



AMERICAN
BANKRUPTCY
INSTITUTE

Northeast Bankruptcy Conference & Consumer Forum 2021

Consumer Track

Subchapter V Demystified

Hon. Peter G. Cary

U.S. Bankruptcy Court (D. Me.) | Portland

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Subchapter V Demystified

Chief Judge Peter Cary, U.S. Bankruptcy Court, District of Maine

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Let's Start With a Poll

Have you been involved in a Subchapter V case?

If yes, in what capacity?

1. Debtor's counsel;
2. Creditor's counsel; or
3. Subchapter V Trustee



DATA ON FILINGS



Eligibility

11 U.S.C. §1182

- *Engaged in commercial or business activities*
- *Not single asset real estate*
- *\$7,500,000 debt limit*
- *Not less than 50 percent of which arose from the commercial or business activities*



Trustee

11 U.S.C. §1183



Status Conference

11 U.S.C. §1188

- *Held within 60 days of filing*
- *Status Report 14 Days Before Conference*



The Plan

11 U.S.C. §1189

- *Only the debtor may file a plan*
- *Filed within 90 days after filing*



Contents of the Plan 11 U.S.C. §1190

- *Plan term*
- *Actual vs. Projected Disposable Income*



Confirmation 11 U.S.C. §1191

- *Subchapter V Confirmation Standards vs. Chapter 11 Confirmation Standards*



Removal of debtor 11 U.S.C. §1185



Questions?

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last updated 1/28/21

COMPARISON OF KEY ASPECTS OF BANKRUPTCY CHAPTERS OF RELIEF THAT ARE AVAILABLE TO SMALL BUSINESSES¹ FOR SBDC

| Criteria | Chapter 11 – Reorganization for a Business Debtor that Designates Itself a Small Business | Subchapter V of Chapter 11 – Reorganization Specifically for a Small Business Debtor (<i>eff 2/20</i>) | Chapter 13 – Adjustment of Debts for an Individual w/ Regular Income | Chapter 12 – Adjustment of Debts for a Family Farmer or Fisherman w/ Regular Income |
|--------------------------------|--|--|---|--|
| Debt Limits² | \$2,725,625 cap on aggregate secured & unsecured debts as of petition date is (excluding debts owed to affiliates or insiders). At least 50% of the debt must be from commercial or biz activities of the debtor. | Same as a “small business debtor” <i>except</i> the \$2,725,625 cap is increased to \$7,500,000 until 3/27/21. | \$1,257,850 cap on secured debt, and \$419,275 cap on unsecured debt. | \$10,000,000 cap on aggregate secured & unsecured debt (<i>cap raised as of 2019</i>). |
| Who is Eligible | An individual or corporation engaged in commercial or biz activities (including any of their affiliates in bankruptcy) with debt that meets above debt limits. | An individual or corporation engaged in commercial or biz activities (including any of their affiliates in bankruptcy) with debt that meets above debt limits. | An individual (or married couple) who has regular (i.e., predictable) income. | An individual (or married couple) or family-owned corporation with sufficiently stable and regular income to fund a ch 12 plan. And at least 50% of the debt is farm related. |

¹ **DISCLAIMER:** This chart was prepared by Chief Judge Colleen A. Brown (U.S. Bankruptcy Court, Dist of Vt) and Chief Judge Peter G. Cary (U.S. Bankruptcy Court, Dist of ME), and updated by Judge Brown for the February 17, 2021 presentation at VLS. This chart has no precedential value or binding authority and may not be cited in any court hearing. This chart is not legal advice and should not be relied upon in lieu of consulting with a bankruptcy attorney in connection with any bankruptcy filing.

² The debt limits are indexed and change at three-year intervals.

| Criteria | Chapter 11 – Reorganization for a Business Debtor that Designates Itself a Small Business | Subchapter V of Chapter 11 – Reorganization Specifically for a Small Business Debtor (<i>eff 2/20</i>) | Chapter 13 – Adjustment of Debts for an Individual w/ Regular Income | Chapter 12 – Adjustment of Debts for a Family Farmer or Fisherman w/ Regular Income |
|---|--|---|--|---|
| Property of the Estate (i.e., assets that fund plan of reorganization) | Includes ALL property the debtor owns or has an interest in, anywhere in the world, on the day the case is filed, PLUS some assets the Debtor acquires in first 180 days, AND earnings from services debtor performs during case if the debtor is an individual. | If chapter 11 plan is <u>consensually</u> confirmed, then includes only property the debtor had on the date case was filed + 180-day property. If plan is <u>non-consensually</u> confirmed, then also includes earnings from services debtor performs during case if the debtor is an individual. | Includes ALL property the debtor owns or has an interest in, anywhere in the world, on the day the case is filed, PLUS some assets the Debtor acquires in first 180 days, AND earnings from services debtor performs during case if the debtor is an individual. | Same as chapter 13 |
| Case Filing Fee | \$1,738 | \$1,738 | \$313 | \$278 |
| UST Fees | Yes, payable quarterly based on amount of disbursements; ranges from \$325 to \$250,000 per quarter. | None. | None. | None. |
| Time for Filing a Plan | Only the debtor may file a plan during first <u>180 days</u> of the case. Outside deadline for any party to file plan is during the first <u>300 days</u> of the case. | Only the debtor may file a plan, and the plan must be filed within the first <u>90 days</u> of the case. | Plan due during first <u>14 days</u> of the case. | Plan due within first <u>90 days</u> of the case. |
| Due Date of First Plan Payment | First payment due upon plan confirmation, but debtor will likely need to make payments to secured creditors every month, to avoid falling behind during the case. | First payment due upon plan confirmation, but debtor will likely need to make payments to secured creditors every month, to avoid falling behind during the case. | First plan payment due within 30 days of case filing (by wage withholding, ACH or TFS). | First payment not due until plan is confirmed. Payments can be scheduled around flow of farmer’s income. |
| Maximum Plan Length | No limit on the term or length of the plan. | Generally a plan term may be up to <u>3 to 5 years</u> , but subchapter V does not expressly prohibit plan payments beyond 5 years. | Maximum plan term is <u>60</u> months. | Maximum plan term is <u>60 months</u> but may pay secured claims over longer period. |

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|---|---|--|---|---|
| Appointment and Role of Case Trustee | Generally, no trustee appointed; occurs only upon a showing of cause, including fraud, dishonesty, incompetence or gross mismanagement of the debtor's affairs. Debtor remains in possession. | A trustee is appointed in every subchapter V case. Trustee's role is to help debtor and creditors reach a consensual plan. May also distribute payments to creditors, but optional. Debtor remains in possession. | A trustee is appointed in every chapter 13 case. Trustee's role is to collect monthly payments from debtor and distribute them to creditors, per terms of plan. Debtor remains in possession. | A trustee is appointed in every chapter 13 case. Trustee's role is to collect monthly payments from debtor and distribute them to creditors per the terms of plan. Debtor remains in possession. |
| Disclosure Statement | Court may determine the plan provides adequate information and that no disclosure statement is required; OR conditionally approve a disclosure statement subject to final approval at plan confirmation hearing. Typically 20-100 pages long. | Not required, unless the court orders one. But the plan must include a brief history of the debtor's business operations, a liquidation analysis and feasibility projections. | None required. | None required. |
| Time Between Filing and Confirmation | No required time period but in Vt, expectation is generally 6 - 9 mos. | No required time period but in Vt, expectation is generally 3 - 6 mos. | In VT, confirmation usually occurs within 60-90 days. | In VT, confirmation typically within 6 - 9 mos. Often, timing depends on nature of farm ops & extent of creditor support for the plan. |
| Type of Relief Available in the Plan | Can be a financial restructuring, operational reorganization, partial liquidation, total liquidation, or any other reorganization the debtor proposes will make the debtor viable and support payments proposed in plan. | Same as conventional chapter 11 case – though usually not as complex since debtors are smaller. | Usually a repayment plan with payments over 36-60 months. But debtor can also file a sale plan that requires debtor to sell some or all of their assets, by a date certain, during the plan, to fund plan. | Debtor can sell or transfer part or all of the farm property, convey farm to the next generation, restructure or change nature of operations, change the type of crop grown, or market served. Significant tax benefits. |

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|---|---|---|--|--|
| Who Votes, or Has Control over Whether Plan is Confirmed | All holders of allowed impaired claims may vote. To get plan confirmed, at least 1 class of impaired creditors must accept the plan by <ul style="list-style-type: none"> - 50% of the number, and - 2/3 of the amount of the claims held by the creditors who voted. | All creditors may vote. This determines whether the plan is confirmed as a consensual or a non-consensual plan. | No creditors vote but any creditor may object to the Plan. The Court rules on objections. | No creditors vote but any creditor may object to the Plan. The Court rules on objections. |
| Cramdown of Secured Claims (i.e., reduction in principal amount due on secured claims) | The plan may reduce (and pay) a secured creditor a sum equal to the value of collateral securing the claim, rather than full amount due. Only exception is mortgages on the debtor's principal residence. | Secured claim reduction is possible even over the objections of members of an impaired class, if the Court approves it. | The plan may reduce (and pay) a secured creditor a sum equal to the value of collateral securing the claim, rather than full amount due. Only exception are mortgages on the debtor's principal residence. | The plan may reduce (and pay) a secured creditor a sum equal to the value of collateral securing the claim, rather than full amount due, including mortgages on the debtor's principal residence. |
| Discharge (Debt Forgiveness) | Order granting discharge (or forgiveness) of debt is entered AFTER D makes all plan payments. Court may grant an earlier discharge under certain circumstances. Debts for marital or family support, most taxes, fines, student loans are generally not discharged (forgiven). | Timing of the entry of discharge order depends on whether the plan is confirmed consensually. If confirmed <u>consensually</u> the discharge enters upon confirmation. If <u>not consensually</u> confirmed, discharge not entered until after all plan payments are made. No early discharge option | Order granting discharge (or forgiveness) of debt is entered AFTER D makes all plan payments (i.e., 3-5 years after case was filed). | Order granting discharge (or forgiveness) of debt is entered AFTER D makes all plan payments (i.e., 3-5 years after case was filed). |
| Overall Cost (varies wildly from case to case) | Less expensive than conventional chapter 11 but usually at least \$30,000. | Least expensive chapter 11 option. Still new, but appears likely to cost at least \$15,000. | Typically, fees range from \$2,500 to \$5,000. Additional fees may apply in a biz case. | A wide range because so many options: \$5,000-\$50,000. |

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|---|--|--|---|---|
| Primary Benefits for a Small Biz Seeking Reorg | Less complicated, less expensive and more streamlined process than conventional chapter 11. Moves more quickly. May not need a disclosure statement. | Even more streamlined, have assistance and expertise of trustee, more options for confirmation even when creditors object. No disclosure statement required. | Once set up on payment system, trustee monitors payments. Allows reinstatement of home mtges as matter of course. | Provides most potent tools for restructuring secured debt, including home mortgages, more flexibility on timing of payments, huge tax benefits. |
| Primary Draw-Backs for a Small Biz Seeking Reorg | Particular debt limits and eligibility requirements apply, and although may not require a DS, it is still complex and expensive. | Short time period for getting plan filed, many aspects of relief depend on getting all creditors on board in that short time frame. | Low debt limits for small biz and is only available if biz is operated by individuals (corp entities not eligible). | Only available to small biz that is engaged in farming or fishing. |

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ADDITIONAL CONSIDERATIONS

1. The filing of a bankruptcy case freezes all collection activity and creates predictability of the business, to facilitate a focus on reorganizing.
2. A successful reorganization benefits both the debtor and all creditors. It allows the debtor to stay in business, continue to employ Vermonters, and contribute to the economy; while getting the creditors more money than they would recover in a liquidation of the debtor; and opening the door for them to have an ongoing business relationship with the debtor.
3. Bankruptcy offers many options for reorganization – it is not limited to liquidations – and allows debtors to retain a sense of dignity while also retaining their business.
4. It is not prudent to seek bankruptcy relief without an attorney who is a bankruptcy expert.
5. Vermont has a very experienced and savvy bankruptcy bar (on both the debtor and creditor sides) and many professionals (accountants, appraisers, etc.) who have the skills and experience in bankruptcy cases to provide critical advice. These attorneys and other professionals understand the value of bankruptcy reorganizations, are able to offer pragmatic guidance to parties in bankruptcy cases, and have a track record of facilitating positive outcomes.
6. Vermont has one of the highest success rates in the country, in bankruptcy reorganization cases, due largely to the effective collaboration – and the shared view of the value of reorganizations – among the bankruptcy attorneys, trustees, and court.
7. The biggest mistake businesses make in pursuing bankruptcy relief is to wait too long before doing so. It is crucial for the debtor to begin a reorganization process, if at all possible, before they run out of cash and/or goodwill with their creditors. The more the debtor has of each of these, the more likely it is to succeed in its reorganization.
8. The information in the chart set out above is general and many exceptions and caveats apply. It is not intended as legal advice and should not be relied upon to determine whether to seek bankruptcy relief. It is merely an overview to illustrate the breadth and variety of relief available through bankruptcy reorganizations.

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CHRONOLOGY OF A BANKRUPTCY REORGANIZATION

Day 1 business files a reorganization **petition** listing all debts, assets, answering Qs about financial circumstances;
➤ **stay goes into effect**

14-180 days later business must file a **plan of reorganization** (*due date determined by type of reorganization*)
➤ must set out how restructured business will operate, when & how creditors will get paid/ source of pmts
➤ during this time creditors filed proofs of claim setting out the amount they claim due & why

60-120 days later business must appear at a **confirmation hearing** to prove its plan is feasible & fair
➤ creditors present their positions, if necessary, witnesses testify, Court decides whether to confirm the plan

3-5 yrs following business performs the confirmed plan, makes payments to creditors and stays current on ongoing debts
➤ business required to file regular operating reports setting out status of operations, assets, payments, etc.

After plan done business exits bankruptcy, reorganized, with a fresh start
➤ and if it is an individual (as opposed to a corporate entity), remaining debts forgiven

Small Business Reorganization Act, 11 U.S.C. §§ 1181-1195 (“SBRA”) *

(Subchapter V Case Update)

July 8, 2021

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The SBRA became effective on February 19, 2020. As of May 31, 2021, approximately 60 chapter 11 subchapter V cases were filed in the First Circuit and the District of Vermont. This case law update is intended to outline published case law so far by bankruptcy courts addressing the various sections of the SBRA. Such cases include the following: ***

Section 1181: Inapplicability of Other Sections

In re Port Arthur Steam Energy, L.P., 2021 WL 2777993 (Bankr. S.D. Texas July 1, 2021)

Section 1181 lists sections of the Bankruptcy Code that do not apply in subchapter V cases, and sections not included in those exclusions (such as § 1123(b)(4) for sale of assets under a chapter 11 plan, and § 1129(a)(11) for plan feasibility requirement¹).

In re Cleary Packaging LLC, 2021 WL 2667735 (Bankr. D. Md. June 29, 2021)

Section 1181(c) provides that if a plan is confirmed under § 1191(b), § 1141(d) (effect of confirmation – discharge) does not apply, except as provided in § 1192. Consequently, § 1141(d) does apply if the plan is confirmed under § 1191(a).²

In re Wildwood Villages, LLC, 2021 WL 1784408 (Bankr. M.D. Fla. May 4, 2021)

* SBRA was amended by the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) (effective 3/27/20), the Consolidated Appropriations Act, 2021 (effective 12/27/20), and COVID-19 Bankruptcy Relief Extension Act of 2021 (effective 3/27/21).

** Thanks to Selin Altintas, Summer Associate at Riemer & Braunstein LLP, for her assistance in updating the case summaries.

*** This paper is more or less limited to published cases as of July 1, 2021, to the extent available on Westlaw, that involve specific sections of the SBRA. Also, the underlying materials used for the initial list of cases include the *Guide to the Small Business Reorganization Act of 2019*, revised and updated July 2020, supplemented November 2020 and April 2021 (Paul W. Bonapfel, U.S. Bankruptcy Judge, N.D.Ga.).

¹ See also, In re Offer Space, 2021 WL 1582625 (Bankr. D. Utah Apr. 22, 2021)

² See also, In re Satellite Restaurants, Inc. Crabcake Factory USA, 626 BR 871 (Bankr. D. Md. March 19, 2021); In re Olson, 2020 WL 10111637 (Bankr. D. Utah Sept. 16, 2020).

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The court stated that examples of streamlined and cost-reducing reorganizational procedures include:³ (i) no requirement to file a disclosure statement unless ordered by the court (§ 1181(b) referring to § 1125);⁴ (ii) the elimination of the absolute priority rule (§1181(a) referring to § 1129(b));⁵ and (iii) committees of creditors and interest holders are appointed only if ordered by the court (§1181(b) referring to §§ 1102 -1103).⁶

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. Apr. 22, 2021)

Section 1181(a) makes § 1115 (which refers to post-petition earnings) inapplicable in a subchapter V small business case. That means in a subchapter V case, an individual debtor's post-petition earnings are ordinarily not property of the estate.

Section 1112 (regarding conversion or dismissal) applies to subchapter V by virtue of not being excluded under § 1181(a).⁷

In re Online King LLC, 2021 WL 1536415 (E.D.N.Y. Jan 19, 2021)

Section 1181 provides that § 1121 (who may file a chapter 11 plan) does not apply in a case under subchapter V.⁸

There are two limited exceptions in § 1112(b)(1) and (2) to conversion or dismissal once “cause” has been shown. The first, under § 1112(b)(1), speaks to the appointment of a trustee or examiner under § 1104. Section § 1104, however, is not applicable to subchapter V pursuant to § 1181(a).⁹

In re Wetter, 620 B.R. 243 (Bankr. W.D. Va. Oct 14, 2020)

Section 1129(a)(7) (best interests of creditors test) applies in subchapter V pursuant to § 1181(a)(specifying which provisions of Title 11 do not apply in subchapter V).

In re Trepetin, 617 B.R. 841 (Bankr. D. Md. July 7, 2020)

Although § 1181(a) states that § 1116 (duties of trustee or debtor in possession in small business cases) is not applicable in a case under subchapter V of chapter 11, the various provisions of § 1116 are thereafter made applicable by § 1187(a) and § 1187(b).

³ The court also exercised its discretion and declined to apply Bankruptcy Rule 7023 to a class claim because it was apparent that instead of allowing the class claim, simplified claims procedures was the best way to proceed.

⁴ See also, In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. Apr. 20, 2021); In re Johnson, 2021 WL 825156 (Bankr. N.D. Tex. Mar. 1, 2021); In re Thurmon, 2020 WL 7249555 (Bankr. W.D. Mo. Dec 8, 2020); In re Ellingsworth Residential Cmty. Ass'n, 619 B.R. 519 (Bankr. M.D. Fla. July 10, 2020).

⁵ See also, In re Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. Dec 17, 2020); In re Peak Serum, 623 B.R. 609 (Bankr. D. Col. Dec 8, 2020); In re Easter, 623 B.R. 294 (Bankr. N.D. Miss. Oct. 9, 2020); In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug 7, 2020).

⁶ See also, In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug 7, 2020); Ellingsworth Residential Cmty. Ass'n, 619 B.R. 519 (Bankr. M.D. Fla. July 10, 2020).

⁷ See also, In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership, 2021 WL 1679062 (Bankr. N.D.W.Va., April 28, 2021).

⁸ See also, In re Wetter, 620 B.R. 243 (Bankr. W.D. Va. Oct 14, 2020); In re Trepetin, 617 B.R. 841 (Bankr. D. Md. July 7, 2020); In re Tibbens, 2021 WL 1087260 (Bankr. M.D. N.C. March 19, 2021).

⁹ See also, In re Baker, 625 B.R. 27 (Bankr. S.D. Tex. Dec 21, 2020) (section 1181 excludes § 1104 regarding appointment of trustee or examiner, but does not exclude § 1112 for case conversion or dismissal).

In re Moore Props of Person Cty., LLC, 2020 WL 995544 (Bankr. M.D. N.C. Feb. 28, 2020)

The required and permissible provisions of a chapter 11 plan are contained in existing § 1123, which applies under subchapter V with three exceptions. Section 1181(a) excludes § 1123(a)(8) from the provisions which may be included in a plan, and excludes the requirements of § 1123(c).¹⁰

Section 1182: Definitions of Debtor and Debtor in Possession
(See also 11 U.S.C. §101(51D))

In re Port Arthur Steam Energy, L.P., 2021 WL 2777993 (Bankr. S.D. Texas July 1, 2021)

The U.S. Trustee objected to the debtor’s subchapter V designation arguing that the debtor is not “a person engaged in commercial or business activities” under § 1182(1)(A). The debtor owned and operated a waste heat facility. The debtor filed a chapter 11 plan that, among other things, would pay creditors by liquidating all remaining assets and distributing any recovery under certain pending litigation.

The court went through the definitions of “engaged”, “commercial”, “business”, and “activity”. The Bankruptcy Code does not define the term “engaged in commercial or business activities.” The court found that the debtor satisfied the § 1182 eligibility requirement. Actively pursuing litigation against a third party, seeking to collect on outstanding accounts receivable, selling assets, preserving asset value and having managers oversee the company while an independent contractor maintained the debtor’s facility are all commercial and business activities. The court explained that § 1182(1)(A) does not require a debtor to maintain its core or historical business operations on the petition date. It requires that the debtor was engaged in commercial or business activities.

In re McGrath, 2021 WL 2405722 (Bankr. M.D.Fla., June 10, 2021)

Creditor objected to debtors’ subchapter V election and argued that the debtors were not eligible to be a “small business debtor” under Subchapter V because they operated a single real estate asset. The definition of a “small business debtor” specifically excludes debtors whose “primary activity” is the business of owning “single asset real estate.” The term “single asset real estate” is defined as a single real estate project “which generates substantially all of the gross income of a debtor.” The court concluded that the debtors did not generate substantially all of their gross income from the property in question because they were not entitled to (and were not receiving) any of the rents. The debtors’ only income is \$3,590 per month from social security. Thus, the debtors were not ineligible for subchapter V for this reason.

See also General / Miscellaneous Issues (case dismissal).

¹⁰ Section 1190(3) further creates an exception to the anti-modification provision in § 1123(b)(5) by permitting the modification of the rights of the holder of a secured claim secured solely by a security interest in the principal residence of the debtor if the obligation is not purchase money and the new value received was used primarily in connection with the debtor's small business.

In re Blue, 2021 WL 1964085 (Bankr. M.D.N.C. May 7, 2021)

The debtor met her burden as a “debtor” under §1182(1)(A) because she was engaging in commercial or business activities through her IT consulting, which was the delivery of services in exchange for profit. The court also found that while debtor’s consulting was part-time and she had another full-time job, nothing in §1182 requires that such activities be the debtor’s only income.

In re Offer Space, 2021 WL 1582625 (Bankr. D. Utah Apr. 22, 2021)

The court ruled that while "engaged in" means the business has to be "currently engaged in" commercial or business activities, the court found that the debtor was actively engaged in commercial or business activities by (i) having active bank accounts, (ii) having accounts receivable, (iii) analyzing and exploring counterclaims in a lawsuit, (iv) managing stock, and (v) winding down its business and taking reasonable steps to pay its creditors and realize value for its assets.

The court distinguished the term "business activity" from "business operation." Activity is a broader term than operation. Therefore, even if a company is not in operation, the company may still be engaged in commercial or business activities. However, merely engaging in the bankruptcy process, without more, is insufficient to satisfy the "engaged in commercial or business activities" requirement under §1182(1)(A).

In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. Apr. 20, 2021)

A debtor limited liability company that owned, managed, and operated a hotel property was not a single asset real estate business because it did more than just managing the property. The debtor operated the hotel, and provided various services. Thus, the debtor was eligible to file under subchapter V.

In re Ikalowych, 2021 WL 1433241 (Bankr. D. Col. April 15, 2021)

The court ruled that "engaged in commercial or business activities" is broadly defined to mean any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for purpose of earning income, including by establishing, managing, or operating incorporated or unincorporated entity to do so. Thus, the court found the debtor was "engaged in commercial or business activities" for subchapter V purposes when he was performing "wind down" work for the company he previously managed, even though he was employed by a third party when he filed for bankruptcy.

In re Sullivan, 626 B.R. 326 (Bankr. D. Colo. March 30, 2021)

In considering whether debtor meets the subchapter V required 50% business-debt threshold, the court looked to the definition of "consumer debts" since the Bankruptcy Code does not define when a debt arises from "commercial or business activities." The court examined the underlying purpose of the debt to discern whether it is a business or commercial debt, stemming from a profit motive. The debt in question was debtor's owed equalization payment required by divorce proceedings. The debtor argued that the equalization payment, which was his wife's share of his business, arose from business or commercial activity because it represented a transfer of a portion of the business' value.

The court ruled that the equalization debt was rooted in the equitable termination of the debtor's marriage. The equitable distribution of their marital property was not a business or commercial transaction – it did not stem from a profit motive. Rather, it was inherently a personal and family-related purpose. The court explained that the mere fact that the parties' marital property included a business did not alter the underlying purpose of the property division. Therefore, the equalization debt was not a business or commercial debt. It was a consumer debt. Accordingly, debtor did not meet the 50% business-debt threshold and was not eligible under subchapter V.

In re Johnson, 2021 WL 825156 (Bankr. N.D. Tex. Mar. 1, 2021)

An individual debtor did not satisfy “engaged in business or commercial activity” requirement when the individual debtor owned and managed certain now-defunct businesses and had mostly business-related debt of the defunct businesses. As of the petition date, the debtor was employed as a president of a separate non-debtor company, but his previously owned businesses have ceased all commercial business activities. The debtor was also not engaged in any business activity with the defunct companies. The debtor had no intention to resume or reorganize the companies.

The court found that the debtor was not “engaged in” any commercial or business activity because the term “engaged” in the context of §101(51D) was commonly defined as “involved in activity: occupied, busy.” Here, the debtor was not occupied with or otherwise busy with respect to any commercial or business activity of the defunct companies. Moreover, the fact that the debtor was currently employed at a separate company as a president, was irrelevant. His activities with the new company had nothing to do with the defunct companies. Accordingly, he did not satisfy the debtor eligibility requirement.

In re Two Wheels Properties LLC, 2020 WL 7786927 (Bankr. S.D. Tex. Dec 30, 2020)

The debtor, a limited liability company, was dissolved by forfeiture of its charter by the Texas Secretary of the State on February 2, 2018. On November 2, 2020, the debtor filed its initial petition under subchapter V. At the initial status conference, the court ordered briefing on the debtor's standing to file a chapter 11 case, considering the forfeiture of its Texas corporate charter. The court held that the debtor lacked such standing.

The court explained that an entity that forfeits its corporate charter is permitted to prosecute a chapter 7 bankruptcy case within 3 years of such forfeiture because it is liquidating its assets to satisfy its liabilities and obligations. Here, the debtor cannot properly be a debtor under subchapter V, to the extent it seeks to continue its business or affairs through the pendency of the case and post-confirmation of any plan of reorganization.

In re Thurmon, 2020 WL 7249555 (Bankr. W.D. Mo. Dec 8, 2020)

Husband and wife debtors failed to satisfy the “engaged in commercial or business activity” requirement when they ceased operating their pharmacy business and sold its assets several months before filing, and stipulated that they had no intention to resume the activities of the business. Although the entity which operated their former business still existed, merely keeping the shell of the former business entity open with the secretary of the state's office did not render the debtor's engaged in business activities.

In re 305 Petroleum, Inc., 622 B.R. 209 (Bankr. N.D. Miss. Oct 27, 2020)

Section 101(51D)(A) excludes single asset real estate debtors from the definition of small business debtors, but §101(51D)(B) does not exclude single asset real estate debtors from the definition of “affiliates”. A single asset real estate debtor’s debt must be aggregated with the debt of its jointly administered affiliate debtors for purposes of determining debtor eligibility. The aggregate debt of all affiliated debtors exceeded \$7.5 million and therefore, did not satisfy the “small business debtors” debt limit.

In re Serendipity Labs, Inc., 620 B.R. 679 (Bankr. N.D. Ga. Oct 19, 2020)

A publicly traded company owned more than 27 percent of the voting shares of the debtor, but only 6.51 percent of the voting shares entitled it to vote on the debtor’s bankruptcy filing. The debtor argued that, in determining whether the public company was an “affiliate” within the definition of §101(2), the court should count only the shares with power to vote on the bankruptcy filing. Because the public company owned more than 20 percent of the debtor’s voting securities, it was an affiliate. Accordingly, the debtor was ineligible for subchapter V given that more than 20% of debtor's voting stock was held by company whose stock was publicly traded on the stock exchange, and which therefore qualified as “issuer” under the Securities Exchange Act.

In re Parking Management, Inc., 620 B.R. 544 (Bankr. D. Md. Aug 28, 2020)

The court considered subchapter V’s eligibility debt limits, noting that courts had addressed similar language governing debt limitations in chapter 12 and 13 cases. The court observed that the standards in those cases provide useful guidance, but that subchapter V cases involve more complex creditor relationships. The court concluded that claims for damages arising from the rejection of unexpired leases were contingent, and that debtor’s obligations under a note pursuant to the PPP funding program were both contingent and unliquidated. Because these debts were not included in the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In re Blanchard, 2020 WL 4032411 (E.D. La. July 16, 2020)

The court expressly adopted the ruling in In re Wright (see below) in holding that “engaged in” does not mean the debtors have to be *currently* engaged in business or commercial activities. Here, the debtor’s debt stemmed mostly from operation of both currently operating and non-operating business, and therefore the debtor satisfied the eligibility requirement.

In re Ellingsworth Residential Cmty. Ass’n, 619 B.R. 519 (Bankr. M.D. Fla. July 10, 2020)

Unsecured creditor objected to debtor’s attempt to proceed under subchapter V because, as non-profit community association, it did not engage in “commercial or business activities.” The court held that non-profit community association engaged in “commercial or business activities,” as required for it to be a “small business debtor” is eligible to file a chapter 11 petition under subchapter V. Any corporation that conducts any “commercial or business activity” can be a small business debtor, whether they operate for profit or not.

In re Wright, 2020 WL 2193240 (Bankr. D.S.C. April 27, 2020)

The debtor owned two businesses, both of which previously filed for chapter 11 bankruptcies but were dismissed. As of the individual debtor’s petition date, both companies ceased operating, and both companies sold all their assets. The individual debtor satisfied the “engaged in business or commercial activity” requirement because he was dealing with the residual business debts of the two companies he owned. Moreover, nothing in the definition of a small business debtor stated that the debtor had to be “currently” engaged in business or commercial activities.

In re Moore Props of Person Cty., LLC, 2020 WL 995544 (Bankr. M.D. N.C. Feb. 28, 2020)

The court stated that under the SBRA the definition of small business only excludes those owners of real property that constitute “single asset real estate.” As defined under 11 U.S.C. § 101(51B), single asset real estate is limited to real property constituting a single property. The debtor's property consists of at least two separate parcels, each generating debtor's revenue. Therefore, the court concluded that the debtor’s property is not a single asset real estate. The debtor met the definition of a small business debtor and was entitled to elect application of subchapter V.

See also General / Miscellaneous Issues (subchapter V election).

Section 1183: Subchapter V Trustee

In re Micron Devices, LLC, 2021 WL 2021468 (Bankr. S.D.Fla., May 20, 2021)

This is an order granting the subchapter V trustee’s motion for approval of settlement agreement. The subchapter V trustee has authority to file and prosecute Rule 9019 settlement motion pursuant to, among others, § 1183(b)(5).¹¹

In re Peak Serum, 623 B.R. 609 (Bankr. D. Col. Dec 8, 2020)

The court held, among other things, that (i) “cause” existed for appointment of trustee in chapter 11 case filed by corporate debtor; and (ii) dismissal of individual case to allow debtor to refile under subchapter V under the enhanced debt limits that recently went into effect was in creditors' best interest.

The court stated that while a subchapter V trustee does not necessarily perform the duties of a chapter 11 trustee, subchapter V affords parties-in-interest comparable remedies, including removal of the debtor-in-possession and expansion of the subchapter V trustee's duties (citing to §§ 1185(a) and 1183(b)).

In re Tri-State Roofing, 2020 WL 7345741 (Bankr. D. Idaho Dec 7, 2020)

¹¹ See also § 323 (role and capacity of trustee); and Bankruptcy Rule 6009 (prosecution and defense of proceedings by trustee or debtor in possession).

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The subchapter V trustee is not a standing trustee and thus was not appointed pursuant to 28 U.S.C. § 586(b). Rather, the subchapter V trustee was appointed as a disinterested person to serve as trustee in the case by the U.S. Trustee under § 1183(a).

See also Section 1194 (Plan Payments- Trustee's fees).

In re Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 (E.D.N.C. June 11, 2020)

Subchapter V trustee filed an application to employ counsel. At the hearing, the trustee stated that he filed the application as a matter of course but did not have any current need for legal representation in the debtor's case. The court denied the application, without prejudice, noting the failure of the trustee to establish specific need for the retention of counsel.

In re Twin Pines, LLC, 2020 WL 5576957 (Bankr. D. N.M. April 30, 2020)

Section 1183(a) permits the U.S. Trustee to serve as trustee in a subchapter V case "as necessary" and 28 U.S.C. § 586(a)(3) provides that the U.S. Trustee shall "supervise the administration of cases and trustees in cases under ... subchapter V of chapter 11 ..." Given the U.S. Trustee's supervisory role, the court did not see any reason why the U.S. Trustee's attendance at the interview and the section 341 meeting was insufficient to satisfy the requirements of the Bankruptcy Code.

In re AJEM Hospitality, LLC, 2020 WL 3125276 (M.D.N.C. March 23, 2020)

The court granted a consent motion of bankruptcy administrator pursuant to § 1183(b)(2) to require subchapter V trustee to perform certain duties specified in §§ 1106(a)(3) and (4) (investigation of the debtor's actions, assets, liabilities, and financial affairs). This is related to potential issue of intercompany claims, and the accompanying need for the subchapter V trustee or another independent third party to conduct an inquiry into any such claims.

The order stated that the duties of a subchapter V trustee are described in § 1183(b) and closely mirror those of a chapter 12 trustee. As in § 1202(b)(2), § 1183(b)(2) allows for expansion of a subchapter V trustee's duties.

Section 1184: Rights and Power of Debtor in Possession

In re Trepetin, 617 B.R. 841 (Bankr. D. Md. July 7, 2020)

Citing to § 1184, the court noted that Congress expressed significant concern for small business debtors, wanting to provide them with a realistic option for reorganizing and saving their business operations. Evidence of this intent is found not only in public commentary but also in the language of subchapter V itself. For example, subchapter V allows only the debtor to file a plan and permits the debtor to retain its prepetition ownership structure even if creditors are not paid in full.

In re Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 (E.D.N.C. June 11, 2020)

The court stated that subchapter V debtors operate as debtors -in-possession pursuant to § 1184.¹²

In re Landau, 2021 WL 2523992 (Bankr. D.Kan., May 5, 2021)

Citing to § 1184, the court stated that a small business debtor that has elected to be treated under subchapter V of chapter 11 may employ an attorney to represent or assist the debtor in possession in performing its duties during the chapter 11 case, subject to court approval thereof. Over the objection of the U.S. Trustee, the court provisionally granted the application, with the final order to be entered once additional information is filed in the case, such as (i) executed contract between the debtor and the attorney outlining the terms of the attorney’s representation in the bankruptcy proceeding, and (ii) a Rule 2016 statement, detailing the terms of that agreement.

Section 1185: Removal of Debtor in Possession

In re Neosho Concrete Products Company, 2021 WL 1821444 (Bankr.W.D.Mo., May 6, 2021)

The court denied the U.S. Trustee’s motion to convert the case and an alternative motion to remove the debtor in possession. The U.S. Trustee argued in favor of converting the case to chapter 7 under § 1112(b)(4) because the debtor is not presently operating and will incur administrative expenses if it continues in subchapter V. Alternatively, the U.S. Trustee proposed removal of the debtor as debtor in possession under § 1185 because the debtor allegedly made preferential transfers to an insider during the preference period. The court determined that the U.S. Trustee did not satisfy its burden of proof under § 1112(b)(4)(A). The U.S. Trustee did not identify any other “cause” for conversion.

The court decided to take a “flexible” approach in determining whether cause existed to remove a debtor in possession, balancing competing interests to determine whether the costs of removal would outweigh the benefits.¹³ In light of everything, and in balancing the interests of the debtor, creditors, and the estate, the court determined that the costs of removing the debtor would outweigh any benefits. Consequently, cause did not presently exist to remove the debtor as debtor in possession.

In re Young, 2021 WL 1191621 (Bankr. D. N.M. March 26, 2021)

Creditor filed a motion to convert the debtors’ chapter 11 case (their 5th in 10 years) to one under chapter 7 pursuant to § 1112(b). In response, the subchapter V trustee proposed that

¹² See also, In re Neosho Concrete Products Company, 2021 WL 1821444 (Bankr.W.D.Mo., May 6, 2021).

¹³ The factors considered by the court include: (i) the materiality of any misconduct, (ii) the debtor-in-possession's evenhandedness or lack thereof in dealings with insiders and affiliated entities in relation to other creditors, (iii) the existence of pre-petition voidable preferences or fraudulent conveyances, (iv) whether any conflicts of interest on the part of the debtor-in-possession are interfering with its ability to fulfill its fiduciary duties, and (v) whether there has been self-dealing or squandering of estate assets.

the debtors be removed from possession pursuant to § 1185(a). None of the previous cases resulted in a confirmed plan, payments to creditors, or a discharge.

The court found cause to convert the case, including (i) bad faith (case filed solely to frustrate the legitimate efforts of a legitimate creditor to enforce his rights), (ii) continuing loss and no likelihood of rehabilitation, and (iii) gross mismanagement. The court also found cause to remove the debtors from possession. The court noted that keeping the case in chapter 11 and removing the debtors from possession would hopefully permit the subchapter V trustee, who was familiar with the case, to efficiently liquidate the estate and distribute money to creditors, possibly resulting in a lower trustee's fee than in a chapter 7 case.

See also Sections 1189 (filing of the plan) and 1191 (plan confirmation).

In re Peak Serum, 623 B.R. 609 (Bankr. D. Col. Dec 8, 2020)

The court stated that while a subchapter V trustee does not necessarily perform the duties of a chapter 11 trustee, subchapter V affords parties-in-interest comparable remedies, including removal of the debtor-in-possession and expansion of the subchapter V trustee's duties (citing to §§ 1185(a) and 1183(b)).

Section 1186: Property of the Estate

In re Trepetin, 617 B.R. 841 (Bankr. D. Md. July 7, 2020)

Citing to § 1186, among others, the court stated that the filing of a bankruptcy petition triggers a number of events and deadlines in a bankruptcy case. For example, the petition creates the bankruptcy estate, which is augmented with certain post-petition property in chapter 11 cases.

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. Apr. 22, 2021)

The court stated that a subchapter V debtor remains in possession of all property of the estate under § 1186(b).

Section 1187: Duties and Reporting Requirements of Debtors

In re Thurmon, 2020 WL 7249555 (Bankr. W.D. Mo. Dec 8, 2020)

Citing to § 1187(a) the court stated that “[u]pon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.” Also, citing to § 1187(b) and § 308(b) the court stated that “[a] debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6) and (7) of section 1116 of this title.”

In re Pearl Resources, LLC, 622 B.R. 236 (Bankr. S.D. Tex Sept 30, 2020)

Citing to § 1187(c), the court stated that in a subchapter V case, a separate disclosure statement for solicitation of votes is not required.

In re Trepetin, 617 B.R. 841 (Bankr. D. Md. July 7, 2020)

Although § 1181(a) states that § 1116 is not applicable in a case under subchapter V of chapter 11, the various provisions of § 1116 are thereafter made applicable by § 1187(a) and § 1187(b).

In re Twin Pines, LLC, 2020 WL 5576957 (Bankr. D. N.M. April 30, 2020)

Section 1187 requires debtors to comply with § 1116(2), which in turn requires “a trustee or debtor in possession” to attend the initial debtor interview and section 341 meeting.

In re Double H. Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. March 5, 2020)

Citing to § 1187(a), the court stated that a debtor is required to file the documents required by section 1116(1) (most recent balance sheet and other financial information) when electing subchapter V treatment as a small business debtor.

Section 1188: Status Conference

In re Keffer, 2021 WL 1523167 (Bankr. S.D.W.Va. April 16, 2021)

The court articulated a step-by-step analysis to evaluate motions to convert filed in cases after §1188 (status conference) and §1189 (plan filing) deadlines have passed. The court found that the debtor should not be held accountable for the circumstances necessitating an extension of the deadline under § 1188. The debtor had no specific knowledge of what the claim from the IRS would be and no inkling that it might derail his chapter 13 case. The court concluded that Trepetin (see below) provided a superior view to the extension issue and rejected the Seven Stars (see below) approach.

See also General / Miscellaneous Issues (case conversion), and Section 1189 (plan filing deadline).

In re Tibbens, 2021 WL 1087260 (Bankr. M.D. N.C. March 19, 2021)

In addressing debtor’s motion to extend the deadline under §1188, the court explained that the deadline to conduct the status conference under § 1188 is a deadline for the court, rather than for the debtor. Subchapter V does not contain any consequence for the court's failure to timely conduct the status conference. Although § 1188(c) requires the debtor to file a report detailing the efforts the debtor has undertaken and will undertake to attain a consensual plan not later than 14 days before the date of the status conference, this reporting deadline is tied to the date of the status conference. The court also noted that it may extend the 60-day period under § 1188 (a) “if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.”

See also General / Miscellaneous Issues (case conversion), and Section 1189 (plan filing deadline).

In re Thurmon, 2020 WL 7249555 (Bankr. W.D. Mo. Dec 8, 2020)

The court referred to § 1188's requirement that "[n]ot later than 14 days before the date of the status conference under subsection (c), the debtor shall file with the court and serve on the trustee and all the parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."

In re Wetter, 620 B.R. 243 (Bankr. W.D. Va. Oct 14, 2020)

The court noted that §1188 imposes deadlines on the court in subsections (a) and (b), not on a debtor. The court also stated that the deadline in subsection (c) is a deadline for a debtor after the status conference is set. The court explained that if the court here has not set a status conference, how can the debtor have missed the deadline?

See also General / Miscellaneous Issues (case conversion), and Section 1189 (plan filing deadline).

In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug 7, 2020)

The court disallowed the case re-designation to subchapter V because it interpreted that Congress intentionally required a very high standard for extending the deadlines under §§ 1188 and 1189. The court disagreed with approaches taken by Trepetin (see below), Ventura (see below), and Twin Pines (see below), stating that when the debtor decides to convert to subchapter V, that is cause which is within the debtor's control. The debtor chose to convert to subchapter V, knowing that the deadlines have expired and that it cannot meet those deadlines without an extension.

See also General / Miscellaneous Issues (re-designation), and Section 1189 (plan filing deadline).

In re Trepetin, 617 B.R. 841 (Bankr. D. Md. July 7, 2020)

The court permitted an extension of time within which the debtor could file his plan, finding that the debtor made the election promptly after conversion, and had proceeded during the chapter 7 case without engaging in any "wrongful or dilatory conduct." The question in extending the deadlines under §§ 1188 and 1189 is "whether the debtor is fairly responsibly for his inability to timely submit his status report, attend the status conference, or file in this subchapter V case." The court found that the debtor did all he could to act timely in the subchapter V case.

See also General / Miscellaneous Issues (case conversion), and Section 1189 (plan filing deadline).

In re Twin Pines, LLC, 2020 WL 5576957 (Bankr. D. N.M. April 30, 2020)

The debtor filed a motion to proceed under subchapter V eight days after the effective date of the SBRA. The U.S. Trustee argued that the debtor cannot elect subchapter V because the deadlines for the subchapter V status conference (§1188) and plan filing (§1189) had passed, rendering compliance with subchapter V impossible. The court disagreed and stated that the court "may extend the period" in which the status conference must be held and the plan filed "if the need for an extension is attributable to circumstances for which the debtor should not

justly be held accountable.” The court found that although the debtor’s case was pending for a little over a year when it filed a motion electing subchapter V, the debtor filed the motion within about a week after subchapter V became available. The debtor cannot justly be held accountable for not complying with the status conference and plan deadlines imposed by subchapter V. Those deadlines expired long before the debtor was able to elect subchapter V.

The court addressed extending the times imposed by §§ 1188(b) and 1189(b) sua sponte, even though no extension motion was filed. The court noted that this will enables it to prevent further delay. The court believed that it already had sufficient evidence and information to make a fully informed decision on whether to extend the deadlines. However, if any party wishes to contest the extensions of time the court granted such party the option to file a motion for reconsideration.

See also General / Miscellaneous Issues (subchapter V election), and Section 1189 (plan filing deadline).

In re Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. April 10, 2020)

In objecting to the re-designation of a chapter 11 case to subchapter V, the U.S. Trustee pointed out that within 60 days of entry of the order for relief, the court must hold a status conference with the SBRA trustee pursuant to § 1188(a), and that pursuant to § 1189(b), the subchapter V debtor shall file a plan within 90 days of entry of the order for relief. In addition, the subchapter V debtor must submit a status report 14 days prior to the status conference detailing efforts to reach a consensual plan under § 1188(c). According to the U.S. Trustee, although there is no bar to applying the SBRA retroactively to cases commenced prior to February 19, 2020, because the order for relief in the debtor's case was entered on October 24, 2018, the debtor's 90-day deadline to file a plan has expired, and it does not appear that the subchapter V trustee can effectively function as the facilitator of a consensual plan. Also, the U.S. Trustee argued that many status hearings have already taken place in the case without the participation of a subchapter V trustee.

The court noted that both the 90-day deadline to file a plan and the 60-day deadline to hold a status conference may be extended if the need for an extension is attributable to circumstances for which the debtor should not be justly held accountable. Given that the debtor's case was filed over fifteen 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 expired before the debtor could have elected to proceed as a subchapter V debtor.

See also General / Miscellaneous Issues (re-designation), and Section 1189 (plan filing deadline).

In re Double H. Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. March 5, 2020)

The court disallowed a debtor who filed for chapter 11 prior to enactment of subchapter V to convert to subchapter V because, among other reasons, granting re-designation under subchapter V would lead to dismissal because the relevant subchapter V deadlines under §§1188 and 1189 had expired.

See General / Miscellaneous Issues (re-designation). See also Section 1189 (plan filing deadline).

Section 1189: Plan Filing

In re Keffer, 2021 WL 1523167 (Bankr. S.D.W.Va. April 16, 2021)

The court articulated a step-by-step analysis to evaluate motions to convert filed in cases after §1188 (status conference) and §1189 (plan filing) deadlines have passed. The court found that the debtor should not be held accountable for the circumstances necessitating an extension of the deadline under § 1189. The debtor had no specific knowledge of what the claim from the IRS would be and no inkling that it might derail his chapter 13 case. The court concluded that Trepetin (see below) provided a superior view to the extension issue and rejected the Seven Stars (see below) approach.

See also General / Miscellaneous Issues (case conversion), and Section 1188 (status conference deadline).

In re Young, 2021 WL 1191621 (Bankr. D. N.M. March 26, 2021)

The court noted that only a debtor may file a plan under subchapter V pursuant to § 1189(a). “Because of that, the subchapter V trustee may need to seek conversion at some point.”)

See also Sections 1185 (removal of debtor in possession) and 1191 (plan confirmation).

In re Tibbens, 2021 WL 1087260 (Bankr. M.D. N.C. March 19, 2021)

The court disagreed with Seven Stars (see below). The court found that although the failure to timely file a plan may constitute cause for dismissal under § 1112(b)(4)(J), nothing in the Bankruptcy Code suggests that this failure alone is fatal to confirmation. The court discussed the key differences between the provisions for small business cases under §§ 1121(e), 1189, and 1112. Similar to §1188, the court may extend the 90-day period under § 1189(b) “if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.”

The court found that, as in Northwest Child (see below), the debtor failed to carry his burden under § 1189(b) that the need for an extension was due to circumstances for which he should not justly be held accountable.

See also General / Miscellaneous Issues (case conversion), and Section 1188 (status conference deadline).

In re Online King LLC, 2021 WL 1536415 (E.D.N.Y. Jan 19, 2021)

The debtor filed a motion to extend the deadline 13 days after expiration of the plan deadline. The court denied the debtor’s request to retroactively extend the 90-day period to file a plan after that period expired. While the court noted that it can retroactively extend the deadline after it had expired, the debtor must still prove that “the need for the extension is attributable to circumstances for which the debtor could not justly be held accountable”. The court found that the debtor did not satisfy that qualification. The motion to extend time

stated reasons such as “the amount of work entailed in negotiating and proposing a plan”; intervening religious holidays “during which the debtor and its counsel could not work”; “competing demands upon debtor’s advisors and personnel”. However, the court concluded that the grounds for extension were only conclusory statements without any explanation or support, and thus the court could not extend the filing deadline.

In re Baker, 625 B.R. 27 (Bankr. S.D. Tex. Dec 21, 2020)

Subchapter V debtor requested an extension of time for him to file a proposed plan. The court held that the debtor was entitled to a second extension of deadline for filing a proposed plan. The court identified four factors to consider in determining whether to extend the deadline for the filing of a plan: (i) whether the circumstances raised by the debtor were within the debtor’s control, (ii) whether the debtor had made progress in drafting a plan, (iii) whether the deficiencies preventing that draft from being filed were reasonably related to the identified circumstances, and (iv) whether any party-in-interest had moved to dismiss or convert the case or otherwise objected to a deadline extension in any way.

In re Northwest Child Development Centers, Inc., 2020 WL 8813586 (Bankr. M.D.N.C. Dec. 8, 2020)

The debtor filed a motion to extend time to file the subchapter V plan a day after the deadline. The debtor requested a two-week extension because a scheduled walkthrough of the property “was unable to occur due to weather and potential COVID-19 exposure”. The court noted that the debtor’s explanation of the circumstances causing the delay in filing the plan is limited to a single sentence in the motion, unsupported by affidavits, exhibits, or direct testimony.

The court acknowledged that inclement weather and pandemics are circumstances beyond the debtor’s control, but found that the debtor must demonstrate that these circumstances prevented the debtor from timely filing a plan. The court observed that while the weather-induced cancellation may explain the debtor’s inability to conduct a planned walkthrough in late October, the debtor did not explain why the walkthrough was rescheduled for a date after the plan deadline. The court noted that the cancelled walkthrough seemed unconnected from, and does not sufficiently explain why the debtor was unable to timely file a plan.

The court stated that subchapter V is designed to be an expedited process and, while extensions of deadlines are permitted under § 1189(b), Congress imposed a heightened burden on debtors seeking to obtain those extensions. The court found that the debtor failed to meet its burden under § 1189(b) to extend the period in which to file the plan. The debtor did not establish that the need for an extension of the deadline was attributable to circumstances beyond the debtor’s control or circumstances for which the Debtor should not justly be held accountable.

In re Wetter, 620 B.R. 243 (Bankr. W.D. Va. Oct 14, 2020)

The court found Seven Stars (see below) to be too rigid in its application of §1189(b), and that Trepetin (see below) charts a better path. The court stated that in Trepetin the court concluded that the question became whether the debtor is fairly responsible for his inability

to timely submit his status report, attend the status conference, or file a plan; the Seven Stars court took a different approach, finding that if a debtor elects subchapter V after expiration of the statutory deadlines, “the debtor should justly be held accountable for those circumstances, because the debtor created them.”

See also General / Miscellaneous Issues (case conversion), and Section 1188 (status conference deadline).

In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug 7, 2020)

The court disallowed the case re-designation to subchapter V because it interpreted that Congress intentionally required a very high standard for extending the deadlines under §§ 1188 and 1189. The court disagreed with approaches taken by Trepetin (see below), Ventura (see below), and Twin Pines (see below), stating that when the debtor decides to convert to subchapter V, that is cause which is within the debtor’s control. The debtor chose to convert to subchapter V, knowing that the deadlines have expired and that it cannot meet those deadlines without an extension.

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The court permitted an extension of time within which the debtor could file his plan, finding that the debtor made the election promptly after conversion, and had proceeded during the chapter 7 case without engaging in any “wrongful or dilatory conduct.” The question in extending the deadlines under §§ 1188 and 1189 is “whether the debtor is fairly responsibly for his inability to timely submit his status report, attend the status conference, or file in this subchapter V case.” The court found that the debtor did all he could to act timely in the subchapter V case.

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The court addressed extending the times imposed by §§ 1188(b) and 1189(b) sua sponte, even though no extension motion was filed. The court noted that this will enable it to prevent further delay. The court believed that it already had sufficient evidence and information to make a fully informed decision on whether to extend the deadlines. However, if any party wishes to contest the extensions of time the court granted such party the option to file a motion for reconsideration.

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The court noted that both the 90-day deadline to file a plan and the 60-day deadline to hold a status conference may be extended if the need for an extension is attributable to circumstances for which the debtor should not be justly held accountable. Given that the debtor's case was filed over fifteen 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 expired before the debtor could have elected to proceed as a subchapter V debtor.

See also General / Miscellaneous Issues (re-designation), and Section 1188 (status conference deadline).

In re Double H. Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. March 5, 2020)

The court disallowed a debtor who filed for chapter 11 prior to enactment of subchapter V to convert to subchapter V because, among other reasons, granting re-designation under subchapter V would lead to dismissal because the relevant subchapter V deadlines under §§1188 and 1189 had expired.

See also General / Miscellaneous Issues (re-designation), and Section 1188 (status conference deadline).

Section 1190: Plan Contents

In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug 7, 2020)

Citing to § 1190(3), the court stated that subchapter V provides qualifying debtors with some powerful and cost-saving restructuring tools not otherwise available to chapter 11 debtors, including the ability to modify a claim secured only by a security interest in the debtor's principal residence, if new value received in connection with granting the security interest was used primarily in connection with the debtor's business and not primarily to acquire the property.¹⁴

In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership, 2021 WL 1679062 (Bankr. N.D.W.Va., April 28, 2021)

When a debtor proposes a plan under subchapter V, it must include, among other things, a brief history of the debtor's business operations, a liquidation analysis, and projections regarding the debtor's ability to make plan payments. See § 1190.

See also General / Miscellaneous Issues (case dismissal), and Section 1191 (plan confirmation).

Section 1191: Plan Confirmation

In re Gabbidon Builders, LLC, 2021 WL 1964544 (Bankr. W.D.N.C., May 14, 2021)

The debtor sought confirmation of the plan under § 1191(b), which requires the debtor to show that the plan does not discriminate unfairly and that the plan is fair and equitable. Section 1191(b) also requires a finding that, among other things, the plan is feasible under § 1129(a)(11). The court stated that for the plan to be feasible, the court must find that the debtor will be able to make all the payments under the plan or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan. The court concluded that the debtor has not proposed a feasible plan and further concluded that the debtor's case should be converted to chapter 7. The court noted that there is no evidence to support a conclusion that the proposed sale of the property under the plan is imminent. Also, assuming the debtor sells the property, the plan then depended on the debtor purchasing a new lot, building a 4,300 square foot home, and selling the home at a substantial profit. The court observed that there is no evidence of the existence of this vacant lot or the ability of the debtor to purchase it for the price indicated.

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. April 30, 2021)

Unsecured creditor objected to subchapter V plan as not being offered in good faith under §1129(a)(3) because payment was over three years, not five, while the debtor could maintain his “lavish lifestyle.” The debtor was a financial adviser who voluntarily put additional money into the proposed plan, exceeding the strict statutory requirements under §1191(c)(2)(A). The class of unsecured creditors voted overwhelmingly in support of the plan. The objecting creditor argued the debtor proposed an inadequate amount for

¹⁴ See also, In re Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. Dec 17, 2020); In re Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. April 10, 2020); In re Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. March 24, 2020); In re Moore Props of Person Cty., LLC, 2020 WL 995544 (Bankr. M.D. N.C. Feb. 28, 2020).

distribution to unsecured creditors and that the plan did not satisfy the §1129(a)(3) requirement that a plan be proposed in good faith.

The court overruled the objection and confirmed the plan because §1191(a) or (b) does not mandate a five-year plan. The court agreed with the debtor's suggestion that §1191(c)(2)(A) provides a helpful standard in evaluating §1129(a)(3). The court also found that §1129(a)(3)'s good faith requirement should be read narrowly, particularly when raised by a dissenting creditor whose class has voted to accept the plan.

In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership, 2021 WL 1679062 (Bankr. N.D.W.Va., April 28, 2021)

The essential elements of confirmation of a subchapter V plan are contained in § 1991.¹⁵ The court agreed with the objecting parties that the debtor's plan is not feasible. The debtor failed to show that the plan is not likely to be followed by liquidation or further reorganization. Specifically, the debtor's plan relied upon the proposed sale of its real estate and increased sales expected from upgrading its website. The real estate sale transaction included a lease back to the debtor so it can continue operating out of the facility. The court stated that it is confident in the debtor's prospective sale, but it had little faith in the plan beyond that.

See also General / Miscellaneous Issues (case dismissal), and Section 1190 (plan contents).

In re Microcurrent Research and Education, LLC, 626 B.R. 455 (Bankr. M.D. Fla. April 14, 2021)

In connection with hearing on confirmation of the debtor's proposed plan, the court found, among other things, that the liquidation analysis attached to the plan failed to clearly disclose unencumbered cash on hand of approximately \$80,000 to \$100,000. Therefore, unsecured creditors were not able to make a fully informed decision as to whether they would be better off under the terms of the plan or under a chapter 7 liquidation. Also, based on the debtor's failure to dedicate the unencumbered funds to pay unsecured creditors or to otherwise explain why those funds are needed as an operating reserve, the court explained that the debtor failed to appreciate the import of § 1129(a)(3), which requires that a chapter 11 plan be "proposed in good faith."

In re Young, 2021 WL 1191621 (Bankr. D. N.M. March 26, 2021)

The plan proposed to retain a liquidating trustee to sell the vacant lot and the real property. While the plan satisfied a number of the confirmation requirements of §1191, the court found that the plan did not meet the best interest of creditors test under § 1129(a)(7)(A)(ii) (creditors to receive at least as much under the plan as in a hypothetical chapter 7 liquidation). The debtors proposed to hire a liquidating trustee to sell the property, who in turn would hire a broker. The debtors also proposed to pay the liquidating trustee at least \$13,250. The court observed that based on the estimated net proceeds the chapter 7 trustee's fees would be capped at \$9,500 (the trustee fee schedule in § 326(a) sets a ceiling, not a floor). Also, in a chapter 7 liquidation certain Set Aside Money would be available to

¹⁵ See also, Ellingsworth Residential Cmty. Ass'n, 619 B.R. 519 (Bankr. M.D. Fla. July 10, 2020); In re Pearl Resources, LLC, 622 B.R. 236 (Bankr. S.D. Tex Sept 30, 2020).

creditors. The court concluded that creditors would do better in a chapter 7 liquidation than under the plan.

Also, the court concluded that the debtors' plan was not confirmable under §1191(b) because it was not fair and equitable. First, it did not provide any cramdown alternatives for the secured creditor as required under §1191(c)(1) (which incorporates section 1129(b)(2)(A)). Also, the plan ignored §1191(c)(2) altogether about disposable income. The court stated that if a subchapter V debtor cannot (or chooses not to) make plan payments, creditors lose the quid pro quo for eliminating the absolute priority rule.

The court also found that the plan was not proposed in good faith under §1129(a)(3). The court observed, among other things, that the debtors filed the subchapter V case to combine the benefits of chapter 7 (e.g., discharge; no postpetition payments) with the delay inherent in the chapter 11 process.

See also Sections 1185 (removal of debtor in possession) and 1189 (filing of the plan).

In re Bressler, 2021 WL 126184 (Bankr. S.D. Tex. January 13, 2021)

In connection with the plan confirmation hearing the court questioned whether the debtor had met the balloting requirements of § 1126(c). The court found that classes of claims are deemed to have accepted a plan when those accepting are the requisite sum of those "that have accepted or rejected" the plan, as dictated by § 1126(c). Therefore, only ballots accepting or rejecting the plan, cast by claim holders in adherence with Rule 3018(c), are totaled to determine whether the numerosity requirements of § 1126(c) are met. The court also concluded that if only one member of a class, in compliance with Rule 3018(c), votes in favor of the plan and all others fail to vote, the voting member binds the entire class and that class will be deemed to have accepted the plan.

In re Motiff Designs, Inc., 2020 WL 7212713 (Bankr. E.D. Mich. Dec 4, 2020)

The court denied confirmation of the plan because, as required by § 1191(a), all the requirements of section 1129(a) are not met. The court also found that the plan does not comply with § 365(d)(4)(A) of the Bankruptcy Code which provides that when an unexpired lease of nonresidential real property is deemed rejected, "the trustee shall immediately surrender that real property to the lessor[.]" Notwithstanding that duty, the plan provides for the debtor to continue to occupy the premises until March 1, 2021. In that respect, the court found that the plan does not comply with § 365(d)(4)(A) and therefore fails to meet the requirement of § 1129(a)(1).

In re Fall Line Tree Service Inc., 2020 WL 7082416 (Bankr. E.D. Cal. Dec. 3, 2020)

The court addressed whether to confirm a subchapter V reorganization plan over the objection of the holder of a disputed unsecured claim. The essential elements for subchapter V plan confirmation are set forth at § 1191, which incorporates with modifications § 1129(a)-(b). The court found that the plan satisfied these confirmation standards.

In re Pearl Resources, LLC, 622 B.R. 236 (Bankr. S.D. Tex Sept 30, 2020)

In the context of a confirmation hearing on proposed subchapter V plan, the court held that, among other things, (i) the plan was proposed in "good faith," (ii) the proposed plan was

feasible, (iii) the “disposable income” test for whether a proposed subchapter V was “fair and equitable” to an impaired, dissenting class was satisfied, (iv) the proposed plan satisfied the enhanced “feasibility” requirement for “cramdown”; and (v) the proposed plan provided secured creditors in impaired, dissenting class with the “indubitable equivalent” of their claims, and could be “crammed down” over objection of that class.

The court discussed § 1191(c)(3)(A) which requires that the debtor be able to make all payments under the plan, or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan, and § 1191(c)(3)(B) which requires that the plan provide appropriate remedies to protect the holders of claims or interests if the debtor does not make the required plan payments. The court stated that such new requirement fortifies the more relaxed feasibility test that § 1129(a)(11) contains.¹⁶ The court explained that the feasibility requirement for confirmation requires a showing that the debtor can realistically carry out its plan. Although a guarantee of success is not required, the bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.

In re VP Williams Trans LLC, 2020 WL 5806507 (Bankr. S.D.N.Y. Sept 29, 2020)

The debtor, a taxi business, owned a single taxi medallion in which its only creditor held a security interest to secure a debt of \$576,927. The debtor contended that the value of the medallion was \$90,000.00; the creditor claimed it was worth \$200,000.00. The creditor filed an election under §1111(b) of the Bankruptcy Code. The debtor objected to the § 1111(b) election and moved to strike it on two grounds. First, the debtor asserted that the value of the medallion is “inconsequential” and therefore than an election under § 1111(b) is not available. Second, the debtor contended that it is too late for the creditor to make a § 1111(b) election and that the creditor was bound by its proof of claim. The court noted that courts have taken different approaches when determining whether property is of inconsequential value, and then reviewed the different approaches.

With respect to plan confirmation issue under § 1191(b), the court explained that an election under §1111(b) affects a debtor's ability to confirm a plan of reorganization over the objection of a secured creditor. A plan cannot be confirmed over the objection of a secured creditor in a subchapter V case unless the plan is “fair and equitable” with respect to its secured claims. The court stated that the treatment of the secured claims should comply with the requirements of § 1129(b)(2)(A). The court found that the proposed plan does not satisfy any of these tests.

In re Olson, 2020 WL 10111637 (Bankr. D. Utah Sept. 16, 2020)

The plan confirmation order found that the plan complied with the applicable provisions of the Bankruptcy Code, thereby satisfying §§ 1129(a)(1) and 1191(a).

In re New Hope Hardware, LLC, 2020 WL 6588615 (Bankr. N.D. Ga. Sept 9, 2020)

¹⁶ Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposes it.

The court confirmed the subchapter V plan which involved a pre-confirmation modification. The court held that (i) no notice was required for clarifications and revisions to debtor's proposed chapter 11 plan, where these clarifications and revisions did not materially and adversely affect any of the classes that accepted the plan, and (ii) certain classes were not impaired under the plan, and thus their acceptance of the plan was not prerequisite to confirmation. The court found that the plan, as modified, complied with all of the applicable requirements of § 1129(a), and can be confirmed under § 1191(a). The court confirmed the plan as modified by the provisions of the confirmation order in order to avoid the additional professional fees that the debtor would incur if the court required the debtor to file a further pre-confirmation modification.

Section 1192: Discharge

In re Cleary Packaging LLC, 2021 WL 2667735 (Bankr. D. Md. June 29, 2021)

The plaintiff filed adversary proceeding seeking a determination that its debt against the debtor is excepted from discharge under § 523(a) of the Bankruptcy Code. The defendant filed a motion to dismiss the complaint arguing that § 523(a) does not apply to an entity debtor under subchapter V of chapter 11.¹⁷ The court explained that the issue concerning the application of § 523 in a subchapter V case arises only if the subchapter V debtor cannot confirm a consensual plan under section 1191(a).¹⁸

The court agreed with the defendant that the § 523(a) exceptions to discharge do not apply to the discharge of a subchapter V entity debtor. The introductory language to sections 523(a)(2) and (a)(6) speaks only of an “individual debtor.” The court found that an entity’s discharge under §1192 was unimpeded by §523(a). While the court acknowledged the overlap of subchapter V with Chapters 12 and 13, the court found that the nature and purpose of the discharge are different for corporate debtors, and those differences must be respected in subchapter V.

In re Satellite Restaurants, Inc. Crabcake Factory USA, 626 BR 871 (Bankr. D. Md. March 19, 2021)

As a matter of apparent first impression, the court held that general debt dischargeability provisions of the Bankruptcy Code does not apply to a chapter 11 corporate debtor. The plaintiffs focused on the phrase in § 1192 “debt of the kind specified in § 523(a)” and argued that any debt described in subparagraphs of § 523(a) may be nondischargeable, regardless of whether the debtor is an individual. Plaintiffs also asserted that, because § 523(a) specifies various types of debts, any debt listed in § 523(a) may be excepted from a § 1192 discharge so long as it falls within the scope of one of the 19 subparagraphs. The defendant, instead, focused on the application of § 523(a) and argued that it did not apply to non-individual debtors before the enactment of the SBRA was enacted and did not get expanded to non-individual debtors under the SBRA.

¹⁷ Applicable sections include §§ 727(a), 1141, 1192, 1228,1328, and 523(a).

¹⁸ The court explained that if another large unsecured creditor voted in favor of the plan and the plan was confirmed under §1191(a), the judgment creditor would lose any argument that § 523(a) applied to its claim. The court believes that any such result is arbitrary and undermines the equality principles of creditor treatment under the Bankruptcy Code.

The court held that nothing in legislative history of § 1192 supported the conclusion that Congress intended to expand the application of § 523(a) to a non-individual. Thus, the reference to §1192 added to §523(a) by the SBRA was intended by Congress to continue to limit application of §523(a)'s exceptions in a subchapter V case to individuals.

Section 1193: Modification of Plan

In re Baker, 625 B.R. 27 (Bankr. S.D. Tex. Dec 21, 2020)

While § 1193 permits a debtor to modify a plan “at any time before confirmation,” or a consensual plan confirmed under § 1191(a) “at any time after confirmation of the plan and before substantial consummation of the plan,” and a non-consensual plan confirmed under § 1191(b) “at any time within 3 years, or such longer time not to exceed 5 years,” filing a placeholder plan merely to satisfy the statutory plan filing deadline serves no justiciable purpose, contributes to increased costs, and subverts the intent underlying subchapter V. The court stated that it disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable.

In re Hologenix, LLC, 2020 WL 8457487 (C.D. Cal. December 21, 2020)

The court stated that the plain terms of § 1193 do not grant creditors the right to seek plan modification. The main issue addressed by the court was a stay pending appeal of the bankruptcy court’s confirmation order.

**Section 1194: Plan Payments and Distributions
(including Subchapter V trustee’s fees)**

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. Apr. 22, 2021)

Citing to § 1194(b), the court noted that the subchapter V trustee shall make payments to creditors under the plan unless otherwise provided in the plan or confirmation order.

In re Hunts Point Enterprises LLC, 2021 WL 1536389 (Bankr. E.D.N.Y. March 26, 2021)

The court dismissed the subchapter V case conditioned on payment of allowed compensation to the subchapter V trustee.

See General / Miscellaneous Issues (case dismissal).

In re Tri-State Roofing, 2020 WL 7345741 (Bankr. D. Idaho Dec 7, 2020)

In determining if an award of compensation for a subchapter V trustee can be made under § 330(a)(1), the court found that two subsections of § 326 must be examined. Subsection (a) specifically excludes payment for trustee services in subchapter V. As to subsection (b)¹⁹ of

¹⁹ Subsection (b) of section 326 states:

§ 326, the court found that a subchapter V trustee is not appointed under 28 U.S.C. § 586(b) and therefore is not a standing trustee, rendering a portion of § 326(b) inapplicable. The language following the second comma in § 326(b) appears to only allow reasonable compensation under § 330 if a trustee is appointed in a case filed under chapter 12 or chapter 13. There is not a reference to a trustee in subchapter V in this portion of the statute. The rest of the section also caps compensation for a trustee at five percent in chapter 12 and chapter 13 cases. As such, the court reasoned that this subsection concerning non-standing trustees in subchapter V may be subject to different interpretations. The court concluded that because the language of the statute can be enforced as written and does not make the amendment absurd, § 326(b) does not prevent an award of compensation to the subchapter V trustee under § 330(a)(1), nor does it place a cap such compensation.

See also Section 1183 (subchapter V trustee).

In re Pearl Resources, LLC, 622 B.R. 236 (Bankr. S.D. Tex Sept 30, 2020)

The court stated that in a non-consensual plan, § 1194(b) provides for the subchapter V trustee to make payments to creditors under the plan, after confirmation, unless the plan or the order confirming it provides otherwise.

Section 1195: Transactions with Professionals

In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug 7, 2020)

Citing to § 1195, the court stated that subchapter V provides qualifying debtors with some powerful and cost-saving restructuring tools not otherwise available to chapter 11 debtors, and such benefits include modification of the disinterestedness requirements of Section 327(a) for a professional that holds a prepetition claim of less than \$10,000.

(b) In a case under Subchapter V of chapter 11 or chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the U.S. Trustee or of a standing trustee appointed under section 586(b) of title 28, *but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title* for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

Subchapter V Election; Re-designation

In re Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. Dec 17, 2020)

Debtor that had originally filed a traditional chapter 11 petition before subchapter V went into effect filed notice of its intent to belatedly proceed under subchapter V. The U.S. Trustee objected, and the court held that notice of election to proceed under subchapter V was a procedurally improper means for the debtor to attempt to proceed under subchapter V.

In re Easter, 623 B.R. 294 (Bankr. N.D. Miss. Oct. 9, 2020)

About ten (10) months after commencing their chapter 11 case but prior to confirmation of their proposed plan, the individual debtors, operators of a trucking and/or hauling business, amended their voluntary petition to elect to proceed under newly enacted subchapter V of chapter 11. The U.S. Trustee objected, and creditors moved to strike the amended petition. The court held that debtors who have a chapter 11 case pending on the effective date of the SBRA may amend their voluntary petition and elect to proceed under subchapter V of chapter 11. The court overruled the objection, and denied the motions to strike.

In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. Aug 7, 2020)

More than a year after the debtor, the operator of a trampoline park, initially filed its chapter 11 in which it elected petition as a “small business debtor,” the debtor filed amended petition to proceed under new subchapter V. The court held that a chapter 11 small business debtor is permitted to elect application of subchapter V to an already-pending case. However, a small business debtor may not amend a chapter 11 petition to elect subchapter V status after expiration of the statutory plan-filing and status conference deadlines. The court did not grant an extension of the statutory plan-filing and status conference deadlines.

See also Sections 1188 (status conference) and 1189 (plan filing).

²⁰ Other subchapter V debtor related cases not already mentioned include: In re Clear the Way Supportive Housing Corp., 2021 WL 2520210 (Bankr. W.D.Tenn., April 30, 2021) (application for compensation by debtor’s counsel for services rendered before case dismissal); In re Secur O&G LLC, 2021 WL 1396378 (Bankr. S.D.W.V April 13, 2021) (sale motion under § 363(b) granted conditionally); In re Adams, 2021 WL 1783350 (Bankr. M.D. Fla. March 19, 2021) (the court considered the debtor’s motion for reconsideration regarding the court’s decision to not grant any further requests for extensions of time to file plan); In re Abundant Life Worship Center of Hinesville, GA, Inc., 2020 WL 7635272 (Bankr. S.D. Ga. Dec 16, 2020) (application of § 362(n)(1)(B) which states that no stay comes into effect if the debtor “was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition[.]”); In re Slidebelts, Inc., 2020 WL 3816290 (Bankr. E.D. Cal. July 6, 2020) (addressing whether the court may require payment to committee counsel in connection with conditional dismissal of chapter 11 case so that the debtor can re-file the case under subchapter V); In re Crilly, 2020 WL 3549848 (Bankr. W.D. Okla. June 30, 2020 (order denying motion for continuation of the automatic stay; court found that the second case was “presumptively filed not in good faith” under § 362(c)(3)(C)).

In re Bonert, 619 B.R. 248 (Bankr. C.D. Cal. June 3, 2020)

The debtors sought to amend their chapter 11 petition to elect treatment under the newly-enacted subchapter V of chapter 11. Official Committee of Unsecured Creditors objected to debtors' subchapter V election. The court allowed re-designation of a pending chapter 11 case to subchapter V. The debtors did not exceed the debt limit for "small business debtors". Passage of the plan-filing and status conference deadlines did not prevent case from proceeding under subchapter V.

In re Twin Pines, LLC, 2020 WL 5576957 (Bankr. D. N.M. April 30, 2020)

The debtor, who filed the chapter 11 case as a small business case approximately one year before the SBRA went into effect, sought to amend its petition to elect subchapter V treatment. The court concluded that Debtor is entitled to proceed under subchapter V.

The U.S. Trustee's objection to the amended petition is based on subchapter V's procedural provisions and the fact that the 45-day period specified by 1129(e) expired before the debtor elected subchapter V. The court observed that neither the Bankruptcy Code nor the Bankruptcy Rules impose any time limit on the debtor's subchapter V election.²¹ The court also stated that filing an amended petition to elect subchapter V does not reset the date of the order for relief under chapter 11 from which several subchapter V deadlines begin to run.²² Because the debtor was not required to file a motion for permission to proceed under subchapter V and the motion was superfluous, the court did not rule on the debtor's motion.

See also Sections 1188 (status conference) and 1189 (plan filing).

In re Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. April 10, 2020)

The court permitted a chapter 11 case that was filed almost 15 months before the SBRA became effective to be re-designated as subchapter V. At least 50% of a debtor's debt was commercial or business debt although a secured creditor's loan accounted more than 50% of a debtor's debt and the loan was used to purchase a residence. The debtor resided in it but also started operating a bed and breakfast within the first year the debtor purchased the residence. Although the purchased property is the debtor's primary residence, the debtor's primary purpose in purchasing the property was to operate bed and breakfast (substance over form). Therefore, the court ruled that the debtors were eligible debtors under subchapter V.

The court relied on In re Progressive Solutions (see below), which allowed conversion to subchapter V even if it created redundant hearings or "procedurally awkward" process of resetting deadlines because the Bankruptcy Code did not pose an absolute bar to retroactive application of SBRA.

See also Sections 1188 (status conference) and 1189 (plan filing).

²¹ Under Interim Bankruptcy Rule 1020(a), a debtor elects Subchapter V treatment on the petition. Bankruptcy Rule 1009(a) provides that a "voluntary petition ... may be amended by the debtor as a matter of course at any time before the case is closed."

²² The court noted that although § 348 provides that certain deadlines are reset to the date of conversion rather than the original order for relief, no language in the Bankruptcy Code suggests that re-designation of a case to a case under Subchapter V functions like a conversion from one chapter to another.

In re Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. March 24, 2020)

Small business debtor that had filed for chapter 11 relief before subchapter V went into effect amended its petition to belatedly elect to proceed under that subchapter, and creditor objected. The court overruled the objection and held that as matter of first impression, (i) a small business debtor has the right to amend its chapter 11 petition to belatedly elect to proceed under subchapter V; and (ii) applying the newly enacted subchapter V provisions to small business debtor which had filed its chapter 11 petition before subchapter V went into effect did not constitute an impermissible retroactive application.

In re Double H. Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. March 5, 2020)

The court disallowed a debtor who filed for chapter 11 prior to enactment of subchapter V to convert to subchapter V because, among other reasons, the statute is silent on retroactive application of the statute.

See also Sections 1188 (status conference) and 1189 (plan filing).

In re Moore Props of Person Cty., LLC, 2020 WL 995544 (Bankr. M.D. N.C. Feb. 28, 2020)

The parties present two issues: (i) may the debtor, whose case was pending on the effective date of the SBRA, elect to proceed under subchapter V of chapter 11; and (ii) is the debtor, who did not meet the definition of a small business debtor on the petition date, eligible to proceed under subchapter V when it now meets that definition under the SBRA?

The court found that “an amendment to a Bankruptcy Petition can be made at any time as a matter of course at any time before the case is closed.” Therefore, the debtor was entitled to amend its statement to elect subchapter V.

See also Section 1182 (definition of debtor/ debtor-in-possession).

In re Progressive Solutions, Inc., 615 B.R. 894 (Bankr. C.D. Cal. Feb 21, 2020)

Small business debtor filed motions for order authorizing amendment of chapter 11 petition to elect to proceed under subchapter V and for order confirming amended chapter 11 small business plan. The U.S. Trustee objected. The court held that: (i) as matter of apparent first impression for the court, debtor's chapter 11 case, which was pending on the effective date of the SBRA, could be re-designated as a subchapter V case, and (ii) the debtor's motion to amend its bankruptcy petition was unnecessary and not required by law.

Case Conversion from Chapter 7 or 13 to Chapter 11 Subchapter V

In re Keffer, 2021 WL 1523167 (Bankr. S.D.W.Va. April 16, 2021)

The debtor filed a motion to convert chapter 13 case to subchapter V, and related motion to extend deadline for subchapter V filings upon conversion. When the debtor filed his chapter 13 case, his assets and debts were within statutory limits for that chapter. It was not until the IRS submitted its amended proof of claim that it became apparent that the debtor could not proceed under chapter 13. First, the court inquired as to whether conversion is appropriate under §1307(d). Next, the court discussed §1112(b) to determine whether conversion to chapter 11 is proper.

The court found that the debtor qualified for conversion under §1307(d). As to the debtor's request to extend the subchapter V deadlines, which must be accomplished via separate motion, the court found that if the debtor can meet the threshold for extending the §1188 and §1189 deadlines, then §1112(b)(4)(j) may not prevent conversion.²³

See also Sections 1188 (status conference) and 1189 (plan filing).

In re Tibbens, 2021 WL 1087260 (Bankr. M.D. N.C. March 19, 2021)

The debtor filed a chapter 13 petition two months prior to the effective date of subchapter V. Debtor filed a motion to sell real property free and clear, which was objected to. After debtor's chapter 13 was dismissed for exceeding debt limitations, he withdrew and amended the sale motion and filed a motion to convert the case to chapter 11 (with the intention to proceed under subchapter V).

The court found that the record did not establish that the debtor would be unable to confirm any chapter 11 plan. Compared to chapter 13 where the court must find that "the action of the debtor in filing the petition was in good faith" (§ 1325(a)(7)), chapter 11 has no similar provisions (§ 1129) and deals with bad faith filings through § 1112, which requires both that the petition be filed with subjective bad faith and that any plan for reorganization be objectively futile. The court noted even if the debtor were to elect to proceed under subchapter V, the failure to meet the deadlines under § 1188 (status conference) and §1189 (plan filing) would not necessarily be fatal to the chapter 11 case or the debtor's ability to confirm a chapter 11 plan. The court granted the motion to convert the case to chapter 11.

Although conversion of the case to chapter 11 constituted an order for relief under chapter 11, it is not construed to change the date of the order for relief for purposes of §§ 1188 and 1189. Therefore, the deadlines in each of these sections would need to be extended for the status conference to be timely held and for the debtor to timely file his plan, both of which periods had expired before the conversion date.

See also Sections 1188 (status conference) and 1189 (plan filing).

In re Kemp, 2021 WL 1941630 (Bankr. S.D. Miss. February 5, 2021)

This is a motion to convert a chapter 12 case to a chapter 11 subchapter V case. Under § 1208(a), a debtor "may convert a case [under chapter 12] to a case under chapter 7 of this title at any time." The statute is silent as to whether a debtor may, with a court's permission, convert a chapter 12 case to a case under chapter 11. The court noted that the Fifth Circuit has not addressed the issue, and that a split of authority has developed among those courts that have.

The court found that the plain language of § 1208 does not permit a chapter 12 debtor to convert to a chapter 11 case. Allowing such a conversion would require the court to supply language to § 1208 in violation of traditional canons of statutory interpretation. Accordingly, the Court found that the debtor may not convert the pending case to one under subchapter V.

²³ Section 1112(b)(4)(j) provides that on request of a party in interest, the court shall convert a case under chapter 11 to a case under chapter 7 or dismiss the chapter 11 case for "cause" which includes "failure to file a disclosure statement, or to file or confirm a plan, within the time fixed...."

In re Wetter, 620 B.R. 243 (Bankr. W.D. Va. Oct 14, 2020)

The debtor moved to convert his Chapter 7 case to one under chapter 11 and to proceed as small business debtor. The court agreed with the U.S. Trustee that the evidence at trial established that the debtor is a small business debtor. As a result, if the debtor did convert to chapter 11, but did not elect to proceed under subchapter V, his case would be a “small business case” as defined in the Bankruptcy Code. Upon doing so, the debtor would immediately be in default of § 1121(e)(2), which provides that in a small business case, “the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief.” The foregoing deadline can only be extended if the order extending time is entered before the existing deadline and other conditions are met. That deadline already expired.

The court explained that Bankruptcy Rule 1009(a) provides that “[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.” Therefore, no motion is required to elect subchapter V status for a debtor already in chapter 11. An amended petition is sufficient to make the election.

Nevertheless, the court expressed that if converted to chapter 11 and subchapter V elected, the court would decline to extend the time for the debtor to file a plan under Section 1189(b) given the debtor's conduct.²⁴ Because the debtor would immediately run afoul of § 1112(b)(4)(J) if the motion were granted and the election made, the court denied the motion to convert to chapter 11.

See also Sections 1188 (status conference) and 1189 (plan filing).

In re Trepetin, 617 B.R. 841 (Bankr. D. Md. July 7, 2020)

The debtor filed a voluntary petition under chapter 7 nine days prior to the effective date of the SBRA, but did not move to convert his case until June 11, 2020. The court permitted a chapter 7 case that was commenced before the effective date of SBRA to be re-designated to chapter 11 subchapter V.

See also Sections 1188 (status conference) and 1189 (plan filing).

In re Bello, 613 B.R. 894 (Bankr. E.D. Mich. March 27, 2020)

After the debtor’s case was converted from chapter 13 to chapter 11, he filed amended voluntary petition, purporting to elect to proceed as a “small business debtor” under subchapter V of chapter 11. Order to show cause was issued as to why the court should not strike debtor's amended petition and its purported election. The court held that as a matter of apparent first impression for the court that the case could proceed under subchapter V of chapter 11. The court agreed with the reasoning and holding of In re Moore Properties (see above) which held that a debtor in a chapter 11 case that was pending before the February

²⁴ The court found that the debtor has been evasive and misleading about the true nature of his involvement with certain party. The debtor gave conflicting information as to ownership and transfer dates at various times to the trustees and creditors. The court also commented on the debtor’s lack of diligence in locating paperwork that is critical to the ownership and value of his largest asset. The debtor has played fast and loose with the facts, and under a “justly accountable” standard, he is not given the benefit of the doubt.

19, 2020 effective date of the SBRA could elect to proceed under subchapter V, particularly when it is still in the early, pre-confirmation stage as a chapter 11 case.

Dismissal of Subchapter V Case:

In re McGrath, 2021 WL 2405722 (Bankr. M.D.Fla., June 10, 2021)

Creditor filed motion to dismiss or convert the case. The court found that the debtor's purpose in filing the bankruptcy was to undo certain Enforcement Order and to attempt to reorganize a SARE (with no equity) in subchapter V. This is an improper use of bankruptcy jurisdiction. Also, the court found that the debtor's proposed amended plan was unrealistic and there is no reasonable likelihood that it will be confirmed. The court decided to dismiss the case for cause under § 1112, with leave to convert to a chapter 7 case.

See also Section 1182 (definition of debtor/ debtor-in-possession).

In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership, 2021 WL 1679062 (Bankr. N.D.W.Va., April 28, 2021)

The debtor sought confirmation of its second amended plan; the U.S. Trustee opposed confirmation and sought dismissal of the debtor's case. The court found cause to dismiss the debtor's case, and the plan was not confirmable. With respect to dismissal of the case under §1112(b), the court found that the debtor has suffered continuing losses in the absence of a reasonable likelihood of rehabilitation. The court noted that its analysis in that regard, however, also bears on its decision to not confirm the debtor's plan.

See also Sections 1190 (plan contents) and 1191 (plan confirmation).

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. Apr. 22, 2021)

The U.S. Trustee filed a motion to dismiss for "cause" the subchapter V small business case of individual debtor, the managing member of a limited liability company that owned and operated a funeral home, who lost \$4,000 playing slot machines during the month after he commenced his bankruptcy case. The court held that (i) under the circumstances, debtor's postpetition, pre-confirmation gambling did not constitute gross mismanagement of the estate and "cause" for dismissal, and (ii) even if the debtor's postpetition gambling constituted gross mismanagement of the estate, dismissal was not in the best interests of creditors. The motion to dismiss was denied.

The court found that the U.S. Trustee did not meet its burden proving cause for dismissal under these facts. The court explained that it is not to say that post-petition gambling can never be considered cause for dismissal in a subchapter V case. The court explained that the debtor should be strongly cautioned that had even a few facts here proven to be different, the motion to dismiss could have been decided in a very different way. While gambling may be legal in some circumstances, it is in many circumstances both offensive to the integrity of the bankruptcy system and inconsistent with the duties owed by any fiduciary of the bankruptcy estate.

In re BK Technologies Inc., 2021 WL 1230123 (Bankr. N.D. W. Va. March 30, 2021)

The court dismissed debtor's subchapter V case under section 1112(b) for being filed in bad faith. The court found no bankruptcy purpose – reorganization or liquidation – for the debtor to achieve. Debtor had stopped operating and sold its assets several months prior to deciding to seek chapter 11 relief. Only after being sued by creditor did the debtor feel compelled to seek bankruptcy protection. The court pointed out that in its proposed plan, the debtor sought to enjoin collection activity against its equity holders and related entities despite such relief being unnecessary as the debtor was simply an empty shell. In sum, the court did "not perceive any purpose of the Bankruptcy Code served" by the debtor's filing, and found that the case simply served as a proposed vehicle to insulate the debtor's equity holders and related entities.

In re Hunts Point Enterprises LLC, 2021 WL 1536389 (Bankr. E.D.N.Y. March 26, 2021)

Creditors' request to de-designate the debtor as a subchapter V debtor was denied. However, the debtor requested dismissal of the case and no longer wanted to proceed with filing a chapter 11 plan. The court found that the debtor's case revolves substantially around a two-party dispute and that allowing the debtor to continue as a subchapter V debtor would be an abuse of the subchapter V provisions. The court found that cause existed to dismiss the debtor's case under § 1112.

Also, the court directed that the case be dismissed upon payment of any compensation allowed to the subchapter V trustee. The court established certain protocols and deadlines providing that after the trustee's fee application, the debtor may submit an order of dismissal with prejudice. In the alternative, the trustee and the debtor may submit a stipulation for payment, with the consent of the U.S. Trustee.

Faculty

Hon. Peter G. Cary is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Maine in Portland, initially appointed in 2014. He also serves on the U.S. Bankruptcy Appellate Panel for the First Circuit. Previously, he clerked for one year for the Maine Superior Court and in 1988 joined the law firm of MittelAsen, LLC, where he practiced law until his appointment to the bankruptcy court. Judge Cary is the treasurer of the Maine State-Federal Judicial Council, an advisory director of the Nathan & Henry B. Cleaves Law Library, an adjunct faculty member at the University of Maine School of Law, and a member of the First Circuit Workplace Conduct Committee, and he is certified in both Consumer and Business Bankruptcy Law by the American Board of Certification. He received his undergraduate degree *cum laude* and Phi Beta Kappa from the University of Massachusetts at Amherst in 1982 and his J.D. *cum laude* from Boston College Law School in 1987.

Tanya Sambatakos is a partner with Molleur Law Office, practicing in both the Portland and Biddford, Maine, offices. She concentrates her bankruptcy practice on representing consumers and small businesses in Maine. Ms. Sambatakos is a member of the York and Maine State Bar Associations, ABI and the National Association of Consumer Bankruptcy Attorneys. She is rated AV-Preeminent by Martindale Hubbell and has been recognized as a “Rising Star” in *New England Super Lawyers* for her work on behalf of consumers. Ms. Sambatakos is currently a board member of the York County Bar Association and the Volunteer Lawyer’s Project, and has spoken on numerous panels focusing on solutions to various debt issues. She is also the bankruptcy co-chair of the Maine State Bar Association and a past board member and volunteer with Habitat for Humanity of Greater Portland. Ms. Sambatakos received her B.S. *cum laude* in business administration from Babson College and her J.D. from Suffolk University Law School.

Macken Toussaint is a partner with Riemer & Braunstein LLP in Boston, where she concentrates her practice on bankruptcy and business restructuring, creditors’ rights and commercial law. She represents individual and corporate debtors in chapter 11 proceedings and advises management of debtor companies on business and legal issues, including pre-bankruptcy workout matters and reporting requirements. She also represents bankruptcy trustees, secured and unsecured creditors, lenders, commercial landlords, plan-funders, institutional investors and buyers in bankruptcy proceedings. In 2016, Ms. Toussaint was appointed by the U.S. Trustee’s Office and the U.S. Bankruptcy Court as a chapter 11 bankruptcy examiner. She has also represented clients with respect to various commercial agreements, corporate issues, creditor issues and disputes, and contract matters. Ms. Toussaint has experience in the representation of lending institutions and borrowers in the structuring, negotiation and documentation of financing transactions, including debtor-in-possession financing, asset-based transactions, unsecured loans, intercreditor transactions, and other general commercial financing. Her experience includes structured financing and asset-securitization transactions, and she supports impact investing and represents social impact lenders and financial institutions. Prior to joining Riemer & Braunstein, Ms. Toussaint clerked for Hon. Henry J. Boroff of the U.S. Bankruptcy Court for the District of Massachusetts (1999-2001). She received her B.A. *magna cum laude* in 1996 from Northeastern University, her J.D. in 1999 from Northeastern University School of Law, and her M.B.A. in 2011 from Suffolk University Sawyer Business School.