3), (b), (d)(1), (e)	Provisions applicable to U.S. Trustees duties to supervise the administration of cases and trustees, (a)(3), appoint standing trustees (b), prescribe qualifications of trustees, (d)(1), and fix compensation of standing trustees, (e), extended to include cases and trustees under subchapter V. Adds new 28 U.S.C. § 586(e)(5), which provides for compensation of standing trustee in subchapter V case when trustee's services are terminated due to dismissal or conversion of the case or substantial consummation of a plan under new § 1183(c)(1). In these circumstances, the standing trustee does not make disbursements on which a percentage fee would be due. The court is to award compensation "consistent with services performed by the trustee and the limits on compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."	§ 4(b)(1)
28 U.S.C. § 589b	Provisions relating to reports of trustees and debtors in possession made applicable in subchapter V cases.	§ 4(b)(2)
28 U.S.C. § 1930(a)(6)(A)	Subchapter V cases excluded from requirement of payment of quarterly U.S. Trustee fees	§ 4(b)(3)
	Amendments Applicable in All Cases	
11 U.S.C. § 547(b)	As amended, 11 U.S.C. § 547(b) provides that a trustee may avoid a preferential transfer "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c).	SBRA § 3(a)
28 U.S.C. § 1409(b)	As amended, 28 U.S.C. § 1409(b) provides for venue only in the district of the defendant of a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than $ 25,000.	SBRA § 3(b)

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

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as Rule 2015(c). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in "small business case" also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a "small business case," although a subchapter V debtor is a "small business debtor.")

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

Note: The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act referenced herein for an additional year.

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13
Prepared by Mary Jo Heston's Chambers
(Updated July 6, 2020)

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1] No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person who primary activity is the business of owning single asset real estate or operating real property or	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than $7,500,000 (will return to $2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below $10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); §

[1] Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

	conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is "an affiliate of an issuer" under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over $2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a "small business debtor" hinges, at least in part, upon whether a creditor's committee is appointed, and on how much that creditor's committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor's committee thereby extinguishing	§ 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below $10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B). Family farmer must be engaged in a farming operation, including "farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." § 101(21).	1113, CARES Act.

	debtor's small business status. The UST appoints any such committee. *Id.* Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.			
Filing Fees	$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is $325 for disbursements up to $15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first $450,000 paid under the plan, and 3% of any payments in excess of $450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

	final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.			
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11	A disinterested trustee is appointed in every ch. 13 case. § 1302.

	Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the	A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."

Trustee Fees	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for "cause." Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).
Estate Property **Estate Property Post-confirmation**	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	Section 1186 augments § 541 and parallels § 1115 in ch. 11. No separate rule.	Section 1207 augments § 541 and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Section 1306 augments § 541, and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).

Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b).	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order.	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.

	§ 1123(b)(3)(B).			
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.
Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d). Small Business Debtors: Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes.	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.

Status Conference	Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f). None required.	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).	None required.	None required.
Commencement of Plan Payments	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.		Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019).	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1).
Plan Content	Plans *must*: 1) designate classes of	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2)	Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all

	claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123. Plans *may*: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2). Plans *may*: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222. Under § 1222(b)(1)-(12), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322. Under § 1322(b)(1)-(11), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 *debtors in possession* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable		Ch. 12 debtors in possession *and* trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which	Ch. 13 *debtors* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of

	nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		applies only in ch. 12, allows *trustees* under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017.	

			Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants.	

Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. *In re Rogers*, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income.	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).

	as their larger ch. 11 counterparts.		Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has

				experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch.	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the

	requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).		12 based on the motion date, not the petition date). There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	conversion. § 1307(f).
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523.	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from

	Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1). An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.			discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement, or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328.

Key Events in the Timeline of Subchapter V Cases[1]

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

- Election to Have Subchapter V Apply
  - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).[4]
  - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor or a debtor as defined under § 1182(1), and if so, whether it elects to have subchapter V apply. Interim Rule 1020(a).[5]

[1] A chart containing more detailed subchapter V deadlines follows.

[2] United States Bankruptcy Judge, Middle District of North Carolina. No copyright is claimed in these materials by the authors, who give permission to reproduce in whole or in part.

[3] Law Clerk to Judge Benjamin A. Kahn. B.A., University of Miami, Departmental Honors in International Studies; J.D., Chicago-Kent College of Law, *magna cum laude*, Order of the Coif.

[4] All references to rules herein are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated. On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein.

[5] There is no deadline in the rules for a debtor to amend its statement or election, and Rule 1009 permits a debtor to amend any statement as a matter of course at any time before the case is closed. Nevertheless, § 1188 of subchapter V requires the court to hold a status conference no later than 60 days after the order for relief, and requires the debtor to serve and file a report detailing efforts to attain a consensual plan no later than 14 days prior to the status conference. The court may extend the period of time for holding the status conference only "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." Similarly, § 1189(b) requires a debtor under subchapter V to file a plan no later than 90 days after the order for relief, and permits the court to extend this period only "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." If the debtor does not elect subchapter V, but seeks to amend its statement to elect subchapter V more than 30 days after the order for relief, the court and the debtor will not be able to comply with the time requirements under §§ 1188 and 1189, unless the court extends these periods, and the court only may do so if the need to do so is attributable to circumstances for which the debtor should not justly be held accountable.

- Status Conference

  - Not later than 60 days after the order for relief the court shall hold a status conference "to further the expeditious and economical resolution of a case under this subchapter." 11 U.S.C. § 1188(a).

  - 14 days BEFORE the status conference under 11 U.S.C. § 1188(a), the debtor shall file and serve on all parties in interest "a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." 11 U.S.C. § 1188(c).

- Filing Plan of Reorganization

  - Not later than 90 days after the order for relief, the debtor shall file a plan. The court may extend this period if the need for an extension "is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b).

- Confirmation Hearing[6]

  - 28 days' notice must be given for the deadline to accept or reject and file objections to a proposed plan, and for the hearing to consider confirmation of the proposed plan.[7] Rule 2002(b). The court fixes the date for the confirmation hearing. Rule 3017.2(c).

- Appointment and Termination of Service of Trustee

  - The United States Trustee shall appoint a standing trustee for subchapter V cases, appoint one disinterested person to serve as trustee, or may serve as trustee. 11 U.S.C. § 1183(a).

  - If the plan is consensually confirmed under 11 U.S.C. § 1191(a), the service of the trustee is terminated when the plan is substantially consummated. However, the United

[6] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

[7] Section 1129(e), which requires that the court confirm a plan in a small business case within 45 days after the plan is filed, does not apply to cases under subchapter V. See 11 U.S.C. § 1181(a); see also 11 U.S.C. 101(51C) (excluding any case in which a debtor elects to have subchapter V apply from the definition of "small business case").

States Trustee may reappoint the trustee for modification of the plan or if the debtor is removed from possession. 11 U.S.C. § 1183(c)(1).

- If the plan is non-consensually confirmed, the trustee will make all payments under the plan, unless the plan or the order confirming the plan provides otherwise. 11 U.S.C. § 1194(b).

- Discharge

  - Consensually Confirmed Plans Under 11 U.S.C. § 1191(a). If a plan is consensually confirmed under 11 U.S.C. § 1191(a), then the general discharge provisions under 11 U.S.C. § 1141(d)(1)-(4) shall apply. See 11 U.S.C. § 1181(a), (c). Therefore, in a non-liquidating subchapter V case, discharge will occur on confirmation of a consensual plan. See 11 U.S.C. § 1141(d)(1).[8]

  - Non-consensually Confirmed Plans Under 11 U.S.C. § 1191(b). If a plan is confirmed under 11 U.S.C. § 1191(b), then the timing provisions for entry of discharge under 11 U.S.C. § 1141(d) shall not apply. See 11 U.S.C. § 1181(c). In such a case, discharge will be entered after completion of all payments due "within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix . . . ." 11 U.S.C. § 1192.[9]

- Modification of a Plan

  - The debtor may modify a plan at any time prior to confirmation. 11 U.S.C. § 1193(a).

  - After confirmation, the debtor may modify a plan consensually confirmed under § 1191(a) prior to substantial consummation of the plan. 11 U.S.C. § 1193(b).[10]

  - After confirmation, the debtor may modify a plan confirmed under § 1191(b) at any time within 3 years, or such longer period not to exceed 5 years, as fixed by the court. 11 U.S.C. § 1193(c).

- Plan Term

  - Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a

[8] Section 1141(d)(5), which delays discharge until the completion of payments under a plan in an individual case unless otherwise ordered by the court, does not apply in subchapter V cases. 11 U.S.C. 1181(a).

[9] Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.

[10] A consensually confirmed plan only may be modified by consent. 11 U.S.C. § 1193(b).

non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

- Timing of Payments
  - The court may authorize the trustee to make payments to the holder of a secured claim prior to confirmation for purposes of providing adequate protection. 11 U.S.C. § 1194(c).

Subchapter V Deadlines[11]

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	**Deadline**	**Act to Be Performed**	**Code or Rule**[12]
Voluntary debtor	Petition Date	State whether the debtor is a small business debtor or a debtor as defined under § 1182(1) and, if so, whether the debtor elects to have subchapter V apply	Interim Federal Rule of Bankruptcy Procedure 1020(a)
Subchapter V DIP, or Trustee if debtor removed from possession	As soon as possible after the commencement of the case	Give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor	Federal Rule of Bankruptcy Procedure ("Rule") 2015(a)(4)
Subchapter V debtor	Upon electing to proceed under subchapter V	Append to its petition its most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return; or a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no federal tax return has been filed	11 U.S.C.A § 1187(a); 11 U.S.C. § 1116(1)(A), (B)[13]
Involuntary debtor	14 days after the entry of the order for relief	File a statement indicating whether the debtor is a small business debtor and, if so,	Rule 1020(a)

[11] On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein. Deadlines and notations set forth herein that existed under the Federal Rules of Bankruptcy Procedure prior to enactment of subchapter V and that have not been modified by the proposed interim rules have been excerpted from COLLIER PAMPHLET EDITION 2018 Supplement, Time Periods Prescribed by the Bankruptcy Rules (Richard Levin & Henry Sommer eds., Matthew Bender) (the "Collier Supplement").

[12] With respect to deadlines under title 11, only those time periods and deadlines arising under subchapter V of title 11 are included herein. Time periods relating to adversary proceedings, appeals, and claims are not included. For comprehensive deadlines generally applicable to all cases, including subchapter V, see the Collier Supplement.

[13] Section 1181(a) provides that 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(a).

		whether the debtor elects to have subchapter V apply	
Chapter 11 parties in interest	30 days after the conclusion of the meeting of creditors or 30 days after any amendment to the debtor's statement under Rule 1020(a), whichever is later	File objection to the chapter 11 debtor's designation as a small business debtor	Rule 1020(b)[14]
Involuntary debtor	7 days after entry of the order for relief	File a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H	Rule 1007(a)(2)
Chapter 11 debtor	14 days after entry of the order for relief	File a list of the debtor's equity security holders, with the number and kind of interests, and the last known address or place of business of each holder	Rule 1007(a)(3)
Voluntary debtor	14 days after filing petition	File the schedules, statements and other documents required by 1007(b)(1)	Rule 1007(c)
Individual chapter 11 debtor	14 days after filing the petition	File a statement of current monthly income	Rule 1007(c)
Voluntary individual debtor	14 days after entry of the order for relief	File a certificate of credit counseling if debtor filed a statement that debtor received counseling but did not have the certificate on the filing date	Rule 1007(c)
Petitioning creditor(s) in an involuntary case	7 days after issuance of the summons	Serve the summons and a copy of the petition on the debtor	Rule 1010(a); Rule 7004(e)
Involuntary debtor	14 days after entry of the order for relief	File the schedules, statements, and other documents required by Rule 1007(b)(1)	1007(c)
Involuntary chapter 11 reorganization on debtor	2 days after entry of the order for relief	File a list of creditors holding the 20 largest unsecured claims	Rule 1007(d)

[14] Any objection is governed by Rule 9014. See F.R.B.P 1020(c).

Involuntary debtor	21 days after service of the summons, unless made by publication on a party not residing or found within the state in which the court sits	File and serve defenses and objections to an involuntary petition	Rule 1011(b)
U.S. Trustee in a chapter 11 health care business case	21 days after the commencement of the case	File motion to appoint a patient care ombudsman	Rule 2007.2(a)
Debtor's attorney	14 days after the order for relief	File statement whether the attorney has shared or agreed to share the compensation with any other entity	Rule 2016(b)
The court	60 days after entry of the order for relief	Hold a status conference to further the expeditious and economical resolution of a case under subchapter V[15]	11 U.S.C. § 1188(a)
Subchapter V debtor	14 days before the date of the § 1888(a) status conference	Debtor file and serve on the trustee and all parties in interest a report that details the efforts debtor has undertaken and will undertake to attain a consensual plan of reorganization	11 U.S.C. § 1188(c)

TIME PERIODS RELATED TO PLANS

Entity	**Deadline**	**Act to Be Performed**	**Code or Rule**
Subchapter V debtor	90 days after the order for relief	File a chapter 11 plan[16]	11 U.S.C. § 1189
Chapter 11 plan proponent	With the plan or within a time fixed by the court	File a disclosure statement or evidence of prepetition acceptance of a plan if the court has ordered that 11 U.S.C. 1125 will apply[17]	Rule 3016(b)

[15] Under §1188(b), the court may extend the time for holding a status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

[16] The court may extend the 90-day period if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.

[17] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility

Class Including Secured Creditor	Date fixed by the court	Make the election under § 1111(b)	Rule 3014
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time fixed for filing objections and the hearing to consider approval of a disclosure statement, if applicable. See note 17, infra.	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of hearing on disclosure statement and objections in a chapter 11 case, if applicable. See note 17, infra.	Rule 3017(a)
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of time for filing objections to an injunction provided in a chapter 11 plan	Rule 3017(f)(1)
The court	No deadline	Fix a date for the hearing on confirmation.	Rule 3017.2(c)
Holders of claims or interests	Time fixed by the court	Accept or reject the plan	Rule 3017.2(a)
Equity security holder	Time fixed by the court	Record date for eligibility to accept or reject the plan	Rule 3017.2(b)

projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

Subchapter V debtor in possession, trustee, or clerk, as directed by the court	Times fixed by the court	Transmit the plan, provide notice of the time to accept or reject the plan, and provide notice of hearing on confirmation[18]	Rule 3017.2(d)
Chapter 11 parties in interest	14 days after entry of the order	Stay of order confirming a chapter 11 plan	Rule 3020(e)
Subchapter V debtor	Any time prior to confirmation	Modify the plan. After the modification is filed with the court, the plan as modified becomes the plan.	11 U.S.C. § 1193(a)
Subchapter V debtor	Any time after confirmation of the plan and before substantial consummation of the plan	May seek to modify a plan that was consensually confirmed under section 1191(a). The plan, as modified under this subsection, becomes the plan only if the court confirms the plan as modified by consent under section 1191(a) of this title.[19]	11 U.S.C. § 1193(b)
Subchapter V debtor	Any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court	May seek to modify the plan if the plan was confirmed under section 1191(b).	11 U.S.C. § 1193(c)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of time for filing objections to modification of an individual's chapter 11 plan and of hearing on objections	Rule 3019(b), (c)

[18] In traditional chapter 11 cases under chapter 11, Rule 3017(c) requires that, on or before approval of the disclosure statement, the court shall fix a time within which holders of claims and interests may accept or reject a plan and may fix the date for notice of the confirmation hearing. Rule 3017(d) requires transmission of the plan and the notice of the times so fixed in traditional chapter 11 cases "in accordance with Rule 2002(b)." Despite the lack of any similar reference to Rule 2002(b) in Rule 3017.2(d), nothing in the interim rule purports to affect the minimum 28 days' notice required of the time fixed for acceptance or rejection of the plan and the hearing to consider confirmation under Rule 2002(b).

[19] Subchapter V does not provide for a contested modification of a consensually confirmed plan.

Any holder of a claim or interest that has accepted or rejected the plan	Within a time fixed by the court	Change the previous acceptance or rejection of the plan if the plan is later modified	11 U.S.C. § 1193(d)
The subchapter V trustee	Until confirmation or denial of confirmation of a plan	Retain payments and funds received pending confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deductions under 11 U.S.C. § 1194(a)(1)-(3).	11 U.S.C. § 1194(a)
The court	After notice and a hearing, and prior to confirmation of a plan	May authorize the trustee to make payments to the holder of a secured claim to provide adequate protection of an interest in property	11 U.S.C. § 1194(c)

DEADLINES THROUGHOUT THE CASE

Entity	**Deadline**	**Act to Be Performed**	**Code or Rule**
Subchapter V debtor	Periodically throughout the case	Comply with the requirements of 11 U.S.C. §§ 308 and 1116(2), (3), (4), (5), (6), and (7)	11 U.S.C. § 1187(b)[20]

[20] Section 1181(a) provides that § 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(b).

Subchapter V debtor	14 days after the information comes to the debtor's knowledge	File supplemental schedule disclosing acquisition of property by bequest, devise, inheritance, property settlement agreement, or as a beneficiary of a life insurance policy or death benefit plan.[21]	Rule 1007(h)
Subchapter V debtor	At any time before the case is closed	File an amendment of any voluntary petition, list, schedule, or statement	Rule 1009(a)
Chapter 11 DIP or trustee in case converted from chapter 7	14 days after conversion of the case	File a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim	Rule 1019(5)(A)(i)
Chapter 11 DIP or trustee in case converted to chapter 7	30 days after conversion of the case	File and transmit to the U.S. Trustee a final report and account	Rule 1019(5)(A)(ii)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of meeting of creditors under § 341	Rule 2002(a)(1)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of proposed use, sale, or lease of property of the estate other than in the ordinary course of business	Rule 2002(a)(2)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on approval of a compromise or controversy other than pursuant to Rule 4001(d)	Rule 2002(a)(3)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on any entity's request for compensation or reimbursement of expenses in excess of $1000	Rule 2002(a)(6)

[21] The obligation to supplement continues post-confirmation for plans confirmed under 11 U.S.C. § 1191(b).

U.S. Trustee in a chapter 11 reorganization case	Between 21 and 40 days after the order for relief	Call a meeting of creditors, except where a prepetition plan has been accepted	Rule 2003(a)
U.S. Trustee	2 years after the conclusion of the meeting of creditors	Preserve recording of § 341 meeting for public access	Rule 2003(c)
Subchapter V debtor	14 days after the plan is substantially consummated	File notice of substantial consummation with the court and serve on the trustee, the U.S. Trustee, and all parties in interest	11 U.S.C. § 1183(c)(2)
Subchapter V trustee	Periodically	File reports and summaries of the operation of the debtor's business, including a statement of receipts and disbursements, if the debtor ceases to be a DIP	11 U.S.C. § 1183(b)(5); 11 U.S.C. §§ 1106(a)(1), (2), (6); 11 U.S.C. § 704(a)(8)
The court	On request and after notice and a hearing	Order that the debtor not be a DIP for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter	11 U.S.C. § 1185(a)
The court	On request and after notice and a hearing	Reinstate the DIP.	11 U.S.C. § 1185(b)
Subchapter V debtor	Periodically	File periodic financial and other reports as required by 11 U.S.C. § 308(b)	11 U.S.C. § 1187(b); 11 U.S.C. § 308(b)
Subchapter V debtor	25 days before the date of the hearing on confirmation of the plan	Mail a conditionally approved disclosure statement if the court directs application of 11 U.S.C. § 1125	11 U.S.C. § 1187(c); 11 U.S.C. § 1125(f)
Subchapter V DIP, or trustee if debtor removed from possession	Periodically	Keep records of receipts and dispositions of money, file reports required by 11 U.S.C. § 704(a)(8)	Rule 2015(b)

Subchapter V DIP, or trustee if debtor removed from possession	Within the time fixed by the court, if so directed	File and transmit to the United States trustee a complete inventory of the property of the debtor	Rule 2015(b)
Subchapter V debtor	No later than 21 days after the last day of each calendar month	File monthly reports as contemplated by 11 U.S.C. § 308	Rule 2015(b)[22]
Chapter 11 trustee or DIP	7 days before the first date set for the § 341 meeting of creditors	File first periodic report of the value, operations, and profitability of each entity that is not a publicly traded corporation or chapter 11 debtor and in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	No less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted	File subsequent periodic reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a chapter 11 debtor in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	14 days before filing the first periodic financial report required by this rule	Send notice to each entity in which the estate has a substantial or controlling interest, and to all holders of an interest in that entity, that it expects to file and serve financial information relating to that entity	Rule 2015.3(e)

[22] The proposed interim rule contemplates that the debtor shall be required to file monthly reports under § 308 and Rule 2015(a)(6) even if removed from possession.

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

Entity	**Deadline**	**Act to Be Performed**	**Rule**
Clerk of court, or some other person as the court may direct	21 days	Provide notice by mail of time for hearing on the dismissal or conversion of a chapter 7, 11, or 12 case, unless the hearing is under § 707(a)(3) or (b) or is on dismissal of the case for failure to pay the filing fee	Rule 2002(a)(4)
The court	As soon as practicable after completion by the debtor of all payments due within the first three years of the plan, or such longer period not to exceed five years as the court may fix	Grant the debtor a discharge[23]	11 U.S.C. § 1192
Chapter 11 party in interest	No later than the first date set for the hearing on confirmation	File complaint objecting to discharge[24]	Rule 4004(a)
Creditor	Any time	File complaint under § 523(a)(2), (4), or (6)	Rule 4007(b)
Creditor in a chapter 11 case	No later than 60 days after the first date set for the § 341 meeting of creditors, with 30 days' notice	File complaint under § 523(a)(2) or (4)	Rule 4007(c)

[23] Such discharge pertains to debts as provided under the plan except any debt (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or (2) of the kind specified in section 523(a).

[24] A complaint seeking revocation of a chapter 11 discharge as procured by fraud may be filed any time before 180 days after the date of the entry of the order of confirmation. 11 U.S.C. § 1144.

APPENDIX E

Comparison of Subchapter V With Chapter 13 and Chapter 11

This paper is based on materials originally prepared for a program titled *Eeny, Meeny, Miny, Moe* presented on March 25, 2022, at the 48th Annual Southeastern Bankruptcy Law Institute in Atlanta, Georgia.

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I. Introduction

A debtor who is eligible to be a debtor under Subchapter V of Chapter 11 has the option of seeking relief under other provisions of the Bankruptcy Code. Subchapter V applies only if the debtor elects it.

All debtors eligible for Subchapter V may be a Chapter 7 debtor, and debtors who qualify as family farmers or fishers may file a Chapter 12 case. These materials consider the Chapter 11 and 13 alternatives.

Which options are available depends on whether the debtor is an individual and the amount of debt.

Chapter 13 is available only for an individual with regular income whose noncontingent, liquidated debts do not exceed specified debt limits. The debt limits under § 109(e) effective as of April 1, 2022, as adjusted under § 104 under § 109(e), were $ 465,275 for unsecured debts and $ 1,395,875 for secured debts.

Effective June 21, 2022, the debt limit in a chapter 13 case is temporarily increased to $ 2,750,000 for both secured and unsecured debts under the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA").[1] On June 21, 2024, the debt limits return to $ 465,275 for unsecured debts and $ 1,395,875 for secured debts.

Individuals and entities may file a Chapter 11 case. Absent a Sub V election, the type of chapter 11 case will depend on the amount of the debtor's noncontingent, liquidated debts.

If the debt is less than $ 3,024,725, adjusted as of April 1, 2022 under § 104, the debtor is a "small business debtor" under § 101(51D),[2] and the debtor is in a "small business case." § 101(51C).

The Bankruptcy Code has provisions that apply specifically in a small business case. A debtor does not elect to be in a small business case; the provisions for small business cases apply if the debtor is a small business debtor and does not elect Subchapter V. If the debt exceeds the small business limit, the debtor is in a traditional chapter 11 case.

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

II. Subchapter V vs. Chapter 13

Chapter 13 is an option only if the debtor is (1) an individual with (2) regular income (3) whose debts are within the debt limits discussed above. § 109(e). Key differences between relief under Chapter 13 as compared to Subchapter V include the following.

Noneligible spouse cannot be a debtor in a joint Sub V case

The spouse of a debtor eligible for Chapter 13 is eligible to be a debtor in a jointly filed Chapter 13 case, even if the spouse does not have regular income.[2] Subchapter V does not have a provision that permits a noneligible spouse to file jointly with an eligible debtor. Although an affiliate of a Subchapter V debtor is eligible to be a Sub V debtor, a spouse is not an affiliate.[3]

Attorney's and trustee's fees may be lower in a Chapter 13 case

In general, a Chapter 13 case is likely to be simpler and cheaper than a Sub V case. The debtor files a plan in the form the court requires and creditors do not vote. The case moves promptly to confirmation. The Chapter 13 process may thus require less time for the debtor's attorney, resulting in a lower attorney's fee.

The Chapter 13 trustee receives a commission based on disbursements under the plan. In a Sub V case, the Sub V trustee receives compensation based on services rendered. Depending on how much money will be disbursed to creditors and the percentage commission the Chapter 13 trustee charges, the Chapter 13 trustee's fees may be lower.

This may not make any difference to the debtor unless the debtor is in a position that payment of claims in full is necessary. If not, the amount of the trustee's fee in either case will

[2] See § 1322(b)(5). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 12:7.
[3] *In re Johnson,* 2021 WL 825156 (Bankr. N.D. Tex. 2021).

be paid before claims of creditors from the plan payments the debtor makes. The amount of the fees will reduce what creditors receive but will not affect how much the debtor pays.

Subchapter V provides more flexibility for modification of secured claims

Subchapter V differs from Chapter 13 in its provisions for the treatment of certain secured claims.

Chapter 13 has provisions that prevent the "strip-down" of a residential mortgage[4] and that require certain secured claims to be paid in full, regardless of the value of the collateral. For example, a Chapter 13 debtor cannot "strip down" a claim secured by a purchase-money security interest in a vehicle purchased within 910 days of the filing of the petition under the so-called "hanging paragraph" to § 1325(a)(5), which prohibits bifurcation under § 506(a) of such claims.[5]

In a Subchapter V case, § 1190(3) permits modification of a residential mortgage if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value have been "used primarily in connection with the small business of the debtor."

For example, assume that the debtor's principal residence is worth $ 300,000 and is encumbered by a first mortgage in the amount of $ 270,000 and a second mortgage that secures a debt of $ 100,000 that the debtor incurred for use in the debtor's business. A debtor cannot

[4] § 1322(b)(5). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:26.
[5] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:20.

reduce the secured portion of the business debt to $ 30,000 in a chapter 13 case but can do so in a Subchapter V case.

Subchapter V does not contain a special provision like the "hanging paragraph" that prohibits bifurcation of certain secured claims. Thus, for example, if the debtor owns a motor vehicle subject to the "hanging paragraph" worth $ 15,000 encumbered by a $ 25,000 debt, the Subchapter V debtor may pay the value of the vehicle, with interest, and treat the $ 10,000 deficiency as an unsecured claim. In a Chapter 13 case, the debtor must treat the entire claim as secured.

On the other hand, the § 1111(b)(2) election is applicable in a Subchapter V case. It permits an undersecured creditor to elect to treat its claim as fully secured, unless the collateral is of "inconsequential value."[6] In this circumstance, if the debtor is retaining the property, cramdown requires that the creditor retain its lien[7] and receive payments over time that (1) have a value that equals the value of the collateral and (2) total the amount of the entire claim.[8]

[6] SBRA Guide § VIII(E)(1).
[7] § 1129(b)(2)(A)(i)(I), applicable under § 1191(b)(1).
[8] § 1129(b)(2)(A)(i)(II), applicable under § 1191(b)(1).

In the mortgage example, assuming an interest rate of six percent, a monthly payment of $ 1,667 for five years,[9] or $ 883 for ten years,[10] meets the payment requirement. Monthly payments are $ 555 over 15 years and $ 417 over 20.[11]

In a Chapter 13 case, the plan generally must provide for a secured claim either by (1) curing prepetition arrearages during the term of the plan and providing for the continuation of regular postpetition payments, which may extend beyond the term of the plan under § 1322(b)(5) or (2) paying the amount of the allowed secured claim, with interest, over the term of the plan, which may not exceed five years,[12] under § 1325(a)(5)(B).[13] The second alternative requires that the monthly payments be in equal amounts.

Subchapter V, however, does not have a restriction on the term of the plan or a requirement for equal monthly payments.

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[9] The value of the collateral is $ 30,000. The monthly payment to amortize that amount over five years with six percent interest is $ 580, a total of $ 34,800. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another $ 65,200, which can be paid in monthly payments over five years of $ 1,067. The total monthly payment is $ 1,667 ($ 580 + $1,067).

[10] The value of the collateral is $ 30,000. The monthly payment to amortize that amount over ten years with six percent interest is $ 333, a total of $ 39,968. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another $ 60,032, which can be paid in monthly payments over ten years of $ 500. The total monthly payment is $ 833 ($ 333 + $ 500).

[11] SBRA Guide VIII(E)(1) contains a table that shows calculations for monthly payments for the terms stated in the text and for terms of 25 years ($ 333), and 30 years ($ 278). Amortization of $ 30,000 with interest at six percent over 53 years requires monthly payments of $ 156.43, which results in payments that total $ 100,113.

[12] § 1322(d). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:9

[13] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman CHAPTER 13 PRACTICE AND PROCEDURE § 5:10, 5:13.

The Subchapter V PDI test is more favorable to debtors

Both Chapter 13 and Subchapter V have "projected disposable income" ("PDI") tests, but they differ.

In a Chapter 13 case, if a plan provides for less than full payment of unsecured claims, a debtor must pay "projected disposable income" to unsecured creditors if the trustee or a creditor objects to confirmation. § 1325(b). (The Chapter 13 trustee always objects.)

The PDI requirement in a Sub V case applies only in the cramdown situation. If all classes of impaired creditors accept the plan, the PDI requirement is not applicable.[14] In a cramdown case, the requirement is applicable regardless of whether an objection is filed.

Subchapter V has a different method for the calculation of disposable income. In a Chapter 13 case, the calculation of disposable income is based on the debtor's "current monthly income,"[15] and an "above-median" debtor[16] must use the so-called "means test" standards in calculating permissible deductions.[17]

In a Subchapter V case, § 1191(d) defines disposable income as "income that is received by the debtor and that is not reasonably necessary to be expended" for support, payment of

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[14] *See In re Walker,* 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8). In *Walker,* the debtor's plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan, but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate. The creditor urged the court to extend the time for payment of PDI to five years. The court on the facts held that the creditor had not shown a lack of good faith.

[15] Section 101(10A) defines "current monthly income." It is the average of the debtor's income (as the statute defines it) in the full six months preceding the filing of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:8, 8:9, 8:10.

[16] W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12.

[17] W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:30.

domestic support obligations, and business expenditures. The PDI definition in subchapter V does not use "current monthly income," and it does not require the "means test" standards.[18]

The "applicable commitment period" for the payment of projected disposable income in a Chapter 13 case under § 1325(b)(4) is three years for a "below-median" debtor and five years for an "above-median" debtor. The required time for payment of PDI in a Sub V case is a minimum of three years and a maximum of five years. § 1191(c)(2). The court determines the length of the period, but the statute provides no standards for making the decision.[19] For an above-median debtor, therefore, the *maximum* period for payment of PDI in a Sub V case is five years, the *minimum* (and only) period in a Chapter 13 case.

Finally, a debtor cannot "prepay" PDI in a Chapter 13 case and end the case; the case must remain open for the entire applicable commitment period.[20] The Sub V PDI test permits the debtor to pay the value of projected disposable income, thus permitting payment in a lump sum or over a shorter period. § 1191(c)(2)(B).

Times for filing of plan and commencement of payments

In a Chapter 13 case, the debtor must file the plan within 14 days of the filing of the petition (or the date of conversion to Chapter 13, if originally filed under another chapter), Bankruptcy Rule 3015(b), and must commence payments under the plan within 30 days, § 1326(a), unless the court orders otherwise.

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[18] SBRA Guide VIII(B)(4)(i).
[19] SBRA Guide VIII(B)(4)(ii).
[20] *E.g.,* Whaley v. Tennyson (*In re Tennyson),* 611 F.3d 873 (11th Cir. 2010) (Above-median debtor with no disposable income must remain in Chapter 13 case for five years.). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:66.

The time for the filing of a Sub V plan is 90 days, unless the court extends it. § 1189(b). Subchapter V does not require payments before confirmation.

Payment of administrative and priority claims under the plan; interest on priority tax debts.

Chapter 13 permits payment of administrative and priority claims in deferred payments over the term of the plan. § 1322(b)(2). The debtor does not have to pay postpetition interest on unsecured priority tax claims.[21]

In a Chapter 11 case, a plan must pay administrative and priority claims, other than priority tax claims, in full on the effective date, unless the creditor agrees to different treatment, § 1129(a)(9)(A), (B), except that, in the case of cramdown confirmation of a plan in a subchapter V case, the plan may provide for payment of administrative expenses under the plan. § 1191(e). For example, although a Chapter 13 plan may provide for payment of a prepetition domestic support obligation over the term of the plan, a Sub V debtor must pay it in cash on the effective date.

Section 1129(a)(9)(C) permits payment of a priority tax claim in installments but requires payment of interest at the applicable governmental rate.

Only the debtor may propose a postconfirmation modification of the plan in a Sub V case

The Chapter 13 trustee or a creditor, as well as the debtor, may propose a postconfirmation modification of a plan. § 1329(a). The trustee or a creditor may do so, for example, to require the debtor to increase payments based on higher earnings or reduced

[21] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 6:16.

expenses or the debtor's receipt of proceeds from the postpetition sale of an asset.[22] Only the debtor may propose a postconfirmation modification in a Sub V case. § 1193(b), (c).[23]

Postpetition assets and earnings as property of the estate

In a Chapter 13 case, postpetition assets and earnings are property of the estate under § 1306(a). Depending on the terms of the plan and the confirmation order and the court's interpretation of the vesting provisions of § 1327(b), postpetition assets and earnings may continue to be property of the estate after confirmation.[24]

Postpetition assets and earnings are not property of the estate in a Sub V case when it is filed.[25] If the court confirms a plan under the "cramdown" provisions of § 1191(b), however, postpetition assets and earnings are included in property of the estate. § 1186(a).

An important consequence of these rules is what happens in the event of conversion of the case to Chapter 7.

In a Chapter 13 case converted to Chapter 7, postpetition assets and earnings are not property of the Chapter 7 estate, § 348(f)(1)(A), unless the case is converted in bad faith. § 348(f)(2).[26] Absent bad faith, therefore, a Chapter 13 debtor retains all postpetition earnings and assets upon conversion to Chapter 7, regardless of whether conversion occurs before or after confirmation.

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[22] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 11:12, 11:13.
[23] SBRA Guide VIII(C).
[24] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:19, 10:11, 10:12.
[25] SBRA Guide XI.
[26] W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 20:11.

Preconfirmation conversion of a Sub V case has the same consequence, except that the debtor's bad faith is not a consideration. Conversion to Chapter 7 after confirmation of a *consensual* plan has the same result, because confirmation of a consensual plan does not put postpetition assets and earnings into the estate.

When conversion of a Sub V case occurs after cramdown confirmation under § 1191(b), the issue is more complicated. Section 1186(a) states that, if a plan is confirmed under § 1191(b), property of the estate includes postpetition assets and earnings. Accordingly, the Chapter 7 estate at the time of conversion would include the debtor's postpetition assets and earnings.

Section 1141(b), however, provides that confirmation of a Chapter 11 plan vests property of the estate in the debtor, unless the plan or confirmation order provides otherwise. If property of the estate vested in the debtor at confirmation, that property would remain property of the debtor upon postconfirmation conversion to Chapter 7. SBRA did not change the applicability of § 1141(b) in Sub V cases.

Section § 1141(b) conflicts with § 1186(a). Presumably, the later and more specific provisions of § 1186(a) prevail over § 1141(b) in a Sub V case.[27] Under this view, the debtor's postpetition assets and earnings are property of the Chapter 7 estate upon conversion.

Timing and scope of discharge

Discharge in a Chapter 13 case occurs under § 1328(a) after the debtor completes payments or under § 1328(b) if the court at the end of the case permits a hardship discharge based on the debtor's justified inability to complete plan payments.

In a Subchapter V case, discharge occurs upon confirmation of a consensual plan.[28]

[27] SBRA Guide XI(B)(1).
[28] SBRA Guide X(A).

In the cramdown situation, discharge does not occur until the debtor completes payments due within the first three to five years of the plan, as the court determines. § 1192.[29] A chapter 13 discharge after completion of plan payments under § 1328(a) applies to more debts than a discharge in a Chapter 7 case,[30] and a Sub V discharge is subject to the same exceptions as a Chapter 7 discharge.[31] The § 1328(a) discharge, therefore, discharges some debts that are excepted in a Sub V case.

Under § 1328(c), the exceptions to a "hardship discharge" under § 1328(b) are the same as in a Chapter 7 or Subchapter V case.

III. Subchapter V vs. Chapter 11 Small Business Case

If a debtor eligible for Subchapter V has debts less than $ 3,024,725, the Chapter 11 case of a debtor who does not elect Subchapter V will be a "small business case."

A. Advantages of Small Business Case

A small business case offers some advantages for the debtor.

There is no trustee. The debtor has a longer time to file a plan, 300 days instead of 90.

"Cramdown" confirmation in a small business case does not require satisfaction of the projected disposable income test for an entity. (A creditor's objection in the case of an individual will trigger a PDI requirement. § 1129(a)(15)).

A small business debtor that is an entity receives its discharge upon confirmation of the plan, regardless of whether it is consensual or cramdown. § 1141(d)(1). The same rule applies in a subchapter V case when the court confirms a consensual plan under § 1191(a).[32] Upon

[29] SBRA Guide X(B).
[30] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 21:16, 21:18.
[31] SBRA Guide X.
[32] SBRA Guide X(A).

cramdown confirmation of a plan, however, the Sub V debtor does not get a discharge until completion of payments for three to five years, as the court determines. § 1192.[33] In addition, it is clear that the exceptions to discharge in § 523(a) do not apply to an entity in a small business case or in a Sub V case when consensual confirmation occurs.[34], whereas courts disagree as to whether the exceptions apply in the case of an entity.[35]

B. Disadvantages of Small Business Case

A small business case has significant disadvantages for a debtor, especially an individual.

Requirement of § 1125 disclosure statement

Section 1125 requires the proponent of a Chapter 11 plan to provide a disclosure statement to creditors prior to the solicitation of votes on the plan containing "adequate information" to enable creditors to make an informed judgment about the plan. The court must approve the disclosure statement after notice and a hearing.

In a small business case, § 1125(f) permits the court to determine that the plan itself provides "adequate information" and allows the court to conditionally approve the disclosure statement, with a hearing on final approval occurring at the confirmation hearing.

Section 1125 does not apply in a Sub V case unless the court orders otherwise. Instead, Subchapter V requires only that the plan contain a brief history of the business operations of the debtor, a liquidation analysis, and projections regarding the ability of the debtor to make payments under the proposed plan. § 1190(1). The Sub V plan does not have to include "adequate information," and the court's approval of the information is not required.

[33] SBRA Guide X(B).
[34] SBRA Guide X(A).
[35] SBRA Guide X(B).

Presumably, materially inaccurate or misleading information could result in a court finding that the plan is not proposed in good faith.

Deadline for confirmation

In a small business case, the court must confirm the plan within 45 days of its filing under § 1129(f), unless the court extends the time under § 1121(e)(3). The order extending time must be signed before the deadline expires. § 1121(e)(3)(C). Subchapter V contains no deadline for confirmation.

Cramdown confirmation is more difficult for a debtor in a small business case

Confirmation in a Chapter 11 case requires that at least one impaired class of creditors, determined without regard to the votes of insiders, accept the plan. § 1129(a)(10).

If this requirement is met but one or more classes do not accept the plan, § 1129(b) permits cramdown if the plan is "fair and equitable." With regard to a class of unsecured creditors, § 1129(b)(2)(B) contains the "absolute priority rule." The absolute priority rule provides that, unless the claims are paid in full, holders of equity interests may not receive or retain anything under the plan.

Neither obstacle exists in a Sub V case. The court may confirm a plan even if no impaired class of creditors accepts, and the absolute priority rule is eliminated. § 1191(b), (c).[36]

Instead, cramdown requires satisfaction of a projected disposable income test,[37] a heightened feasibility finding,[38] and the inclusion in the plan of "appropriate remedies" for creditors in the event of default.[39] The projected disposable income rules apply to cramdown confirmation in the case of an entity as well as in the case of an individual.

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[36] SBRA Guide VIII(B).
[37] §1191(c)(2). SBRA Guide VIII(B)(4)
[38] § 1191(c)(3)(A). SBRA Guide VIII(B)(5).
[39] § 1191(c)(3)(B). SBRA Guide VIII(B)(5).

Provisions with regard to the cramdown of secured claims are the same. § 1191(c)(1).

Subchapter V permits modification of a residential mortgage in some circumstances

In a traditional Chapter 11 case, as in a Chapter 13 case, a plan cannot modify a claim secured only by real estate that is the debtor's principal residence. § 1123(b)(5). Accordingly, a plan may not "strip down" a residential mortgage claim to the value of the collateral and treat the deficiency claim as unsecured.

In a Sub V case, § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value have been "used primarily in connection with the small business of the debtor."[40]

Only the debtor may file a plan in a Sub V case

In a small business case, a party other than the debtor may file a plan after the expiration of the debtor's exclusivity period of 180 days. § 1121(e). The court may extend the period or order otherwise for cause. Only the debtor may file a plan in a Sub V case. § 1189(a).

[40] Query whether an individual whose debts exceed the limits for qualification as a "small business debtor" under § 101(51D)(A) but who qualifies for subchapter V under the temporary $ 7.5 million debt limit under the CARES Act and BTATCA meets the requirement in (B) for use of loan proceeds for the debtor's "small business" because such a debtor is not a "small business debtor."

In an individual small business case, property of the estate includes postpetition assets and earnings

In a traditional Chapter 11 case, § 1115(a) includes postpetition assets and earnings in the estate of an individual.[41] An important consequence for the debtor is that, if the case converts to Chapter 7, the Chapter 7 estate includes postpetition assets and earnings.[42]

Section 1115(a) is not applicable in a Sub V case. § 1181(a). Section 1186(a) provides, however, that if the court confirms a plan under the cramdown provisions of § 1191(b), property of the estate includes postpetition assets and earnings.

If a Sub V case of an individual is converted to Chapter 7 prior to confirmation, it is clear that the Chapter 7 estate does not include postpetition earnings and assets. As the earlier discussion of the issue in connection with Chapter 13 cases indicates, however, it is likely that postpetition assets and earnings will be property of the Chapter 7 estate if conversion occurs after cramdown confirmation.

A single unsecured creditor may invoke the PDI requirement in an individual's small business case

Section 1129(a)(15) provides that confirmation of a plan in an individual case requires the debtor to commit projected disposable income to the plan if a creditor objects, unless the plan provides for payment in full. The requirement is applicable if a single creditor objects, even if the class of unsecured creditors has accepted the plan. If the PDI requirement is applicable, the debtor must use PDI to make plan payments for the longer of five years or the term of the plan.

Section 1129(a)(15) is inapplicable in Subchapter V cases. §§ 1181(a), 1191(a), 1191(b). Thus, the PDI requirement is not applicable at all if all impaired classes accept the

[41] SBRA Guide XI(A).
[42] *Id.*

plan.[43] Moreover, when the PDI requirement applies in the cramdown situation, the *maximum* period for the payment of PDI is five years, even if the plan extends for a longer period.

Discharge of an individual in a Subchapter V case occurs at confirmation of a consensual plan

In a Chapter 11 case, discharge of an individual does not occur until completion of payments under the plan under § 1141(d)(5)(A), or the court grants a "hardship" discharge at the end of the case under § 1141(d)(5)(B).

Section 1141(d)(5) does not apply in a Sub V case. § 1181(a). Accordingly, if the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation. As a result, an individual gets a discharge upon confirmation of a consensual plan.

If cramdown confirmation occurs, the debtor's discharge does not occur until completion of payments for three to five years, as the court determines, under § 1192.

Sub V does not contain a provision for a hardship discharge. It is not necessary in the case of consensual confirmation because discharge occurs at confirmation. In the case of cramdown confirmation, the debtor may seek postconfirmation modification of the plan under § 1193(b) to deal with postconfirmation inability to make payments.

Automatic stay is effective in later case filed by Subchapter V debtor, but not by debtor in a small business case

Section 362(n) generally provides that the automatic stay of § 362(a) does not apply in a case in which the debtor was the debtor in a small business case that was dismissed in the two years preceding the filing of the current case or in which a plan was confirmed during that

[43] *See In re Walker,* 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8) and *supra* note 14.

period. Because it applies to a debtor in a "small business case," it does not apply to a debtor in a Sub V case.

V. Subchapter V vs. Traditional Chapter 11

If a debtor eligible for Subchapter V is not a small business debtor, it will be in a traditional chapter 11 case if it does not elect application of Subchapter V.

A traditional Chapter 11 case generally has the same advantages and disadvantages for a debtor as a small business case, with these differences.

1. No deadline for confirmation exists in a traditional Chapter 11 case.

2. The modifications to the disclosure statement rules applicable in a small business case under § 1125(f) do not apply.

3. The exclusivity period for the debtor to file a plan is 120 days, rather than 180. § 1121(b).

4. The rules in § 1116 for the filing and reporting of financial and other information that govern a small business case, which apply in a Sub V case, § 1187(a), do not apply in a traditional Chapter 11 case.

5. The provision for elimination of creditors' committees unless the court orders otherwise apply only in Subchapter V and small business cases.

MAY-JUNE 2022 SUPPLEMENT

TO

A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019 (JULY 2021 REVISION)

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

This May-June 2022 Supplement supplements the July 2021 and May 2022 compilations of *A Guide to the Small Business Reorganization Act of 2019,* which updated the work originally published at 93 Amer. Bankr. L. J. 571 (2019).

This Supplement is in two parts. The first part supplements the July 2021 compilation with revisions and new material that were in the May 2022 Supplement and the May 2022 compilation. The May 2022 supplement and compilation incorporate material in an interim February 2022 Supplement prepared for use at continuing legal education programs. The second part is the June 2022 Supplement, which supplements the May 2022 compilation with additional revisions and material. The June Supplement begins at page 34.

All revisions are in the June 2022 compilation.

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

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

MAY 2022 SUPPLEMENT

I. Introduction

Page 3, footnote 10, add to end of Ventura citation:

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

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

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

Page 15, add at end of page:

Most courts have determined that the burden is on the debtor to establish eligibility for subchapter V if challenged.[1] A contrary view is that the objecting party as the moving party has the burden of proving that the debtor is not eligible.[2] 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).[3] A district court or bankruptcy appellate panel has jurisdiction to hear an appeal

[1] NetJets Aviation, Inc. v. RS Air, LLC (*In re* RS Air, LLC), 2022 WL 1288608 at *8-9 (B.A.P. 9th Cir. 2022); 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, 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).

[2] *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).

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

In *Gregory Funding v. Ventura (In re Ventura),* 2022 WL 1188367 (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.

from an interlocutory order, with leave of the court, under 28 U.S.C. § 158(a)(3) and § 158(b)(1), respectively. 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.[4]

Page 18, add at end of footnote 42

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).

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.

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).

[4] 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).

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

Page 20, add at beginning of section

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.[5] Similarly, an entity formed for the sole purpose of acquiring and selling interests in aircraft and providing depreciation tax benefits to its sole member is eligible for subchapter V even though it has no profit motive.[6]

Page 23, add at end of section

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

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

[5] *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).

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

> 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].

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

Page 26, insert after end of second full paragraph

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?

Page 30, add after first full paragraph:

In *In re Vertical Mac Construction, LLC,* 2021 WL 3668037 (Bankr. M.D. Fla. 2021), the debtor filed a subchapter V case to liquidate its assets and disburse the sale proceeds to

creditors. Shortly after filing the petition, the debtor moved to sell its assets under § 363, and the court approved the sale.

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

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

The bankruptcy court in *RS Air* had found that the debtor was engaged in commercial or business activities on the petition date by litigating with the objecting creditor, paying registry fees for its aircraft, remaining in good standing as a limited liability company under state law, filing tax returns, and paying taxes. The bankruptcy court also found that the debtor intended to resume business operations once it was able to do so. The BAP concluded that these activities were "commercial or business activities" within the meaning of the eligibility statute. *Id.* at *6.

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

business that had ceased operations on the filing date is sufficient to be "engaged" in business activities. *Id.* at 397.

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

Page 31, insert before last full paragraph

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.[7]

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

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

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

Page 41, delete the third full paragraph and replace it with:

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

[7] 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).

Congress could not have intended such results. The appropriate interpretation of (B)(iii) is to limit its application to an affiliate of an issuer that is subject to the reporting requirements specified in (B)(ii).[8]

IV. The Subchapter V Trustee

IV A. Appointment of Subchapter V Trustee

Page 43, add at end of section

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.*

[8] *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.").

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.

IV B. Role and Duties of the Subchapter V Trustee

Page 44, add after first full paragraph:

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).

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

Page 46, add at end of first full paragraph

The trustee's duty to appear and be heard regarding confirmation gives the trustee standing to object to confirmation.[9]

Page 46, line 3 of second full paragraph, add footnote after "condition":

In re Ozcelebi*,* 639 B.R. 365 (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.").

Page 47, add new paragraph at end of section

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

[9] *In re* Topp's Mechanical, Inc.*,* 2021 WL 5496560 at *1 n.1 (Bankr. D. Neb. 2021)

then to conclude that the subchapter V trustee's role was intentionally designed to be less adversarial."

Nevertheless, 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.[10]

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V. Debtor as Debtor in Possession and Duties of Debtor

V A. Debtor as Debtor in Possession

Page 66, after second line, add new text:

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

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

other professionals[11] and their compensation.[12] The debtor cannot use cash collateral[13] or use, sell, or lease property outside the ordinary course of business[14] 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 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.[15] Thus, failure to take such actions may constitute cause for dismissal or conversion under § 1112(b)(1).[16]

V B. Duties of Debtor in Possession

Page 67, add paragraph at end of footnote 145:

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

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[11] § 327(a).

[12] § 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.

[13] § 363(c)(2).

[14] § 363(b).

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

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

perform the duties prescribed in (a)(6). *See In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 6 (Bankr. D. P.R. 2022).

V C. Removal of Debtor in Possession

Page 70, sixth line, insert new sentence after footnote 158:

A court may, after notice and a hearing, remove a debtor from possession *sua sponte.*[17]

Page 71, insert new paragraph after second full paragraph:

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

[17] *In re* Pittner*,* 2022 WL 348188 (Bankr. E.D. Mass. 2022).

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

requirement of conversion or dismissal for cause, the court considered whether dismissal or conversion was in the best interest of creditors and the estate. *Id.* at *3.[19]

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

The court noted that § 1112(b)(1) requires conversion or dismissal for cause "unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." Although § 1104(a) does not apply in a subchapter V case,[20] the court continued, subchapter V contains "its own parallel provision in § 1185(a)'s authorization for the court to remove a debtor in possession for cause, with a resulting increase under § 1183(b)(5) in the powers of the subchapter V trustee." *Id.* at *3.

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

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

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

[19] Not surprisingly, the court rejected the debtor's contention that "moving forward on a purchase and sale agreement outside of the Court-established deadlines would be a better option" as an appropriate response to the failure to comply with the order. 2022 WL 348188 at *2.
[20] New § 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.

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VI. Administrative and Procedural Features of Subchapter V

VI D Time for Filing of Plan

Page 82, add footnote at end of second paragraph:

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).

Page 83, add new footnote at end of first paragraph:

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."

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

Page 94, add to footnote 227, after E.g.:

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

Page 94, add text at end of line 3 after footnote 226:

Similarly, an error in calendaring the deadline for filing a plan may not provide a basis for an extension.[21]

The need to resolve disputes concerning the debtor's interests in property before filing a plan may justify extending the deadline,[22] 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.[23]

VII. Contents of Subchapter V Plan

Page 97, line 1, add footnote after "1123":

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).

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[21] *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.

[22] *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.

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

Page 97, add at end of footnote 240:

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).

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

Page 99, third line of third paragraph, add footnote after "residence":

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.

Page 99, end of third paragraph, add new footnote:

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.

Pages 100-101, footnotes 251 and 254, change Ventura citation to:

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).

VIII. Confirmation of the Plan

VIII A. Consensual and Cramdown Confirmation in General

Page 105, add after first paragraph of section

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.[24]

Page 106, add to footnote 270:

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).

Page 107, add text at end of page:

The type of confirmation also 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 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.

[24] *E.g., 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).

If the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation,[25] and the subchapter V trustee's services are terminated upon substantial confirmation of the plan.[26] 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,[27] and the trustee continues to serve until that time.[28] Full administration cannot occur until three to five years after confirmation, depending on the period during which the debtor must make payments.[29]

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.[30]

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.

The court denied the debtor's request to administratively close a subchapter V case in *In re Gui-Mer-Fe, Inc.,* 2022 WL 1216270 (Bankr. D. P.R. 2022). The court concluded that a case can be closed only when it is fully administered and that the debtor's concerns about administrative costs were unfounded because the debtor was exempt from paying US. Trustee

[25] See § X(A).
[26] See § IV(D)(1).
[27] See § X(B).
[28] See § IV(D)(1).
[29] See § VIII(D)(4)(ii).
[30] *See In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at *3-5 (Bankr. D. P.R. 2022).

fees[31] and because its duty to file reports under § 308[32] and Bankruptcy Rule 2015 terminated upon confirmation. *Id.* at *8.[33] *See also id.* at * 6.

VIII B. Cramdown Confirmation Under New § 1191(b)

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

Page 111, add at end of section

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.[34]

[31] 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).

[32] Although § 308 applies only in a small business case, § 1187(b) requires a subchapter V debtor to comply with it.

[33] 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).

[34] *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.

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

Page 111, add at end of last line on page:

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).[35]

Page 112, delete line 1 and replace with:

The first is in subparagraph (A). Section 1191(c)(2)(A) requires that the plan provide that all of the

Page 112, fourth line, insert paragraph break after footnote 289, delete "Alternatively, the plan may provide that" and replace with this text:

The second alternative in subparagraph (B) is that the plan provide

Page 112, sixth line, after footnote 290, insert this text:

Courts have confirmed plans under the § 1191(c)(2)(B) alternative that provide for pro rata distributions to unsecured creditors from cash derived from a capital contribution from the debtor's equity owner[36] or the postpetition liquidation of an asset[37] in an amount not less than the value of the debtor's disposable income.

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[35] *See* Legal Service Bureau, Inc. v. Orange County Bail Bonds (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 (B.A.P. 9th Cir. 2022). The court did not discuss the issue, but the point is implicit in its holding. *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.").

[36] *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.

[37] 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.

Page 112, line 6, after footnote 290 and insertion of previous text, insert paragraph break before "The court".

VIII B 4 i. Determination of projected disposable income

Page 113, add at end of page

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.[38]

Page 116, add after first two lines

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.

Page 118, add at end of section

The determination of objections to confirmation based on the PDI requirement requires the court to receive evidence regarding their accuracy and reliability, which may include testimony from an accountant or financial advisor as well as the debtor's principal.[39]

[38] Alyssa Nelson, *Are Social Security Benefits "Disposable Income" for the Purposes of Subchapter V?,* 40-Sept Amer. Bankr. Inst. J. 30 (2021).
[39] *In re* The Lost Cajun Enterprises LLC, 2021 WL 6340185 (Bankr. D. Col. 2021).

VIII B 4 ii. Determination of period for commitment of projected disposable income for more than three years

Page 121, add after third full paragraph, at end of section

Several courts have addressed the issue of the period over which the debtor must pay disposable income to creditors.

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), which Section VIII(D)(8) discusses in detail, involved a plan that all impaired classes had accepted, so the PDI requirement did not apply. The court rejected the objecting creditor's contention that the debtor's failure to propose payments for more than three years established a lack of good faith.

In re Urgent Care Physicians, Ltd., 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), considered arguments by the U.S. Trustee and creditors that the court should require the debtor to make payments for five years instead of the three years that the plan proposed for the plan to be fair and equitable. The court concluded that a three-year term was appropriate.

The legislative history of subchapter V, the court said, indicated that Congress had recognized that small businesses typically have shorter life-spans than large businesses and that it had enacted subchapter V to permit small businesses to obtain bankruptcy relief in a timely, cost-effective manner and remain in business, thereby benefitting not only the owners, but also employees, suppliers, customers, and others who rely on the business.

Congress's recognition that small businesses typically have shorter life-spans, the court reasoned, "suggests that a plan term of three years is more reasonable, generally speaking (or as a default), than a five-year term, absent unusual circumstances." *Id.* at *10. The court added that Congress's concern for employees, customers, and others, as well as for the small business itself,

"reflects an intent to balance the shorter life-span planning of small businesses and timely cost-effective benefits to debtors, against the benefits to creditors." *Id.*

The *Urgent Care Physicians* court concluded that a three-year term achieved the proper balance. The court noted that the debtor provided outpatient health care for urgent needs, had deferred payments to insiders and some healthcare equipment payments, and had committed to paying at least its projected disposable income. Extending the term for two more years, the court continued, would further defer salary restoration to key staff, and further deferring full repayment of equipment charges could jeopardize availability of the equipment. *Id.* at *11.

The court concluded, *id.* at *11 (citation omitted):

> While at first blush the simple math of an extended plan term might seem to generate a higher payment to unsecured creditors, the inherent risks to the small business debtor of that extension could defeat the unsecured creditors' desire for greater recovery. The three-year term here is fair and equitable, as it properly balances the risks and rewards for both the debtor and its creditors. In these circumstances, the Court declines to fix a longer plan period. A longer plan term would disproportionately harm the debtor in forcing it to accrue additional unpaid expenses and potentially emerge from its reorganization saddled with more debt.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), the Bankruptcy Appellate Panel of the Ninth Circuit described the three-year period as a "baseline requirement." *Id.* at *5. The court explained, *id.*:

> As part of the streamlined, flexible process under subchapter V, the Bankruptcy Code sets a baseline requirement that a debtor commit three years of disposable income, while

it also affords the bankruptcy court discretion to require more as a condition of finding a plan fair and equitable.

The court observed that the court's role in setting a period longer than three years is "unique to subchapter V, noting that the period for payment of disposable income in chapter 13 cases is set by statute and in chapter 12 cases by the debtor, *id.* at *5, as earlier text discusses. Because the bankruptcy court had not set a commitment period longer than three years, the court ruled, the plan satisfied the minimum confirmation requirement if it provided for payment of disposable income based on a three-year period.

The *Orange County Bail Bonds* court affirmed confirmation of the plan because it met the alternative requirement of subparagraph (B) of § 1191(c)(2) that the plan provide for payments having a present value of not less than the debtor's disposable income for three years. Specifically, the plan provided for about $ 433,000 that the debtor realized from the postpetition liquidation of an estate asset to make payments under the plan, which exceeded its projected disposable income for three years of about $ 287,000. *Id*. at *6.[40]

[40] The opinion in *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), states that the liquidation proceeds were about $ 433,000, *id.* at *3, that the plan proposed to pay the objecting creditor, Legal Service Bureau, Inc., d/b/a Global Fugitive Recovery ("Global"), which the plan separately classified, $100,000 of those proceeds, *id.*, and that the bankruptcy court's confirmation order required payment to Global of $127,794.35. *Id.* at *4. The opinion further states that the plan proposed to pay Global from its actual disposable income for the five years after confirmation, but the debtor stated that because it would pay only actual disposable income, it was possible that Global could receive nothing from future earnings or that it might not be paid in full. *Id.* at *3. The debtor projected total disposable income of about $287,000 over the three-year period after confirmation and about $493,000 over five years. *Id.*

The BAP opinion further states that, in response to an objection to confirmation that § 1191(c)(2) requires a debtor to commit at least three years of projected disposable income to the plan, the debtor amended the plan to provide that it would not receive a discharge unless it paid all actual disposable income over a five-year period and it paid the largest creditor, separately classified, a minimum of $181,000 from actual disposable income. *Id.* at *3.

The BAP opinion does not recite what happened to the liquidation proceeds that Global did not receive or the treatment of unsecured claims in the other class.

A review of the plan and confirmation order in the bankruptcy court clarifies the provisions of the plan. *In re* Orange County Bail Bonds, Inc., Bankruptcy Case No. 8:19-bk-12411-ES (the "Bankruptcy Case").

Although the confirmed plan separately classified Global and general unsecured creditors, it provided for the classes to share pro rata in the liquidation proceeds remaining after payment of priority and administrative claims and in the debtor's actual disposable income. Plan of Reorganization for Small Business Debtor, Bankruptcy Case ECF No. 285 (Mar. 2, 2021), at 1 (¶ C), 3 (¶ 4.01, Class 2 and Class 3 treatment). The provisions for treatment of

VIII B 5. Requirements for feasibility and remedies for default

Page 122, add after first full paragraph (ending with "in the plan")

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).

Page 124, add after first two lines

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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 of the subchapter V trustee, unpaid postpetition compensation due to the debtor's principal, and priority claims in the total amount of $ 300,567.37, leaving a balance of $132,405.58 for distribution to unsecured creditors. Global received $127,794.35, and the only two other unsecured creditors received a total of $4,611.23.

The bankruptcy court confirmed the amended plan, concluding that it met the requirements of subparagraph (A) of § 1191(c)(2). Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 at *9 (B.A.P. 9th Cir. 2022).

The Bankruptcy Appellate Panel ruled that the plan did not meet the requirements of subparagraph A because it did not provide for payment of the debtor's projected disposable income. "Instead," the court explained, "it provides for an effective date payment of $427,972.95 and possible payment of an unknown amount from Debtor's actual disposable income." *Id.* at *5.

The BAP rejected the debtor's argument that the plan complied with subparagraph B because the effective date payment of the liquidation proceeds plus the minimum payment of $181,000 was greater than projected disposable income over five years.

The court advanced two reasons. First, the plan made discharge contingent on the minimum payments, but it did not require the payment of any specific amount. Second, the effective-date value of the payments could not be determined because the plan did not specify the timing or actual amount of any future payment. *Id.* at *5.

Nevertheless, the BAP concluded that the plan satisfied § 1191(c)(2)(B) because the effective date payment of the liquidation proceeds (about $433,000) exceeded the debtor's projected disposable income (about $287,000) for the minimum three-year period. *Id.* at *6. Therefore, the BAP ruled that the bankruptcy court "did not clearly err in finding that the Plan is fair and equitable to [the objecting creditor]. Although the confirmation order referenced § 1191(c)(2)(A), any such error was harmless. And we may affirm on any ground fairly supported by the record." *Id.* (citations omitted).

Other courts have similarly relied on testimony from an accountant[41] or credible testimony from the debtor's principal[42] to conclude that a plan meets the feasibility requirement of § 1191(c)(2).

Page 124, add at end of section

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.

VIII D 1 Classification of claims; unfair discrimination

Page 128, add at end of section

Unfair discrimination may also occur when a plan proposes to pay an undersecured creditor who exercises the § 1111(b)(2) election[43] more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.[44]

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

Page 129, add at end of second line

Other bankruptcy courts in the Tenth Circuit have reached the same result.[45]

[41] *In re* Moore & Moore Trucking, LLC, 2022 WL 120189 (Bankr. E.D. La. 2022).
[42] *In re* Urgent Care Physicians, 2021 WL 6090985 (Bankr. E.D. Wisc. 2021).
[43] Section VIII(E)(1) discusses the § 1111(b)(2) election.
[44] *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).
[45] *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).

VIII E. § 129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases

VIII E 1. The § 1111(b)(2) election

Page 142, add to footnote 352

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).

Page 142, last full paragraph, replace first two sentences

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."

Page 148, add at end of section

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.

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

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

Page 155, add text at end of page:

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)[46] indicate that at least some courts are permitting the debtor to make all payments under the plan in the absence of any objection.

[46] *See, e.g., In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 2 (Bankr. D. P.R. 2022).

The fact that the subchapter V trustee does not make payments under the plan does not, however, terminate the subchapter V trustee's services.[47]

X. Discharge

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

Page 163, add new paragraph at end of section

Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021), followed *Satellite Restaurants* and *Cleary Packaging* and likewise ruled that the exceptions to discharge in § 523(a) are not applicable to an entity in a sub V case.

XII. Default and Remedies After Confirmation

XII C Postconfirmation Dismissal or Conversion to Chapter 7

1. Postconfirmation Dismissal

Page 176, add text after last line on page, after "status":

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.[48] 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

[47] *E.g., In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 8 (Bankr. D. P.R. 2022).
[48] 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.

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.

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.*

XII C 2 Postconfirmation conversion

Page 179, insert paragraph after second line

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.

XIII. Effective Date and Retroactive Application of Subchapter V

Pages 180-82, footnotes 462, 465, and 469. add at end of each Ventura citation:

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

Pages 188 footnotes 500, 502, add at end of Ventura citation:

rev'd sub nom. Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

Page 190, after second full paragraph ending with footnote 508, add new paragraph:

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 *4 (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.

The court concluded that the amendment to elect subchapter V "cannot be allowed to cause such prejudice." *Id.* 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)."[49] *Id.* 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.

[49] *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.

JUNE 2022 SUPPLEMENT

I. Introduction

Pages 1-2, delete second paragraph on page 1 and first two paragraphs on page 2 and replace deleted text with:

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 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.[50]

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.[51] Under this legislation, § 1182(1) defines eligibility for subchapter V, with the same language that defines a "small business debtor" in

[50] SBRA, § 4(a)(11), 133 Stat. 1079, 1086.
[51] 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 was retroactive. See Section 3(B)(1); Part XIII.

§ 101(51D), except for the debt limit. On June 20, 2024, the provisions expire, and § 101(51D) will again govern eligibility for subchapter V.

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.[52] 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").[53] On June 20, 2024, the debt limits return to $ 465, 275 for unsecured debts and $ 1,395,875 for secured debts.[54]

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

Page 4, add text at end of third line, after footnote 12

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.[55]

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[52] § 109(e) governs chapter 13 eligibility.

[53] Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA") § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022). 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).

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

[55] 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.

Page 4, insert text after second full paragraph:

An individual eligible for subchapter V may also be eligible for chapter 13 if the debtor has regular income and debts that do not exceed the chapter 13 debt limit.[56] 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").[57] On June 20, 2024, the debt limits return to $ 465, 275 for unsecured debts and $ 1,395,875 for secured debts.[58]

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III. Debtor's Election of Subchapter V and Eligibility for Subchapter V

Change title of Part III as shown above

A. Debtor's Election of Subchapter V

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002).

BTATCA generally reinstates the provisions for eligibility for subchapter V as they existed prior to expiration of the temporary legislation, with two changes relating to affiliates.

Specifically, BTATCA:

(1) Reinstates the debt limit for subchapter V eligibility to $7.5 million for two years. BTATCA, §§ 2(d), 2(i)(1)(B), and adjusts it for inflation under § 104, BTATCA § 2(b).

(2) Amends the definition of "small business debtor" in § 101(51D)(B):

(A) to exclude from the definition of "small business debtor" in clause (iii) a debtor that is an affiliate of a public company instead of a debtor that is an affiliate of an issuer under the Securities Exchange Act of 1934. BTATCA § 2(a)(2);

[56] § 109(e) governs chapter 13 eligibility.
[57] Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA") § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022). 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). The court may convert a chapter 11 case to chapter 13 if the debtor requests it. § 1112(c).
[58] BTATCA § 2(i)(1)(A).

(B) to add "under this title" after "affiliated debtors" in clause (i) so that the debts of affiliated debtors are included in the debt limit calculation only if the affiliate is a debtor in a bankruptcy case, and amends conforms the definition of a debtor eligible for subchapter V.

(3) Amends § 1182(1) for two years so that, except for the debt limit, the eligibility requirements for a debtor to elect subchapter V are the same as those that define a small business debtor. BTATCA §§ 2(d), 2(i)(1)(B).

(4) Provides that, after two years, a debtor must be a small business debtor to be eligible for subchapter V. BTATCA § 2(i)(1)(B).

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

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). See note at beginning of Section III(A) in the June Supplement.

F. What Debts Are Included in Determination of Debt Limit

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). See note at beginning of Section III(A) in the June Supplement.

Revised Section III(F) moves the discussion of *In re 305 Petroleum, Inc.,* 622 B.R. 209 (Bankr. S.D. Miss. 2020) (dealing with inclusion of debts of an affiliated SARE debtor for purposes of the debt limit) to a footnote because BTATCA resolved the issue.

G. Ineligibility of Corporations Subject to SEC Reporting Requirements and of Affiliates of Such Corporations

Change title of Section III(G) as shown above.

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). See note at beginning of Section III(A) in the June Supplement.

Revised Section III(G) moves the discussion of *In re Phenomenon Market & Entertainment, LLC,* 2002 WL 162001 (Bankr. C.D. Cal. 2022) (holding that a debtor was not eligible to be a subchapter V debtor because it was an affiliate or an "issuer" under the Securities Exchange Act of 1934) to a footnote because BTATCA changes the result.

IV. The Subchapter V Trustee

B. Role and Duties of the Subchapter V Trustee

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

Page 54, insert at beginning of page:

Nevertheless, the trustee's monitoring and supervisory responsibilities include oversight of the debtor's compliance with the Bankruptcy Code.[59]

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

Page 51, first paragraph, insert after footnote 90:

Because the subchapter V trustee is a fair and impartial fiduciary with monitoring and supervisory duties and the duty to facilitate a consensual plan, courts are likely to request that the subchapter V advise the court of the trustee's positions and recommendations concerning issues affecting administration of the case.[60]

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

Page 55, delete second sentence of section, after footnote 107, and replace with:

In addition, § 1183(b)(5)(B) authorizes the trustee to operate the debtor's business when the debtor is removed from possession.[61]

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[59] *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.").

[60] *E.g., In re* 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).

[61] As originally enacted, § 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 3, 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

E. Compensation of Subchapter V Trustee

2. Compensation of non-standing subchapter V trustee

Page 62, add footnote at end of fourth full paragraph:

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 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).

V. Debtor as Debtor in Possession and Duties of Debtor

C. Removal of Debtor in Possession

Page 78, line 4, insert after footnote 175:

An incurable conflict of interest between the debtor's principal and the estate – such as the possibility of claims against the debtor's principal insiders – may establish cause.[62]

Page 140, add footnote at end of first full paragraph:

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

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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).

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

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.".

Page 83, insert after first full paragraph

The court in *In re National Small Business Alliance,* 2022 WL 2347699 (Bankr. D.C. 2022), revoked the subchapter V election of a debtor who had been removed from possession so that the case would proceed as a traditional chapter 11 case and directed the appointment of a chapter 11 trustee. The court took this action after the debtor's efforts for over a year to confirm a plan after removal from possession had been unsuccessful because neither conversion to chapter 7 nor dismissal of the case 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 is powers under § 105(a) authorized the revocation 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.

VI. Administrative and Procedural Features of Subchapter V

I. Filing of Proof of Claim; Bar Date

Page 100, insert at end of section:

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 the analysis of factors that apply in traditional chapter 11 cases.

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

Page 116, add subheading:

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

Page 119, after 4th line, delete first full paragraph and insert:

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).[63]

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.

[63] 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.[64]

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.[65] Because the typical method for meeting this requirement is periodic payments with a value equal to the value of the encumbered

[64] *See In re* Louis, 2022 WL 2055290 (Bankr. C.D. Ill. 2022).
[65] See Section VIII(B)(2).

property, compliance with this requirement may require an evidentiary hearing regarding 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 regarding 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, both the effects of confirmation differ depending on whether consensual or cramdown confirmation occurs. Later text in this Section 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."[66] 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.[67] 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.[68]

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 or helpful to its business or financial condition.[69]

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[66] See Section IV(B)(1).
[67] 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).
[68] See Section VIII(C). Section VIII(C)(1) discusses substantial consummation.
[69] The debtor in *In re National Tractor Parts, Inc.,* 2022 WL 2070923 (Bankr. N.D. Ill. 2022), sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVD-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA's claim as a general unsecured claim, payable in quarterly payments.

Because postconfirmation modification may be necessary for or helpful to the debtor's postconfirmation success, a debtor may want to preserve the flexibility of postconfirmation modification through cramdown, rather than consensual, confirmation.

Another potential advantage of cramdown confirmation is that postconfirmation payment of administrative expenses, usually compensation of the subchapter V trustee and the debtor's attorney and other professionals, is permissible in a cramdown plan under § 1191(3).[70] As a practical matter, however, it is likely that the same result can occur under a consensual plan.

If the debtor has proposed a feasible plan that all impaired classes have accepted but does not have the ability to pay administrative expenses in full on its effective date, the subchapter V trustee and debtor professionals will be hard-pressed to thwart confirmation of a consensual plan by insisting on immediate payment in full. The facts that deferral can happen anyway through cramdown confirmation and that the trustee and the debtor are charged with achieving consensual confirmation should lead to their agreement to deferred payment so that the plan complies with § 1129(a)(9)(A).

Several consequences of consensual confirmation are more beneficial to a debtor than cramdown confirmation. Some of these advantages may be achievable through a cramdown plan

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The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made *de minimis* payments totaling $ 1,428.20 to creditors in two classes but had not yet made a $ 50,000 payment to a creditor in another class or begun quarterly payments to generally unsecured creditors.

The court held that commencement of payments occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

[70] 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.[71] The result is the same in a traditional chapter 11 case.[72] 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.[73]

This difference is not important in the case of an entity because the distinction between postpetition and prepetition assets and earnings it immaterial.[74]

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).[75]

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.[76]

[71] See Section XI(B)(2).
[72] See Section XI(A).
[73] See Section XI(B)(2).
[74] See Section XI(B)(1).
[75] See Section X(A).
[76] See Section X(B).

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 of 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.[77] The sub V trustee continues to serve after cramdown confirmation and makes payments under the plan, unless the plan or confirmation order provides otherwise.[78] 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 disbursements. In short, parties opposed to confirmation of a cramdown plan may nevertheless

[77] See Section IX(A).
[78] See Section IX(B).

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)[79] but not until completion of payments after three to five years, as fixed by the court, upon cramdown confirmation under § 1192.[80] 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.[81]

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 a condition for support of a consensual plan. If the debtor has addressed the amount of payments

[79] See Section IX(A).
[80] See Section IX(B).
[81] 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.).

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.[82]

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 negotiations that will resolve its issues. If all other class have accepted the plan, the creditor's acceptance may permit consensual confirmation.

[82] *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.

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.[83] 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

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[83] *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.").

B. Cramdown Confirmation Under § 1191(b)

5. Requirements for feasibility and remedies for default

Page 140, delete two paragraphs and replace with:

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")[84] amended it to clarify its operation. [85]

As amended, § 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), but in this situation it further requires that the plan provide "appropriate remedies, which may include the liquidation of nonexempt assets, to

[84] Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA") § 2(f), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). The amendment applies in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

[85] Prior to BTATCA, § 1191(c)(3) had three parts.

Paragraph (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 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.

protect the holders of claims or interests in the event that the payments are not made. § 1181(c)(3)(B)(ii). 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 follow.

Page 141, add text at end of first paragraph:

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.

Page 144, add text after first paragraph:

In an individual case, the court in *In re Hyde,* 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), the court 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 established that the debtor could realistically carry out the plan providing for payment of projected disposable income for five years.

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C. Postconfirmation Modification of Plan

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

Page 144, insert at end of page:

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 transferred." § 1101(2)(A). The second is the "assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan." § 1101(2)(B). The third is the "commencement of distribution under the plan." § 1101(2)(C).

Typically, the determining factor for substantial consummation is the commencement of distribution.

In re National Tractor Parts, Inc., 2022 WL 2070923 (Bankr. N.D. Ill. 2022), considered when distributions commence. There, the debtor sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVD-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA's claim as a general unsecured claim, payable in quarterly payments.

The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim under the original plan provisions if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made de minimis payments totaling $ 1,428.20 to creditors in two classes but had not yet made a $ 50,000 payment to a creditor in another class or begun quarterly payments to general unsecured creditors.

The *National Tractor Parts* court held that "commencement of distribution" occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

The *National Tractor Parts* court concluded that § 1101(2)(C) is plain and unambiguous. The court explained, *id.* at * 4:

> The plain language of [§ 1101(2)(C)] does not require commencement of distribution to every creditor, or every class, or even substantially all creditors or classes. It means, simply, that the process contemplated in the confirmed plan is underway.

The court observed, further, that the language in § 1101(2)(A) and (B) refers to "all or substantially all" of property to be transferred or dealt with by the plan, whereas such language is "conspicuous in its absence from § 1101(2)(C). *Id.* at *4.

National Tractor Parts is consistent with other cases dealing with other cases addressing the issue in traditional chapter 11 cases.[86]

[86] *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

Some courts, however, have concluded that commencement of distribution does not incur merely because the debtor has made some payments under the plan.[87] As one court explained:[88]

> 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.

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

IX C. Unclaimed Funds

Page 172, end of page, add new subtitle as above and insert this text:

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.[89] Unclaimed property typically arises when a check is mailed to the creditor at its address shown on its proof of claim or the debtor's records, but the creditor has changed its address or the creditor simply does not negotiate the check.

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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).

[87] *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).

[88] *In re* Dean Hardwoods, Inc., 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010).

[89] 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).

Disposition of unclaimed funds in a subchapter V case depends on who makes the distribution.

For distributions that the subchapter V trustee makes, § 347(a) requires that, 90 days after the final distribution, the trustee stop payment on any check remaining unpaid and pay the money into the court for disposition under chapter 129 of title 28. The applicable provisions of chapter 129 direct the Court to disburse unclaimed funds to the "rightful owners," 28 U.S.C. § 2041, upon "full proof of the right thereto." 28 U.S.C. § 2042. Accordingly, a creditor may later seek to recover the unclaimed funds. This is the same rule that applies to a trustee's disbursements in cases under chapters 7, 12, and 13.

For payments that the debtor makes, § 347(b) provides that any funds that remain unclaimed at the expiration of the time allowed to claim the funds become property of the debtor or of the entity acquiring the asses of the debtor under the plan. This rule also applies in chapter 9 and traditional chapter 11 cases and to distributions that a debtor or party other than the trustee makes in chapter 12 cases.

Section 347(b) does not prescribe the method by which the time to claim the funds is determined. A well-drafted plan, therefore, should establish the deadline, or the debtor or other party may request that the court fix one. Plans in traditional chapter 11 cases that do not provide for full payment of unsecured creditors often provide that no further distributions will be made to creditors who do not timely claim their distribution and for the pro rata distribution of unclaimed funds to creditors who have claimed their distributions.[90]

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[90] 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.

X. Discharge

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

Page 178, insert after second full paragraph:

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 it 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.[91] In a subchapter V case, however, consensual confirmation of a plan may result in immediate stripping of the lien.[92]

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

Pages 180-85

The text beginning with the last paragraph of page 180 through the end of Section X(B) has been deleted and replaced with new text that revises and reorganizes existing text and that adds an expanded analysis of the applicability of exceptions to discharge in § 523(a) to the cramdown discharge of § 1192 that an entity receives upon confirmation of a cramdown plan under § 1191(b).

[91] § 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).
[92] *In re* Vega Cruz, 2022 WL 2309798 (Bankr. D. P.R. 2022).

XIII. Effective Dates and Retroactive Application of Subchapter V

Page 203, Delete first line of second paragraph and insert this text:

As later text discusses, courts upon enactment of SBRA had to decide whether SBRA applied retroactively and, if so, whether a debtor could amend its petition to elect subchapter V when mandatory deadlines for the status conference[93] and the filing of a plan[94] had expired.

The provisions in the Bankruptcy Threshold Adjustment and Technical Correction Act ("BTATCA")[95] 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.[96] 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 amend the petition to elect subchapter V in cases filed during this time if a mandatory deadline has passed.

[93] See Section VI(C).
[94] See Section VI(D).
[95] Bankruptcy Threshold Adjustment and Technical Corrections Act, "), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002).
[96] BTATCA § 2(h)(2).

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

Faculty

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Hon. Paul W. Bonapfel is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta and Rome, Ga., appointed in 2002. Prior to his appointment, he practiced law in Atlanta with Lamberth, Bonapfel, Cifelli & Stokes, P.A., now known as Lamberth, Cifelli, Ellis & Nason, P.A. As an attorney, Judge Bonapfel represented all types of parties in bankruptcy cases, including consumer and business debtors in liquidation cases, business debtors in reorganization cases, chapter 7 and 11 bankruptcy trustees, creditors' committees, and creditors in both consumer and business cases. Judge Bonapfel is a co-author of *Chapter 13 Practice and Procedure* (Thomson Reuters). A Fellow in the American College of Bankruptcy, he has served as chairperson of the Bankruptcy Sections of the State Bar of Georgia and the Atlanta Bar Association and was a director and president of the Southeastern Bankruptcy Law Institute, which presents an annual seminar on bankruptcy law and procedure. In addition, he teaches a course at Mercer Law School in Macon, Ga., on consumer bankruptcy practice. Judge Bonapfel received his B.A. *cum laude* from Florida State University in 1972 and his J.D. *magna cum laude* from the University of Georgia School of Law in 1975, where he was a notes editor of the *Georgia Law Review*. Following law school, he clerked for U.S. District Judge Wilbur D. Owens, Jr., in Macon.

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