



AMERICAN
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Consumer Practice Extravaganza

Subchapter V Issues

Keri P. Ebeck

Bernstein-Burkley | Pittsburgh

Ciara L. Rogers

Waldrep Wall Babcock & Bailey PLLC | Raleigh, N.C.

Brendon D. Singh

Tran Singh LLP | Houston

Subchapter V vs. Chapter 13

Panelists: Brendon Singh, Keri P. Ebeck and Ciara Rogers

Chapter 11 “Sub V” Refreshers

- Effective February 19, 2020
 - COVID caused a slow roll
 - Significant increase recently (78%)
- Designed to allow small business debtor a more efficient and less expensive manner of reorganizing under Chapter 11
- New act excludes only ‘single asset real estate’ real estate business debtors
- At least 50% of the debt arose from the business activity
- Debt limits – currently \$3,024,725 (commenced after 6/21/24)

Chapter 11 “Sub V” Refreshers

- Shortened Timelines
 - Status conference held 60 days after entry of the order for relief
 - 14 days prior to status conference debtor must file report detailing efforts taken or which will be taken to attain a consensual plan
 - Debtor must file a plan within 90 days, unless extended by court, for matters which the ‘debtor should not justly be held accountable’



Chapter 11 “Sub V” Refreshers

Chapter 11 Trustee Appointed

- Oversee and monitor the case
- Facilitate the development of consensual plan of reorganization
- Make distributions under non-consensual plan, unless plan or order states otherwise
- Make a final report and file a final account of administration of the estate
- Service terminates upon substantial consummation
 - Ordinarily when distributions commence, first payment date
 - Non-consensual plans, trustee service will terminate after commitment period

Chapter 11 “Sub V” Refreshers

- Primary Residence/Business Purpose
 - Modification of a claim secured only by a security interest in real property that is the primary residence of the debtor is **allowed** if the new value received in connection with the granting of the security interest was not used primarily to acquire the real property, **but was used primarily in connection with the small business of the debtor**



Chapter 11 “Sub V” Refreshers

- Confirmation can be obtained without the support of any class of claims
 - Confirmation standards limited to ‘fair and equitable’ and not ‘unfairly discriminate’
 - New ‘best efforts’ test for unsecured creditors
 - New feasibility test – reasonable likelihood that the debtor will be able to make all payments under the plan
 - Absolutely priority rule and new value exception are not applicable
 - No quarterly trustee fees
 - No creditors committee will be appointed – unless court orders otherwise

Chapter 11 “Sub V” Refreshers

• DISCHARGE

- Under consensual plan, debtor will receive discharge upon confirmation
- Under non-consensual plan, discharge does not occur until debtor completes plan payments for a period of at least 3 yrs or such longer time as the court fixes, not to exceed 5yrs.

• SERVICING RECOMMENDATIONS

- No POC Deadline – suggest 70-day internal deadline
- Status Conference
- No co-debtor stay
- No obligation for debtor to commence payments prior to confirmation
- 1111B Election deadlines – request deadline be set if not otherwise ordered
- No confirmation deadline
- No disclosure statement - plan will contain the required disclosures
- Administrative expenses paid through the plan rather than on the Effective Date
- For consensual plan – stay will terminate upon confirmation

How does Subchapter V differ
from Chapter 13?

Different Confirmation Consequences

- Discharge
- Property of the estate – post-petition assets and earnings
- Post-confirmation modification
- Role of trustee

Projected Disposable Income

Chapter 13 – §1325(b)

- Applies if trustee or unsecured creditor objects
- “Means test” standards apply to above-median debtor
- “Applicable commitment period” is five years for above-median debtor

Subchapter V – § 1191(c)

- Applies only if *class* of creditors objects to confirmation
- “Means test” standards do not apply
- Commitment period is three to five years

Modification of Secured Claims

Chapter 13

- “Hanging paragraph” requires treatment of some claims secured by PMSI in personal property as fully secured
- Equal monthly payments required
- Cannot modify residential mortgage

Subchapter V

- No hanging paragraph; PMSI claims can be bifurcated
- No requirement for equal monthly payments
- Residential mortgage can be modified in some circumstances

Payment of administrative expenses and priority claims under the plan

Chapter 13

- Debtor may pay administrative and priority claims (including DSO) through plan payments; no interest on tax claims

Subchapter V

- Administrative and priority claims must be paid in full on the effective date, except taxes that may be paid, with interest, over a five-year period beginning on date of filing petition, with interest at governmental rate under § 1129(a)(9)(C)
- § 1191(e) permits payment of administrative expenses under the plan if cramdown confirmation occurs

Post-petition Assets and Earnings

Chapter 13 –

§§ 1306(a), 1327(b)

- Property of the estate includes post-petition assets and earnings
- Confirmation vests property of estate in debtor unless plan or confirmation order provides otherwise – §1327(b)

Subchapter V –

§ 1186(a)

- Post-petition assets and earnings are property of estate only after cramdown confirmation – §1115(a) does not apply (§1181(a))
- Confirmation vests property of the estate in the debtor unless plan or confirmation order provides otherwise – §1141(b)

Post-confirmation Modification of Plan

Chapter 13 –

§ 1329(a)

- Debtor, trustee, or unsecured creditor may modify plan

Subchapter V –

§ 1193(b), (c)

- Only the debtor may modify plan
- No post-confirmation modification of consensual plan after “substantial consummation”

Chapter 11 “Sub V” Case Law Update

- *Cantwell-Cleary, Co. v. Cleary Packing, LLC* (In Re Cleary Packing, LLC), 36 F.4th 509
 - *Debts described in 11 U.S.C. 523(a) can be nondischargeable as to corporate debtors, not just individual debtors, if the plan is nonconsensual.*
- *Avion LLC v. GFS Industries, LLC* (In Re GFS Industries, LLC), 647 B.R. 337 (Bankr. W.D. Tex. Nov 10, 2022)
 - *Statutory language by Judge Duncan*
 - *Section 523 dischargeability subject to both individual and corporate debtors.*

Chapter 11 “Sub V” Case Law Update

- *In Re Macedon Consulting, Inc.* 652 B.R. 480 (EDVA)
 - *All future amounts due under an expired lease qualify as “noncontingent and liquidated” debts that should be counted towards the sub V eligibility cap.*
- *In Re Cortlandt Liquidation, LLC* (No. 20-12097), 2023 WL 1483783 (Bankr. S.D.N.Y.)
 - *Proper method for calculating the cap on lease rejection damages under section 502(b)(6)*

Chapter 11 “Sub V” Case Law Update

- *Single Asset Real Estate Debtor*
 - *Not Eligible for subchapter V if its primary activity is the business of owning a single asset real estate 11 U.S.C. 1182(1)(A)*
 - *In Re Evergreen Site Holdings*, 625 B.R. 307 (Bankr. S.D. Ohio, 2023)
 - *Debtor who owned two adjacent properties would likely conduct business on the properties other than leasing and collecting rent. Court held that the debtor was eligible for subchapter V.*
 - *In Re Brindle Path Partners, LLC*, 2024 WL 86601 (Bankr. D. Utah, 2024)
 - *Court held that the debtor was not eligible for subchapter V, when the single asset real estate debtor was a part of development of an equestrian community- it was in four phases, that were not yet complete.*

Faculty

Keri P. Ebeck is an attorney with Bernstein-Burkley in Pittsburgh, where she focuses her practice on commercial, consumer and real estate bankruptcy. She was recognized in the 2020 edition of *Pennsylvania's Best Lawyers for Bankruptcy*, and she speaks nationally on chapter 7, 12 and 13 matters involving creditors. She's also very involved with the American Legal Financial Network, with which she has regular speaking engagements. Ms. Ebeck is admitted to practice in Pennsylvania and New Jersey, and before the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania; the Northern and Southern Districts of Indiana; the Eastern, Northern, Southern and Western Districts of Texas; the Northern District of Ohio; the Third Circuit Court of Appeals; and the U.S. Supreme Court. She is a member of the American and Pennsylvania Bar Associations, is a past chair of the Bankruptcy and Commercial Law Section for the Allegheny County Bar Association and vice chair of its Finance Committee, Finance chair for the Judith K. Fitzgerald Western Pennsylvania Bankruptcy Inns of Court, and a member of the American Legal & Financial Network and the International Women's Insolvency & Restructuring Confederation's Pittsburgh Chapter. Ms. Ebeck received her B.A. in political science in 2000 from King's College and her J.D. in 2003 from Roger Williams University.

Ciara L. Rogers is a partner with Waldrep Wall Babcock & Bailey PLLC in Winston-Salem, N.C., where her practice focuses on bankruptcy and business insolvency. She is certified as a Business Bankruptcy Law Specialist by the North Carolina State Bar and is licensed to practice in all federal and state courts in North Carolina and Virginia, as well as the Fourth Circuit Court of Appeals. Before joining Waldrep Wall Babcock & Bailey PLLC, Ms. Rogers was an attorney with Oliver & Cheek. Prior to that, she clerked for Hon. J. Rich Leonard and Hon. Randy D. Doub of the U.S. Bankruptcy Court for the Eastern District of North Carolina. In 2018, Ms. Rogers became the director of Campbell University School of Law's Stubbs Bankruptcy Clinic, where she supervises second- and third-year law students in providing *pro bono* bankruptcy representation to low-wealth individuals in the Eastern District of North Carolina. She is a member of the North Carolina and Virginia Bar Associations. In 2023, Ms. Rogers was honored as one of ABI's 40 Under 40. She received dual B.S degrees in history and political science from Averett University and her J.D. from North Carolina Central University School of Law.

Brendon D. Singh is a founding partner of Tran Singh LLP in Houston, where he focuses on consumer and corporate restructuring and litigation. His experience includes the representation of debtors in chapter 7, 11 and 13 bankruptcies and out-of-court workouts. Mr. Singh is Board Certified in Consumer Bankruptcy Law by the Texas Board of Legal Specialization. He was recognized as a "Texas Super Lawyer" in the category of Consumer Bankruptcy by *Texas Monthly* from 2022-24 and as a "Texas Rising Star" from 2018-22 in the category of Consumer Bankruptcy. He also was selected by *Houstonia* magazine as a "Houston Top Lawyer" from 2018-23 in the category of Bankruptcy, and he was named in *The Best Lawyers in America* as one of the "Ones to Watch" in the category of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law from 2022-24. In 2020, Mr. Singh was appointed by the U.S. Trustee to serve as a subchapter V trustee, and he is appointed to small business cases filed in the Southern District of Texas. Recently, he was appointed to serve on the Small Business and Subchapter V Rules Committee. Prior to his partnership at Tran Singh LLP,

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Mr. Singh interned for Hon. Judge Vanessa Gilmore in the U.S. District Court for the Southern District of Texas-Houston Division and was a summer associate at Liskow Lewis, LLP in Houston. He received his B.S. *cum laude* in 2007 from the University of Houston and his J.D. *summa cum laude* in 2011 from Texas Southern University Thurgood Marshall School of Law, where he participated in the annual Duberstein Bankruptcy Moot Court Competition from 2009-11; since 2013, he has continued his involvement with the competition as a coach for his alma mater.