UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION (DETROIT)

In re:	Case No. 17-50551
Arrel Adoma Leatherwood,	Chapter 7
Debtor.	Honorable Mark A. Randon

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ORDER DENYING CREDITOR'S MOTION FOR STAY PENDING APPEAL

The Court reopened Arrel Leatherwood's bankruptcy and granted her motion for contempt against Options 4 You, LLC for violation of the discharge injunction (Dkt. Nos. 25, 33). On or before March 25, 2021, the Court ordered Options to deliver two checks to Leatherwood's attorney: a check payable to Leatherwood for $1,315.00, and a check payable to her attorney for $1,794.00. Options appealed. Before the Court is its motion for a stay pending appeal.

There are four factors used to determine whether to grant a stay pending appeal: "(1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies." *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). The Court "is required to make specific findings concerning each of the four factors, unless fewer are dispositive of the issue." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995) (quotations and citation omitted). The "most critical" factors are the first two: a strong showing of the likelihood of success and that the movant will suffer irreparable harm. *Nken v. Holder*, 556 U.S. 418, 434 (2009). In balancing

these factors, "[t]he probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction. Thus, a stay may be granted with either a high probability of success and some injury or *vice versa*." *Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (internal citation omitted).

Options does not have a strong likelihood of success on the merits. *See In re Leatherwood*, No. 17-50551, 2021 WL 726072, at **2-4 (Bankr. E.D. Mich. Feb. 23, 2021).

As to the second factor, "economic loss does not constitute irreparable harm, in and of itself. Economic loss is generally recoverable while injunctive relief is available only when legal remedies prove inadequate." *Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d at 290 (internal citation omitted). "The key word [as it relates to this factor] is *irreparable*. Mere injuries, however substantial, in terms of *money*, time and energy necessarily expended in the absence of a stay are not enough." *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis added). Absent a stay, Options' loss is purely economic—$3,109.00.[1] This is not irreparable harm. In the unlikely event that Options succeeds on appeal, its economic loss is recoverable.

Options also argues that the United States Supreme Court's decision in *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) requires reversal on appeal. But *Fulton*—which Options argued before this Court and this Court considered—is wholly inapplicable. In *Fulton*, the Supreme Court held that the mere retention of estate property after the filing of a bankruptcy does not violate the automatic stay as an act to "exercise control" of the property. *Id.* at 592; *see*

[1]Options says the Court erred in awarding attorney fees without allowing it to address the reasonableness of such fees. However, the Court reviewed the billing statement of Leatherwood's attorney, finding that the time expended on the motion and hourly rate were reasonable. The Court only awarded a fraction of the amount on the billing statement.

also 11 U.S.C. § 362(a)(3). This case involves a violation of the discharge injunction under 11 U.S.C. § 524(a)(2), which voided Options' judgment and enjoined the "*continuation*" of its garnishment to recover the debt. 11 U.S.C. §§524(a)(1) and (a)(2) (emphasis added). Moreover, Options was not even in possession of the funds from the second garnishment when it received actual knowledge of Leatherwood's bankruptcy and discharge. It received those funds six months later.

Because Options fails on the first two factors, Options' motion is **DENIED**.[2]

IT IS ORDERED.

Signed on March 30, 2021

/s/ Mark A. Randon

Mark A. Randon
United States Bankruptcy Judge

[2]The Court notes that the public interest is served when creditors respect the discharge injunction and allow debtors to obtain a fresh start under the bankruptcy code. No other interested party will be harmed.

Commercial Law League of America
127th National Convention

Perspective from The Bench: Judges Address Latest Challenges Facing Debtors and Creditors

May 13, 2021

Panelists:

Hon. Janet S. Baer
U.S. Bankruptcy Court, N.D. Ill.

Hon. Paul W. Bonapfel
U.S. Bankruptcy Court, N.D. Ga.

Hon. Judith K. Fitzgerald (Ret.)
Shareholder, Tucker Arensberg, P.C. and
Professor in Practice, University of Pittsburgh School of Law

CHAPTER 13 PRACTICE AND PROCEDURE (2D EDITION) § 15:12

TURNOVER OF MOTOR VEHICLE OR OTHER PROPERTY REPOSSESSED PREPETITION

(To be published in forthcoming 2021 Edition)
Hon. W. Homer Drake, Jr.
Hon. Paul W. Bonapfel
Adam M. Goodman

When a creditor with a security interest in personal property, usually a motor vehicle, takes possession of it (or seizes the property through legal process) before the debtor files a Chapter 13 case, the debtor often wants to obtain possession of it and pay the allowed amount of the secured claim under the plan pursuant to Code § 1325(a)(5)(B).[1] If the secured creditor has already disposed of the collateral at the time of filing, of course, the debtor cannot recover possession because the debtor no longer has an interest in it.[2]

If the creditor has not disposed of collateral in its possession, the general rule under the Supreme Court's decision in *U.S. v. Whiting Pools, Inc.*,[3] is it is property of the estate.[4] Code § 542(a) provides that an entity in "possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under [Code § 363] or that the debtor may exempt [under Code § 522] shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." In a Chapter 13 case, the debtor is entitled to possession of property of the estate[5] and has the rights of a trustee under § 363(b) to use property of the estate under Code § 363(b).[6] Accordingly, § 542(a) requires turnover to the debtor in a Chapter 13 case.[7]

This section discusses the creditor's obligation to turn over repossessed or seized property to the debtor and the debtor's remedies to obtain possession if the creditor refuses. Analysis includes

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[1] See § 5:10

[2] *E.g., In re Ratliff,* 260 B.R. 526 (Bankr. M.D. Fla. 2000); *In re Brown*, 210 B.R. 878, 881 (Bankr. S.D. Ga. 1997).

[3] *U.S. v. Whiting Pools, Inc.,* 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). See § 14:5.

[4] In some jurisdictions, courts have held that the debtor's interest in a motor vehicle repossessed prepetition property is limited to her right to redeem and that the repossessed collateral itself is not property of the estate. See § 14:5.

[5] 11 U.S.C.A. § 1306(b). See § 16:2.

[6] 11 U.S.C.A. § 1303. See §§ 16:3, 16:4.

[7] *E.g., In re Denby-Peterson,* 941 F.3d 115, 128, n. 66 (3d Cir. 2019).

consideration of the creditor's rights to adequate protection[8] of its interest in the collateral. The issue involves the extent to which adequate protection is an appropriate consideration in a turnover proceeding in view of the fact that Code § 542(a) does not condition turnover on the provision of adequate protection.

Turnover and the automatic stay

In its 2021 decision in *City of Chicago v. Fulton,*[9] the Supreme Court ruled that a creditor's retention of property in its possession at the time of the filing of a Chapter 13 case does not violate the provision of the automatic stay in Code § 362(a)(3), which prohibits "any act to obtain possession of property of the estate or of property from the estate or *to exercise control* over property of the estate."[10]

The Courts of Appeals for the Second, Seventh, Eighth, Ninth, and Eleventh Circuits had concluded that a creditor's retention of property was an act to exercise control over property of the estate in violation of Code § 362(a)(3) and that the creditor had an affirmative obligation to turn it over.[11] Agreeing with the contrary rulings of the Third and Tenth Circuits,[12] the Supreme Court in *Fulton*

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[8] See § 15:8.

[9] *City of Chicago v. Fulton,* 141 S.Ct. 585 (2021).

[10] 11 U.S.C.A. § 362(a)(3) (emphasis added).

[11] *E.g., In re Fulton,* 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 83412 (7th Cir. 2019), *rev'd* 141 S. Ct. 585 (2021); *In re Weber*, 719 F.3d 72, 69 Collier Bankr. Cas. 2d (MB) 1168, Bankr. L. Rep. (CCH) P 82484 (2d Cir. 2013); *Thompson v. General Motors Acceptance Corp., LLC,* 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); *In re Rozier,* 376 F.3d 1323 (11th Cir. 2004); *In re Del Mission, Ltd.,* 98 F.3d 147, 1151-52 (9th Cir. 1996); *In re Knaus*, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989); *In re Sharon*, 234 B.R. 676, 1999 Fed. App. 0009P (B.A.P. 6th Cir. 1999).

[12] *In re Denby-Peterson*, 941 F.3d 115, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Cowen*, 849 F.3d 943, 63 Bankr. Ct. Dec. (CRR) 211 (10th Cir. 2017).

The obligation to surrender possession of a motor vehicle included the obligation to disable any locking devices the creditor attached to the vehicle to prevent its operation if the debtor defaulted. *In re Horace*, 74 Collier Bankr. Cas. 2d (MB) 391, 2015 WL 5145576 (Bankr. N.D. Ohio 2015); *In re Dawson*, 2006 WL 2372821 (Bankr. N.D. Ohio 2006), *aff'd*, 2006 WL 3827459 (N.D. Ohio 2006); *In re Hampton*, 319 B.R. 163 (Bankr. E.D. Ark. 2005).

A creditor's failure to turn the vehicle over promptly subjected the creditor to damages for violation of the automatic stay, including the debtor's attorney's fees. Case law did not define a deadline. *E.g., In re Terry,*

concluded that the language of Code § 362(a)(3) "halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition"[13] and therefore held that "mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a) of the Bankruptcy Code."[14]

The *Fulton* Court declined to consider how the turnover obligation in Code § 542(a) operates or the meaning of other provisions of the automatic stay in paragraphs (4) and (6) of Code § 362(a).[15]

Paragraph (4) of Code § 362(a) prohibits "any act to create, perfect, or enforce any lien against property of the estate," and paragraph (6) prohibits "any act to collect, assess, or recover a claim against the debtor" that arose prepetition. *Fulton* involved the City of Chicago's enforcement of parking fines by impounding motor vehicles and its assertion of a possessory lien under Illinois law. In one of the four cases consolidated on appeal in *Fulton,*[16] the bankruptcy court had concluded that the City violated Code § 362(a)(6) by demanding payment of the debt and that continued possession of the vehicle, combined with the demand for payment, was a violation of Code § 362(a)(4) as an act to enforce its lien under Illinois law.[17]

Although the Supreme Court in *Fulton* did not address the (a)(4) and (a)(6) issues, the bankruptcy court's rulings seem inconsistent with *Fulton*'s reasoning that the automatic stay preserves

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2019 WL 7169095 (Bankr. N.D. Tex. 2019) (Withholding property for over a month was "unquestionably egregious," warranting punitive damages); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (nine days an unreasonable delay); *In re Smith*, 2016 WL 3765839 (Bankr. N.D. Ohio 2016) (making the vehicle available three days postpetition not unreasonable).

[13] *City of Chicago v. Fulton,* 141 S.Ct. 585, 590 (2021).

[14] *Id.* at 592.

[15] *Id.* at 592.

[16] *Fulton* involved four separate bankruptcy court rulings that the Seventh Circuit considered in a consolidated appeal. The cases were: *In re Shannon,* 590 B.R. 467 (Bankr. N.D. Ill. 2018); *In re Peake,* 588 B.R. 811 (Bankr. N.D. Ill. 2018); *In re Fulton,* 2018 WL 2392854 (Bankr. N.D. Ill. 2018), *amended and superseded,* 2018 WL 2570109 (Bankr. N.D. Ill. 2018); *In re Howard,* 2018 WL 1830910 (Bankr. N.D. Ill. 2018).

[17] *In re Shannon,* 590 B.R. 467, 477 (Bankr. N.D. Ill. 2018), *aff'd on other grounds,* 926 F.3d 916 (7th Cir. 2019), *rev'd on other grounds, sub nom. City of Chicago v. Fulton,* 141 S.Ct. 585 (2021).

the status quo and that a violation of it requires an affirmative act.[18] Moreover, in noting that the phrase, "to exercise control over property of the estate" was added to the original 1978 statute in 1984, the *Fulton* Court observed that the debtors did not dispute that § 362(a)(3) had imposed no turnover obligation before the amendment.[19] A possible implication is that nothing else in § 362(a) imposed such an obligation either.

In any event, it is difficult to conclude that a creditor's continued possession of collateral violates either (a)(4) or (a)(6) if the creditor holds a consensual security interest whose validity and perfection does not depend on possession.

Possession is not an act to "create, perfect, or enforce" a lien that violates Code § 362(a)(4), and it is not an act to collect a prepetition claim that violates Code § 362(a)(6) unless, perhaps, it is accompanied by a demand for payment. A well-advised creditor can avoid operation of § 362(a)(6) by declining a turnover request without demanding payment simply by giving no reason for its decision.

Turnover under Code § 542(a)

The fact that the automatic stay may not require a creditor to surrender possession of collateral does not mean that the creditor need not turn it over to the debtor. Code § 542(a) provides that a creditor must turn over property of the debtor unless it is of inconsequential value or benefit to the estate.

Code § 542(a) applies to property "that the trustee may use, sell, or lease under [Code § 363] or that the debtor may exempt [under Code § 522]." In a Chapter 13 case, the debtor is entitled to possession of property of the estate,[20] has the rights of a trustee to use property of the estate under

[18] *City of Fulton v. Chicago,* 141 S.Ct. 585, 590 (2021).
[19] *Id.* at 591.
[20] 11 U.S.C.A. § 1306(b). See § 16:2.

Code § 363(b),[21] and may claim an exemption.[22] If the creditor has possession of property that the debtor owns, Code § 542(a) applies.

Code § 542(a) does not, however, require turnover of property that is of "inconsequential value or benefit to the estate." If the encumbered property is worth less than the amount of the debt, it has "inconsequential value" to the estate in the sense that its sale will produce nothing for the benefit of creditors.

But the property itself may have significant value or be important to the estate. For example, a debtor typically requires a motor vehicle for transportation, among other things, to and from work to earn income to make plan payments. Indeed, Justice Sotomayor in her concurring opinion in *Fulton*[23] recognized the critical importance of a motor vehicle to debtors and their creditors.[24] Furthermore, the debtor has the right to retain encumbered property under a Chapter 13 plan by paying the creditor the allowed amount of its secured claim,[25] a primary purpose of Chapter 13 and often an important objective of the debtor.[26] Thus, even fully encumbered property may have consequential value or be of benefit to the estate.

In the usual situation, therefore, Code § 542(a) requires the secured creditor to deliver repossessed or seized property to the Chapter 13 debtor. The result could be different if, for example, a repossessed motor vehicle is one that the debtor does not need, such as a recreational vehicle, that has no equity.

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[21] See §§ 16:3, 16:4.
[22] See § 14:22.
[23] *City of Chicago v. Fulton,* 141 S.Ct. 585, 593 (2021) (Sotomayor, J., concurring).
[24] *Id.* at 593-94.
[25] See § 5:10.
[26] See § 2:3.

The creditor's turnover obligation

The question is how a debtor enforces her right to possession under Code § 542(a) if a creditor declines to turn over repossessed or seized property. The initial issue is whether Code § 542(a) is self-operative and requires turnover without a court order, an issue that *Fulton* did not address.[27]

As Justice Sotomayor noted in her concurring opinion in *Fulton,*[28] the court in *In re Larimer*[29] held that the turnover obligation under Coder §542(a) is automatic. In *Larimer,* the court entered a declaratory judgment that the Internal Revenue Service had an obligation to deliver the estate's share of a tax refund to the Chapter 7 trustee, reasoning that Code § 542(a) does not require a demand, a court order, or any other action.[30] The *Larimer* court further observed that failure of an entity to comply with Code § 542(a) is "probably contumacious."[31] Several courts have similarly stated that Code § 542(a) is self-operative and mandatory.[32]

Most courts, however, conclude that Code § 542(a) does not require turnover of repossessed or seized property without a court order.[33] These courts reason that enactment of Code § 542(a) as part of the Bankruptcy Code in 1978 did not change the pre-Code practice that conditioned turnover on entry

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[27] *City of Chicago v. Fulton,* 141 S.Ct. 585, 592 (2021).
[28] *City of Chicago v. Fulton,* 141 S.Ct. 585, 594 (2021) (Sotomayor, J., concurring).
[29] 27 B.R. 514, 516 (Bankr. D. Idaho 1983).
[30] *Id.* at 516.
[31] *Id.* at 516.
[32] *Scarver v. Ellis (In re McKeever),* 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017); *Ingalls v. Phillips (In re Spence),* 2009 WL 3756621 at * 5 (Bankr. W.D. Tex. 2009); *Warsco v. Drew (In re Drew),* 2007 WL 4879278 (Bankr. N.D. Ind. 2007); *Calvin v. Wells Fargo Bank, N.A. (In re Calvin),* 329 B.R. 589 (Bankr. S.D. Tex. 2005); *Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. v. Boyer (In re Diversified Products, Inc.,),* 196 B.R. 801 (N.D. Ind. 1996), *aff'd* 100 F.3d 53 (7th Cir. 1996); *Forbes v. Lucas (In re Lucas),* 100 B.R. 969, 972 (Bankr. M.D. Tenn. 1989), *aff'd* 110 B.R. 335 (M.D. Tenn. 1989), *rev'd on other grounds,* 924 F.2d 597 (6th Cir. 1991); *In re McCary,* 60 B.R. 152, 154 (Bankr. N.D. Ill. 1986). These cases generally state the principle in the context of turnover disputes that involve issues distinct from the turnover of repossessed or seized property.
[33] *E.g., In re Denby-Peterson,* 941 F.3d 115, 129-31 (3d Cir. 2019); *In Re Dillard*, 2001 WL 1700026 (Bankr. M.D.N.C. 2001); *In re Barringer*, 244 B.R. 402 (Bankr. E.D. Mich. 1999); *In re Nash*, 228 B.R. 669 (Bankr. N.D. Ill. 1999); *In re Fitch*, 217 B.R. 286 (Bankr. S.D. Cal. 1998); *In re Brown,* 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Massey,* 210 B.R. 693 (Bankr. D. Md. 1997); *In re Young,* 193 B.R. 620 (Bankr. D.D.C. 1996).

of a court order for it and that it does not deprive a creditor of its rights to assert that the statute does not require turnover or to obtain adequate protection of its interest in connection with turnover.[34] Some note that in *U.S. v. Whiting Pools, Inc.*,[35] the bankruptcy court conditioned turnover of property in the creditor's possession on the provision of adequate protection and that none of the courts deciding the issue in *Whiting Pools* had intimated that the turnover obligation was self-operative.[36]

Whether or not Code § 542(a) is self-operative, the debtor must seek an order from the court to enforce turnover if the creditor refuses to surrender the property. Later text discusses why the self-operative issue matters in the analysis of two questions: (1) whether a creditor is entitled to adequate protection in connection with turnover; and (2) whether a debtor may recover attorney's fees and damages due to a creditor's failure to turn over property.

Procedure to compel turnover

The threshold issue regarding a turnover proceeding is whether a debtor may seek turnover by filing a motion, which initiates a contested matter under Bankruptcy Rule 9014, or whether she must file a complaint, which initiates an adversary proceeding. Section 23:4 discusses the two types of proceedings, section 23:5 discusses procedures in adversary proceedings, and section 23:6 discusses how procedures in contested matters differ from those in adversary proceedings. For the most part, the same procedures applicable in adversary proceedings are available to the parties in a contested matter,

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[34] *E.g., In re Denby-Peterson*, 941 F.3d 115, 129-31 & n. 72 (3d Cir. 2019); *In re Young,* 193 B.R. 620 (Bankr. D.D.C. 1996). *See generally* James L. Buchwalter, *Contempt and Arrest Proceedings Resulting from Statutory Turnover Obligations in Bankruptcy – 21st Century Cases,* 38 A.L.R. Fed. 3d, Art. 10, § 2 (2019); Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?,* 33 No. 9 Bankr. Law Letter NL 1 (Sept. 2013).

[35] *U.S. v. Whiting Pools, Inc.,* 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). See § 14:5.

[36] *E.g., In re Denby-Peterson*, 941 F.3d 115, 129-31 & n. 72 (3d Cir. 2019); *In re Young,* 193 B.R. 620 (Bankr. D.D.C. 1996).

except that an adversary proceeding requires the issuance of summons.[37] In particular, a creditor must be served with a complaint in an adversary proceeding (together with summons) or with a motion in a contested matter in the same way under Bankruptcy Rule 7004.[38]

Procedures in a contested matter tend to be less formal and more expeditious (and, therefore, less expensive) than those in an adversary proceeding. The primary impact on the debtor of requiring an adversary proceeding is the additional fees required for the attorney to prepare the additional paperwork that an adversary proceeding involves (e.g., summons and civil cover sheet) and additional pleadings necessary for emergency relief. A Chapter 13 debtor does not have to pay a fee to file an adversary proceeding.

Bankruptcy Rule 7001(1) defines an adversary proceeding as "a proceeding to recover money or property," with certain exceptions.[39] The prevailing view is that Rule 7001(1) requires a debtor to commence an adversary proceeding to require turnover of repossessed property under Code § 542(a).[40]

A requirement of an adversary proceeding for turnover is a departure from practice in jurisdictions that had permitted a debtor to seek turnover on the ground that the creditor's retention of property violated the automatic stay. Because a party may seek to enforce the automatic stay and obtain remedies for its violation in a contested matter, a debtor could file a motion for turnover as a

[37] See §§ 23:4, 23:6.
[38] See § 23:7.
[39] The exceptions are proceedings to compel a debtor to deliver property to the trustee or a proceeding under 11 U.S.C.A. § 554(b) (request for order for trustee to abandon property); 11 U.S.C.A. § 725 (disposition by Chapter 7 trustee of property in which entity other than the estate has an interest); Bankruptcy Rule 2017 (examination of debtor's attorney's fees); and Bankruptcy Rule 6002 (accounting by prior custodian of property of the estate).
[40] *E.g., In re Denby-Peterson*, 941 F.3d 115, 129 (3d Cir. 2019); *In re Perkins,* 902 F.2d 1254, 1258 (7th Cir. 1990) (collecting cases); *In re Brown,* 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Young,* 193 B.R. 620 (Bankr. D.D.C. 1996); *In re Estes,* 185 B.R. 745 (Bankr. W.D. Ky. 1995).

remedy for the stay violation.[41] *City of Chicago v. Fulton*[42] removes this basis for permitting a debtor to seek turnover by motion.

As a practical matter, neither the debtor's nor the creditor's interests are served by litigating a turnover matter in an adversary proceeding rather than in a contested matter initiated by a simple motion for turnover. As later text discusses, the only issue in a turnover proceeding in most Chapter 13 situations is adequate protection. Bankruptcy Rule 4001(a)(1) provides for determination of adequate protection by motion.

The parties to a turnover proceeding do not need to deal with the more formal and in some ways cumbersome procedures that an adversary proceeding requires. Other than the fact that an adversary proceeding requires the issuance of summons, the procedures for determination of a contested matter are the same as those for an adversary proceeding.[43] Both the debtor and the creditor can save time and money by proceeding by motion.

If a debtor seeks turnover by motion, the court may proceed to determine it in the absence of an objection that an adversary proceeding is required because a party may waive that right.[44] Moreover, courts have held that determination of an issue raised by motion in a contested matter rather than by a complaint in an adversary proceeding is harmless error.[45] Finally, a court may convert a contested matter to an adversary proceeding or, at worst, dismiss the motion without prejudice so that

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[41] See § 5:16.
[42] *City of Chicago v. Fulton,* 141 S.Ct. 585 (2021).
[43] See § 23:4.
[44] *E.g., In re Village Mobile Homes, Inc.,* 947 F.2d 1282 (5th Cir. 1991). See § 23:4.
[45] *E.g., In re Cannonsburg Environmental Associates, Ltd*., 72 F.3d 1260, 28 Bankr. Ct. Dec. (CRR) 465, Bankr. L. Rep. (CCH) P 76754, 1996 FED App. 0009P (6th Cir. 1996); *In re Munoz,* 287 B.R. 546, 68 Cal. Comp. Cas. (MB) 421, 40 Bankr. Ct. Dec. (CRR) 196 (B.A.P. 9th Cir. 2002). See also *In re Copper King Inn, Inc.,* 918 F.2d 1404, 23 Collier Bankr. Cas. 2d (MB) 1547, 12 U.C.C. Rep. Serv. 2d 1155 (9th Cir. 1990) (holding contested matter was essentially an adversary proceeding because motion and objection were filed and an evidentiary hearing was held).

the debtor can file an adversary proceeding.[46] In any event, if the court enters an order in a contested matter when an adversary proceeding is required, the order is nevertheless effective, provided that constitutional due process requirements of notice and an opportunity to be heard have been met, under the Supreme Court's ruling in *United Student Aids Funds, Inc., v. Espinosa.*[47]

Because the litigation of a turnover proceeding as a contested matter rather than an adversary proceeding is simpler, more expeditious, and less expensive, parties and courts may seek creative ways to avoid the application of Bankruptcy Rule 7001(1). It is arguable that a proceeding to "recover" property within the meaning of Rule 7001(1) does not include a proceeding to "require turnover," which is limited to the issue of possession under Code § 542(a).[48] A debtor might seek an order under Code § 105(a)[49] for the court to require the creditor to show cause why it should not turn over the property in compliance with its § 542(a) obligations, or assert that the motion is to enforce the provisions of Code § 542(a) under Code § 105(a) and not to "recover property." Another possibility is to present the matter as a motion to determine adequate protection necessary for turnover. The difficulty with all of these theories is that, as noted earlier, the prevailing view in the case law is that a turnover request is a proceeding to recover property under Rule 7001(1), although the cases do not address these arguments.

In deciding whether to proceed by motion, a debtor must consider whether she will seek damages and attorney's fees because of the creditor's failure to comply with its turnover obligations.

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[46] See § 23:4.

[47] *United Student Aid Funds, Inc., v. Espinosa,* 559 U.S. (2010) (discussed in § 10:4). See § 23:4.

[48] The distinction is based on the concept that turnover is appropriate when the property is indisputably property of the estate but not when the debtor's interest is subject to dispute. *See Scarver v. Ellis (In re McKeever),* 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017) ("[T]urnover proceedings are strictly limited to actions to recover property that is indisputably part of the estate; in other words, a turnover action is not the appropriate tool for acquiring the right to use or possess property if the debtor's right to use or possess the property is subject to dispute."). A motion in a contested matter is an appropriate way for a debtor to require *turnover* of property that she indisputably owns, but an adversary proceeding is necessary to *recover* it if her ownership is subject to dispute.

[49] 11 U.S.C.A. § 105(a) authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

A debtor seeking turnover by motion to enforce the automatic stay could combine a request for damages and attorney's fees with the request for turnover because Code § 362(k) authorizes their recovery for a willful violation of the stay and courts permitted debtors to seek them by motion.[50] As later text discusses, Code § 542(a) contains no remedies for its enforcement. Accordingly, a request for damages and attorney's fees appears to be a proceeding to recover money for which Bankruptcy Rule 7001(1) requires an adversary proceeding.

Expedited consideration of debtor's request for turnover

As Justice Sotomayor observed in her concurring opinion in *City of Chicago v. Fulton,*[51] the average time an adversary proceeding for turnover under § 542 filed after July 2019 and concluding before June 2020 was pending was over 100 days, a long time for a debtor to wait for return of a motor vehicle.[52] Justice Sotomayor noted that some courts may permit debtors to seek turnover through a motion where the creditor has received adequate notice or may expedite proceedings or order preliminary relief requiring temporary turnover.

Delay of at least 30 days is inherent in an adversary proceeding, because the defendant has that long from the date of issuance of summons to answer the complaint.[53] Moreover, trial on the merits does not occur until the parties complete discovery. A debtor in urgent need of property such as a vehicle, therefore, must find a way to expedite the process.

The adversary rules provide for a party to obtain preliminary relief on an expedited basis. A complaint for turnover under § 542(a) requests an order requiring the creditor to turn over the property

[50] See § 15:6.
[51] *City of Chicago v. Fulton,* 141 S.Ct. 585, 592 (2021) (Sotomayor, J., concurring).
[52] *Id.*
[53] Fed. R. Bankr. P. 7012(a).

in its possession. A turnover order is in the nature of an injunction,[54] and Federal Rule of Civil Procedure 65, applicable in an adversary proceeding under Bankruptcy Rule 7065, governs a request for an injunction.[55]

Federal Rule 65(a) permits a debtor to seek emergency relief by filing a motion for a preliminary injunction[56] pending final determination of the adversary proceeding on the merits.[57] The court may advance the trial on the merits and consolidate it with the hearing on the motion for a preliminary injunction.[58] Bankruptcy Rule 7065 permits the issuance of a preliminary injunction requested by a debtor without compliance with Federal Rule 65(c), which requires the moving party to provide security to pay costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Alternatively, and perhaps more simply, a debtor might file a motion in the adversary proceeding contemporaneously with the complaint that seeks emergency relief based on the circumstances and requests an expedited hearing. Although the adversary rules do not contemplate such motions, Code § 105(a) provides a basis for the court to hear and determine the right to possession on an interim basis.

If the debtor elects to proceed by motion in a contested matter instead of filing an adversary proceeding, the debtor should request an expedited hearing and state the need for emergency relief. A separate motion to schedule an emergency hearing will assist in bringing it to the attention of the court.

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[54] *See Bailey v. Connolly (In re Van Fleet),* 461 B.R. 62 (D. Col. 2010); *Wildlife Center, Inc. v. Fasig Tipton Kentucky, Inc. (In re Wildlife Center, Inc*.), 102 B.R. 321, 323 (Bankr. E.D. N.Y. 321).

[55] The court may make Federal Rule 65 applicable in a contested matter. Fed. R. Bankr. P. 9014(c).

[56] A debtor may also seek a temporary restraining order under Fed. R. Civ. P. 65(b), which the court may issue without notice to the creditor. It is unlikely in most circumstances that a bankruptcy court will issue a turnover order without notice.

[57] *See, e.g*., *In re Reid,* 423 B.R. 726 (Bankr. E.D. Pa. 2010).

[58] Fed. R. Civ. P. 65(a)(2).

Depending on local practice, a debtor may need to contact the court's staff about the scheduling of an emergency hearing regardless of the type of proceeding the debtor files.

Issues in a turnover proceeding; adequate protection

Whether the debtor files a contested matter or an adversary proceeding, the issues are the same. Earlier text explains that in most situations it is undisputed that the debtor owns the property and that it is not of inconsequential value or benefit. Unless the creditor contends that it no longer has the property (perhaps because it disposed of it) or raises other defenses to turnover, the only issue before the court, absent unusual circumstances, is adequate protection. [59]

A secured creditor's right to adequate protection of its interest in encumbered property arises from Code § 363(e). It provides that, upon request of the creditor, the court "shall prohibit or condition" the use of property in the case as is necessary to provide adequate protection.[60]

The Bankruptcy Code requires adequate protection to protect a secured creditor from the diminution of value that may occur during the case. In the Chapter 13 context, adequate protection typically consists of periodic payments equal to the estimated depreciation that will occur.[61] When the collateral is a motor vehicle, an additional component of adequate protection is insurance on it to protect the creditor from damage or destruction due to a collision.[62]

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[59] For example, if a creditor's repossession efforts have been thwarted by the debtor's concealment of the collateral or by multiple bankruptcy filings that call the debtor's good faith into question, the creditor might resist turnover on the ground that the court should lift the stay or dismiss the case for those reasons, which would permit the creditor to retain possession. In such circumstances, a sympathetic court might defer a ruling on turnover and permit the creditor to retain possession pending determination of a motion for stay relief or for dismissal of the case due to bad faith so that the creditor does not bear the burden and expense of a second repossession.

[60] See § 15:8.

[61] See §§ 5:15, 5:18.

[62] See §§ 5:15, 15:8.

Code § 542(a) does not condition turnover on the provision of adequate protection to the creditor. Under the view that the turnover obligation under Code § 542(a) is self-operative, a creditor cannot properly refuse to turn over property based on a lack of adequate protection. Instead, it must request adequate protection in accordance with Code § 363(e). To enforce the self-operative nature of § 542(a), a court must decline to consider adequate protection in connection with a turnover request. Otherwise, the court by addressing adequate protection issues effectively authorizes the creditor to retain the property until that issue is addressed, the effect of which is that § 542(a) is not self-operative.

The prevailing view, however, is that Code § 542(a) is not self-operative and that a creditor is entitled to adequate protection in connection with the turnover of property, as earlier text discusses. The issue is what type of adequate protection is appropriate in the context of a turnover request in a Chapter 13 case.

Most Chapter 13 turnover requests involve a motor vehicle and occur early in the case when the debtor has an urgent and compelling need for it, as Justice Sotomayor's concurring opinion in *City of Chicago v. Fulton* demonstrates.[63] It is, therefore, important that the court consider the two adequate protection issues in turnover matters – periodic payments and insurance – in ways that permit their prompt determination and encourage consensual resolution in a manner consistent with the adequate protection rights of creditors under the statutory scheme of Chapter 13.

With regard to insurance, most courts under pre-*Fulton* practice ruled that a creditor violated Code § 362(c)(3) by conditioning turnover on the debtor's provision of proof of insurance,[64] while some

[63] *City of Chicago v. Fulton,* 141 S.Ct. 585, 592 (2021) (Sotomayor, J., concurring).

[64] E.g., *In re Weber*, 719 F.3d 72, 69 Collier Bankr. Cas. 2d (MB) 1168, Bankr. L. Rep. (CCH) P 82484 (2d Cir. 2013); *Thompson v. General Motors Acceptance Corp*., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999); *see In re Yates*, 332 B.R. 1, 7, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005), abrogated by *In re Cowen*, 849 F.3d 943 (10th Cir. 2017*); In re Stephens*, 495 B.R. 608, 614 (Bankr. N.D. Ga. 2013); *In re*

courts permitted a creditor to do so.[65] After *Fulton,* a creditor's retention of a motor vehicle alone does not violate Code § 362(a)(3), and its insistence on insurance is an act to protect its collateral, not to collect a prepetition debt in violation of Code § 362(a)(6) or to create, perfect, or enforce its lien in violation of Code § 362(a)(4). It is unlikely that a court will permit a debtor to take possession of a vehicle that is not insured, and a debtor should not have a different expectation.

A court can promptly determine whether insurance exists, and existence of the insurance requirement makes proof of it an expected and routine part of consensual resolution of a turnover request. Accordingly, a court properly conditions turnover on its existence.

Consideration of the amount and timing of adequate protection payments in a turnover context at the outset of a Chapter 13 case, on the other hand, is inconsistent with Chapter 13's provisions for adequate protection for creditors secured by personal property. In addition, factual issues relevant to determination of the amount of the payments, such as the value of the collateral and its expected depreciation, may not be capable of prompt determination.[66] Addressing adequate protection payments in connection with a turnover matter introduces an additional subject for negotiation and therefore makes consensual resolution more difficult.

A court's consideration of adequate protection payments on an expedited basis at the outset of the case in connection with an emergency turnover is inconsistent with what might be called Chapter

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Rutherford, 329 B.R. 886 (Bankr. N.D. Ga. 2005); *Nissan Motor Acceptance Corp. v. Baker,* 239 B.R. 484 (N.D. Tex. 1999).

[65] E.g., *In re Massey*, 210 B.R. 693 (Bankr. D. Md. 1997); *In re Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Kolberg,* 199 B.R. 929 (W.D. Mich. 1996); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996); *see Mitchell v. BankIllinois*, 316 B.R. 891 (S.D. Tex. 2004) (failure to turn over vehicle to Chapter 13 debtor after debtor has made demand and has provided proof of insurance is violation of the automatic stay*); In re House*, 2017 WL 2579026 (Bankr. S.D. Miss. 2017) (Willful stay violation after lender failed to turn over vehicle when "good faith negotiation" broke down).

[66] Valuation and related depreciation issues may require expert testimony. See § 5:6.

13's "default rules" for dealing with adequate protection for a security interest in personal property. In general, the default rules provide for the debtor to propose adequate protection payments, for a dissatisfied creditor to request an increase, and for the court to determine the dispute at a hearing in accordance with the court's usual practice for hearing such matters. This is, of course, consistent with Code § 363(e), which conditions adequate protection on a creditor's request for it.

One default provision is Code § 1325(a)(5)(B)(iii). It requires that a Chapter 13 plan provide for monthly payments to a secured creditor with a security interest in personal property that are sufficient to provide adequate protection to the creditor.[67] If the amount of the payment is not satisfactory, the creditor can either object to confirmation, file a motion for the court to determine adequate protection pursuant to Code § 363(e), or both.

The second default provision addresses adequate protection payments when the creditor's security interest is a purchase money security interest. Code § 1326(a)(1)(C) requires that adequate protection payments to such a creditor begin not later than 30 days after the filing of the case, unless the court orders otherwise.[68] Code § 1326(a)(1)(C) permits the debtor to establish the amount of the adequate protection payments in the plan, unless the court, after notice and hearing, modifies, increases, or reduces the payments pursuant to Code § 1326(a)(3). A dissatisfied creditor may either file a motion requesting an increase in adequate protection payments under Code § 1326(a)(3), request an increase under § 363(e), or both.

The court will hear requests for adequate protection under Code § 363(e) or objections to a plan's proposal for adequate payments under Code § 1326(a)(3) in accordance with its usual procedures for such matters, which may include expedited consideration of them.

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[67] 11 U.S.C.A. § 1325(a)(5)(B)(iii). See § 5:15.
[68] See § 5:16.

Because Code § 1325(a)(5)(B)(iii) and Code § 1326(a)(1)(C) specifically address adequate protection payments and permit the debtor to set their amount in the first instance, subject to later review by the court at the creditor's request, addressing the amount of adequate protection payments at the outset of the case in the context of a turnover request seems inappropriate. In view of the fact that Code § 542(a) does not condition turnover on the provision of adequate protection, a court absent unusual circumstances properly addresses adequate protection payments at a later time in accordance with Code § 363(e) and the default rules just discussed.

Arguably, consideration of adequate protection payments and turnover at the same time promotes judicial economy because another hearing will not be necessary. But a procedure that defers the issue makes it more likely that the more urgent issue of turnover is resolved consensually upon proof of insurance so that only a hearing on the adequate protection payments is required. Moreover, whereas a debtor's need for a motor vehicle involves an emergency measured in days, the amount of adequate protection payments involves no such urgency.

On balance, postponement of the payment issue promotes prompt turnover and consensual resolution without unduly impairing the creditor's interest. Determination of adequate protection payments under the two default rules under the court's ordinary procedures puts a creditor who has possession of collateral in the same position as any other creditor secured by personal property with regard to adequate protection payments at the outset of the case.

Under this approach, a creditor can insist on proof of insurance before turning the property over to the debtor but cannot refuse turnover because of a dispute over adequate protection payments. In a jurisdiction that adopts the self-operative view of Code § 542(a), however, a creditor may need to promptly bring the insurance matter to the attention of the court in a motion requesting that the court require insurance in connection with turnover.

Bankruptcy judges have discretion under the Bankruptcy Code and Bankruptcy Rules to determine how to address adequate protection payments in connection with a turnover request. Section 363(e) permits a court to require adequate protection without a hearing. The Bankruptcy Rules do not specify how much notice is required for a hearing on adequate protection, and Bankruptcy Rule 9006(c)(1) generally permits the court to reduce the time for notices.[69] Thus, courts have flexibility in deciding how to balance Justice Sotomayor's concerns in *Fulton*[70] about a debtor's need for the prompt return of a motor vehicle with a creditor's right to adequate protection.

Enforcement of turnover order and sanctions

If the court issues an order for turnover and the creditor fails to comply, the bankruptcy court may enforce its order through its civil contempt powers.[71] Bankruptcy Rule 9020 provides that Bankruptcy Rule 9014,[72] which states procedures for contested matters, governs a motion for contempt. Remedies for civil contempt include sanctions in the form of attorney's fees and damages, as well as coercive penalties designed to compel compliance with the order.

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[69] Fed. R. Bankr R. P. 9006(c)(2) states certain time periods that the court cannot reduce, but notice with regard to a hearing on adequate protection is not one of them.

[70] *City of Chicago v. Fulton,* 141 S.Ct. 585, 592 (2021) (Sotomayor, J., concurring).

[71] *E.g., Hansbrough v. Birdsell (In re Hercules Enterprises, Inc.),* 387 F.3d 1024 (9th Cir. 2004); *Bailey v. Connolly (In re Van Fleet),* 461 B.R. 62 (D. Col. 2010); *Wildlife Center, Inc. v. Fasig Tipton Kentucky, Inc. (In re Wildlife Center, Inc.),* 102 B.R. 321, 323(Bankr. E.D. N.Y. 321); *see Lawrence v. Goldsborough (In re Lawrence),* 279 F.3d 1294 (11th Cir. 2015) (debtor may be found in contempt for failure to turn over assets to trustee).

The bankruptcy court's civil contempt powers arise primarily from 11 U.S.C.A. § 105(a); some courts also conclude that bankruptcy courts have inherent civil contempt power. *E.g., Law Solutions of Chicago LLC v. Corbett,* 971 F.3d 1299 (11th Cir. 2020); *In re Kalikow*, 602 F.3d 82 (2d Cir. 2010); *In re White-Robinson*, 777 F.3d 792 (5th Cir. 2015); *In re Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609, 613 (5th Cir. 1997); *In re McLean*, 794 F.3d 1313 (11th Cir. 2015); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9th Cir. 1996) *In re Ragar*, 3 F.3d 1174, 1179 (8th Cir. 1993*); In re Skinner*, 917 F.2d 444, 447 (10th Cir. 1990); *In re Walters*, 868 F.2d 665 (4th Cir. 1989). *See also* Norton Bankruptcy Law and Practice 3d § 13:5; Drake & Visser, *Bankruptcy Practice for the General Practitioner* § 4:9.

[72] See § 23:6.

Most courts conclude that a bankruptcy court does not have criminal contempt powers.[73] A court imposes noncompensatory punitive damages pursuant to its criminal contempt powers. Thus, courts have ruled that a bankruptcy court may not impose punitive damages,[74] although some have noted that a bankruptcy court might be able to award relatively mild or nonserious punitive damages.[75]

If Code § 542(a) is mandatory and self-executing, a creditor who refuses to turn over property until ordered to do so has violated Code § 542(a) regardless of whether it complies with the court's order when issued. The question is whether the debtor may recover attorney's fees incurred in obtaining the turnover order and damages resulting from the delay in obtaining possession.

Even if Code § 542(a) is not self-operative, the question arises when a recalcitrant creditor refuses to turn over property until the court orders it but did not oppose the motion or produced no legitimate basis for its refusal.

Under the principles discussed above, a Chapter 13 debtor is ordinarily entitled to possession of repossessed or seized personal property under Code § 542(a); in the case of a motor vehicle, the debtor may need to provide proof of insurance. The argument is that it is an abuse of the bankruptcy process for a creditor to require litigation to resolve an issue that requires immediate attention and is not complicated. Sanctions in the form of attorney's fees and damages may be appropriate to compensate a debtor harmed by a creditor's unwarranted refusal to comply with Code § 542(a) and to deter others from engaging in the same type of behavior.

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[73] *E.g., Adell v. John Richards Home Building Co., L.L.C. (In re John Richards Home Building Co., L.L.C.)*, 552 Fed. App. 401, 415 (6th Cir. 2013); *In re Hipp, Inc.,* 895 F.2d 1503, 20 Bankr. Ct. Dec. (CRR) 418, 22 Collier Bankr. Cas. 2d (MB) 876, Bankr. L. Rep. (CCH) ¶ 73293 (5th Cir. 1990). *Contra, e.g., In re Ragar,* 3 F.3d 1174 (8th Cir. 1993); *see Green Point Credit, LLC v McLean (In re Mclean*), 794 F.3d 1313 (11th Cir. 2017) (Remanding issue of punitive damages to bankruptcy court).

[74] *E.g., In re Dyer,* 322 F.3d 1178, 1193 (9th Cir. 2003).

[75] *E.g., Adell v. John Richards Home Building Co., L.L.C. (In re John Richards Home Building Co., L.L.C.*), 552 Fed. App. 401, 415 (6th Cir. 2013); *Knupfer v. Lindblade* (*In re Dyer),* 322 F.3d 1178 (9th Cir. 2010).

Under pre-*Fulton* practice, bankruptcy courts awarded attorney's fees and damages, including punitive damages when appropriate, to debtors when they concluded that the creditor had violated Code § 362(a)(3) by refusing to turn over property. Code § 362(k) specifically authorizes such relief as a remedy for individuals for a creditor's violation of the automatic stay.[76] The remedy under § 362(k) is no longer available after *Fulton.*

Unlike Code § 362, Code § 542(a) contains no remedies for a creditor's violation of its turnover obligation. And under the view that § 542(a) is not self-operative, a creditor has no turnover obligation until the court orders it.

A possible source for remedies is Code § 105(a). It provides, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." In explaining that bankruptcy courts do not need the automatic stay to enforce turnover under Code § 542(a), one court observed that bankruptcy courts have "broad equitable powers under [Code § 105(a)] and can provide equitable relief as necessary or appropriate to carry out the provisions of § 542(a). Moreover, § 105(a) grants bankruptcy courts the power to sanction conduct abusive of the judicial process."[77]

The Supreme Court stated in *Marrama vi Citizens Bank of Massachusetts*[78] that Code § 105(a) gives a bankruptcy court "broad authority" to "take any action that is necessary or appropriate to prevent an abuse of process.'" The Court qualified this statement In *Law v. Siegel,*[79] stating that, in

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[76] See § 15:6.

[77] *In re Cowen,* 849 F.3d 943, 950 (10th Cir. 2017) (citations and interior quotations omitted), *quoting Scrivner v. Mashburn (In re Mashburn),* 535 F.3d 1258, 1263 (10th Cir. 2008).

[78] *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365, 375, 127 S.Ct. 1105 (2014) (quoting 11 U.S.C.A. § 105(a)).

[79] *Law v. Siegel,* 571 U.S. 415, 420-21, 134 S.Ct. 1188 (2014).

exercising its statutory and inherent powers, "a bankruptcy court may not contravene specific statutory provisions." Courts will have to determine whether, based on a conclusion that a creditor's response to a debtor's turnover request violated Code § 542(a) or abused the bankruptcy process, Code § 105(a) permits an award of attorney's fees and damages or whether doing so contravenes other provisions of the Bankruptcy Code.

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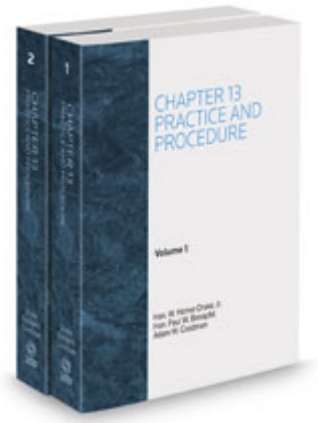

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141 S.Ct. 585
Supreme Court of the United States.

CITY OF CHICAGO, ILLINOIS, Petitioner
v.
Robbin L. FULTON, et al.

No. 19-357
|
Argued October 13, 2020
|
Decided January 14, 2021

Synopsis

Background: Bankruptcy court issued rule to show cause why city should not be sanctioned for refusing to release Chapter 13 debtor's vehicle, which had been impounded because of unpaid parking tickets. The United States Bankruptcy Court for the Northern District of Illinois, Jacqueline P. Cox, J., 584 B.R. 252, entered judgment in favor of debtor, and city appealed. In separate Chapter 13 case, debtor moved to enforce automatic stay by requiring city to release vehicle, and the United States Bankruptcy Court for the Northern District of Illinois, Deborah Lee Thorne, J., 588 B.R. 811, granted motion. City appealed. In yet another case, debtor again filed motion to enforce stay against city, which motion was granted by the United States Bankruptcy Court for the Northern District of Illinois, Carol A. Doyle, J., 590 B.R. 467, and city appealed. Finally, like relief was granted by the United States Bankruptcy Court for the Northern District of Illinois, Jack B. Schmetterer, J., 2018 WL 2570109, and city appealed. Consolidating cases for purposes of appeal, the Court of Appeals for the Seventh Circuit, Flaum, Circuit Judge, 926 F.3d 916, affirmed. Certiorari was granted.

The Supreme Court, Justice Alito, held that an entity's mere retention of estate property after the filing of a bankruptcy petition does not constitute an act to exercise control over property of the estate in violation of the Bankruptcy Code's automatic stay, abrogating *In re Weber*, 719 F.3d 72, *In re Del Mission Ltd.*, 98 F.3d 1147, and *In re Knaus*, 889 F.2d 773.

Vacated and remanded.

Justice Barrett took no part in the consideration or decision of the case.

Justice Sotomayor filed a concurring opinion.

***587** *Syllabus*[*]

The filing of a petition under the Bankruptcy Code automatically "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). Section 541 is intended to include within the estate any property made available by other provisions of the Bankruptcy Code. Section 542 is one such provision, as it provides that an entity in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property. The filing of a petition also automatically "operates as a stay, applicable to all entities," of efforts to collect prepetition debts outside the bankruptcy forum, § 362(a), including "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," § 362(a)(3). Here, each respondent filed a bankruptcy petition and requested that the city of Chicago (City) return his or her vehicle, which had been impounded for failure to pay fines for motor vehicle infractions. In each case, the City's refusal was held by a bankruptcy court to violate the automatic stay. The Seventh Circuit affirmed, concluding that by retaining possession of the vehicles the City had acted "to exercise control over" respondents' property in violation of § 362(a)(3).

Held: The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed. Respondents' alternative reading would create at least two serious problems. First, reading § 362(a)(3) to cover mere retention of property would render § 542's central command—that an entity in possession of certain estate property "shall deliver to the trustee ... such property"—largely superfluous, even though § 542 appears to be the provision governing the turnover of estate property. Second, respondents' reading would render the commands of § 362(a)(3) and § 542 contradictory. Section 542 carves out exceptions to the turnover command. Under respondents' reading, an entity would be required to turn over property under § 362(a)(3) even if that property were exempt from turnover under § 542. The history of the Bankruptcy Code confirms the better reading. The Code originally included both § 362(a)(3) and § 542(a), but the former provision lacked the phrase "or to exercise control over property of the estate." When that phrase was later added by amendment, Congress made no mention of transforming § 362(a)(3) into an affirmative turnover obligation. It is unlikely that Congress would have made such an important change simply by adding the phrase "exercise control," rather than by adding

a cross-reference to § 542(a) or some other indication that it was so transforming § 362(a)(3). Pp. 590 - 592.

926 F.3d 916, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which all other Members joined, except BARRETT, J., who took no part in the consideration or decision of the case. SOTOMAYOR, J., filed a concurring opinion.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Opinion

Justice ALITO delivered the opinion of the Court.

***589** When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum. *Ritzen Group, Inc.* v. *Jackson Masonry, LLC*, 589 U.S. ——, —— – ——, 140 S.Ct. 582, 588–589, 205 L.Ed.2d 419 (2020). Those prohibited efforts include "any act ... to exercise control over property" of the bankruptcy estate. 11 U.S.C. § 362(a)(3). The question in this case is whether an entity violates that prohibition by retaining possession of a debtor's property after a bankruptcy petition is filed. We hold that mere retention of property does not violate § 362(a)(3).

I

Under the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences. For one thing, a petition "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." § 541(a)(1). Section 541 "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 205, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). One such provision, § 542, is important for present purposes. Titled "Turnover of property to the estate," § 542 provides, with just a few exceptions, that an entity (other than a custodian) in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property.

A second automatic consequence of the filing of a bankruptcy petition is that, with certain exceptions, the petition "operates as a stay, applicable to all entities," of efforts to collect from the debtor outside of the bankruptcy forum. § 362(a). The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others. Under the Code, an individual injured by any willful violation of the stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." § 362(k)(1).

Among the many collection efforts prohibited by the stay is "any act to obtain possession of property of the estate or of property from the estate or *to exercise control over property of the estate*." § 362(a)(3) (emphasis added). The prohibition against exercising control over estate property is the subject of the present dispute.

In the case before us, the city of Chicago (City) impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Court of Appeals affirmed all of the judgments in a consolidated opinion. *In re Fulton*, 926 F.3d 916 (CA7 2019). The court concluded that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City had acted "to exercise control over" respondents' property in violation of § 362(a)(3). *Id.,* at 924–925. We granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a ***590** bankruptcy estate violates § 362(a)(3).[1] 589 U.S. ——, 140 S.Ct. 680, 205 L.Ed.2d 449 (2019). We now vacate the judgment below.

II

The language used in § 362(a)(3) suggests that merely retaining possession of estate property

does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms—"stay," "act," and "exercise control"—is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken* v. *Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed ... ; a deed." Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." Webster's Third New International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." Webster's New International Dictionary, at 892. The suggestion conveyed by the combination of these terms is that § 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.

We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents. As respondents point out, omissions can qualify as "acts" in certain contexts, and the term " 'control' " can mean " 'to have power over.' " *Thompson* v. *General Motors Acceptance Corp.*, 566 F.3d 699, 702 (CA7 2009) (quoting Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2003)). But saying that a person engages in an "act" to "exercise" his or her power over a thing communicates more than merely "having" that power. Thus the language of § 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision.

Any ambiguity in the text of § 362(a)(3) is resolved decidedly in the City's favor by the existence of a separate provision, § 542, that expressly governs the turnover of estate property. Section 542(a), with two exceptions, provides as follows:

> "[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

The exceptions to § 542(a) shield (1) transfers of estate property made from one entity to another in good faith without notice or knowledge of the bankruptcy petition ***591** and (2) good-faith transfers to satisfy certain life insurance obligations. See §§ 542(c), (d). Reading § 362(a)(3) to cover mere retention of property, as respondents advocate, would create at least two serious problems.

First, it would render the central command of § 542 largely superfluous. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Yates* v. *United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (plurality opinion; internal quotation marks and brackets omitted). Reading "any act ... to exercise control" in § 362(a)(3) to include merely retaining possession of a debtor's property would make that section a blanket turnover provision. But as noted, § 542 expressly governs "[t]urnover of property to the estate," and subsection (a) describes the broad range of property that an entity "shall deliver to the trustee." That mandate would be surplusage if § 362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.

Respondents and their *amici* contend that § 542(a) would still perform some work by specifying the party to whom the property in question must be turned over and by requiring that an entity "account for ... the value of " the debtor's property if the property is damaged or lost. But that is a small amount of work for a large amount of text in a section that appears to be the Code provision that is designed to govern the turnover of estate property. Under this alternative interpretation, § 362(a)(3), not § 542, would be the chief provision governing turnover—even though § 362(a)(3) says nothing expressly on that question. And § 542 would be reduced to a footnote—even though it appears on its face to be the governing provision. The better account of the two provisions is that § 362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.

Second, respondents' reading would render the commands of § 362(a)(3) and § 542 contradictory. Section 542 carves out exceptions to the turnover command, and § 542(a) by its terms does not mandate turnover of property that is "of inconsequential value or benefit to the estate." Under respondents' reading, in cases where those exceptions to turnover under § 542 would apply, § 362(a)(3) would command turnover all the same. But it would be "an odd construction" of § 362(a)(3) to require a creditor to do immediately what § 542 specifically excuses. *Citizens Bank of Md.* v. *Strumpf*, 516 U.S. 16, 20, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995). Respondents would have us resolve the conflicting commands by engrafting § 542's exceptions onto § 362(a)(3), but there is no textual basis for doing so.

The history of the Bankruptcy Code confirms what its text and structure convey. Both § 362(a)(3) and § 542(a) were included in the original Bankruptcy Code in 1978. See Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595. At the time, § 362(a)(3) applied the stay only to "any act to obtain possession of property of the estate or of property from the estate." *Id.*, at 2570. The phrase "or to exercise control over property of the estate" was not added until 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 371.

Respondents do not seriously dispute that § 362(a)(3) imposed no turnover obligation prior to

the 1984 amendment. But ***592** transforming the stay in § 362 into an affirmative turnover obligation would have constituted an important change. And it would have been odd for Congress to accomplish that change by simply adding the phrase "exercise control," a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in § 542. Had Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a crossreference or provide any other indication that it was transforming § 362(a)(3). The better account of the statutory history is that the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property.

* * *

Though the parties debate the issue at some length, we need not decide how the turnover obligation in § 542 operates. Nor do we settle the meaning of other subsections of § 362(a).[2] We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BARRETT took no part in the consideration or decision of this case.

Justice SOTOMAYOR, concurring.

Section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay" of "any act ... to exercise control over property of the [bankruptcy] estate." 11 U.S.C. § 362(a)(3). I join the Court's opinion because I agree that, as used in § 362(a)(3), the phrase "exercise control over" does not cover a creditor's passive retention of property lawfully seized prebankruptcy. Hence, when a creditor has taken possession of a debtor's property, § 362(a)(3) does not require the creditor to return the property upon the filing of a bankruptcy petition.

I write separately to emphasize that the Court has not decided whether and when § 362(a)'s other provisions may require a creditor to return a debtor's property. Those provisions stay,

among other things, "any act to create, perfect, or enforce any lien against property of the estate" and "any act to collect, assess, or recover a claim against [a] debtor" that arose prior to bankruptcy proceedings. §§ 362(a)(4), (6); see, *e.g.*, *In re Kuehn*, 563 F.3d 289, 294 (CA7 2009) (holding that a university's refusal to provide a transcript to a student-debtor "was an act to collect a debt" that violated the automatic stay). Nor has the Court addressed how bankruptcy courts should go about enforcing creditors' separate obligation to "deliver" estate property to the trustee or debtor under § 542(a). The City's conduct may very well violate one or both of these other provisions. The Court does not decide one way or the other.

Regardless of whether the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly ***593** comports with its spirit. "The principal purpose of the Bankruptcy Code is to grant a ' "fresh start" ' " to debtors. *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). When a debtor files for Chapter 13 bankruptcy, as respondents did here, "the debtor retains possession of his property" and works toward completing a court-approved repayment plan. 549 U.S. at 367, 127 S.Ct. 1105. For a Chapter 13 bankruptcy to succeed, therefore, the debtor must continue earning an income so he can pay his creditors. Indeed, Chapter 13 bankruptcy is available only to "individual[s] with regular income." 11 U.S.C. § 109(e).

For many, having a car is essential to maintaining employment. Take, for example, respondent George Peake. Before the City seized his car, Peake relied on his 200,000-mile 2007 Lincoln MKZ to travel 45 miles each day from his home on the South Side of Chicago to his job in Joliet, Illinois. In June 2018, when the City impounded Peake's car for unpaid parking and red-light tickets, the vehicle was worth just around $4,300 (and was already serving as collateral for a roughly $7,300 debt). Without his car, Peake had to pay for rides to Joliet. He filed for bankruptcy, hoping to recover his vehicle and repay his $5,393.27 debt to the City through a Chapter 13 plan. The City, however, refused to return the car until either Peake paid $1,250 upfront or after the court confirmed Peake's bankruptcy plan. As a result, Peake's car remained in the City's possession for months. By denying Peake access to the vehicle he needed to commute to work, the City jeopardized Peake's ability to make payments to *all* his creditors, the City included. Surely, Peake's vehicle would have been more valuable in the hands of its owner than parked in the City's impound lot.[1]

Peake's situation is far too common.[2] Drivers in low-income communities across the country face similar vicious cycles: A driver is assessed a fine she cannot immediately pay; the balance balloons as late fees accrue; the local government seizes the driver's vehicle, adding impounding and storage fees to the growing debt; and the driver, now without reliable transportation to and from work, finds it all but impossible to repay her debt and recover her vehicle. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 11–16, 31–32. Such drivers may turn to Chapter 13 bankruptcy for a "fresh start." *Marrama*, 549 U.S. at 367, 127 S.Ct. 1105 (internal quotation marks omitted).[3] But without their vehicles, many debtors quickly find themselves

unable to make their Chapter 13 payments. The cycle thus continues, disproportionately burdening communities ***594** of color, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 17, and interfering not only with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities.

Although the Court today holds that § 362(a)(3) does not require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors' vehicles to their owners. Most obviously, the Court leaves open the possibility of relief under § 542(a). That section requires any "entity," subject to some exceptions, to turn over "property" belonging to the bankruptcy estate. 11 U.S.C. § 542(a). The debtor, in turn, must be able to provide the creditor with "adequate protection" of its interest in the returned property, § 363(e); for example, the debtor may need to demonstrate that her car is sufficiently insured. In this way, § 542(a) maximizes value for all parties involved in a bankruptcy: The debtor is able to use her asset, which makes it easier to earn an income; the debtor's unsecured creditors, in turn, receive timely payments from the debtor; and the debtor's secured creditor, for its part, receives "adequate protection [to] replace the protection afforded by possession." *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 207, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). Secured creditors cannot opt out of this arrangement. As even the City acknowledges, § 542(a) "impose[s] a duty of turnover that is mandatory when the statute's conditions ... are met." Brief for Petitioner 37.

The trouble with § 542(a), however, is that turnover proceedings can be quite slow. The Federal Rules of Bankruptcy Procedure treat most "proceeding[s] to recover ... property" as "adversary proceedings." Rule 7001(1). Such actions are, in simplified terms, "essentially full civil lawsuits carried out under the umbrella of [a] bankruptcy case." *Bullard* v. *Blue Hills Bank*, 575 U.S. 496, 505, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015). Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days. See Administrative Office of the United States Courts, Time Intervals in Months From Filing to Closing of Adversary Proceedings Filed Under 11 U.S.C. § 542 for the 12-Month Period Ending June 30, 2020, Washington, DC: Sept. 25, 2020.

One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments. To address this problem, some courts have adopted strategies to hurry things along. At least one bankruptcy court has held that § 542(a)'s turnover obligation is automatic even absent a court order. See *In re Larimer*, 27 B.R. 514, 516 (Bankr. D Idaho 1983). Other courts apparently will permit debtors to seek turnover by simple motion, in lieu of filing a full adversary proceeding, at least where the creditor has received adequate notice. See Tr. of Oral Arg. 81 (counsel for the City stating that "[i]n most bankruptcy courts, if a creditor responds to a motion [for turnover] by" arguing that the debtor should have instituted an adversary

proceeding, the bankruptcy judge will ask whether the creditor received "actual notice"); Brief for United States as *Amicus Curiae* 32 (reporting that "some courts have granted [turnover] orders based solely on a motion"); but see, *e.g.*, *In re Denby-Peterson*, 941 F.3d 115, 128–131 (CA3 2019) (holding that debtors must seek turnover through adversary proceedings). Similarly, even when a turnover request does take the form of an ***595** adversary proceeding, bankruptcy courts may find it prudent to expedite proceedings or order preliminary relief requiring temporary turnover. See, *e.g.*, *In re Reid*, 423 B.R. 726, 727–728 (Bkrtcy. Ct. ED Pa. 2010); see generally 10 Collier on Bankruptcy ¶ 7065.02 (16th ed. 2019).

Ultimately, however, any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges. It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned. Congress, too, could offer a statutory fix, either by ensuring that expedited review is available for § 542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner.

Nothing in today's opinion forecloses these alternative solutions. With that understanding, I concur.

All Citations

141 S.Ct. 585, 208 L.Ed.2d 384, 69 Bankr.Ct.Dec. 160, Bankr. L. Rep. P 83,578, 21 Cal. Daily Op. Serv. 373, 2021 Daily Journal D.A.R. 503, 28 Fla. L. Weekly Fed. S 648

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Compare *In re Fulton*, 926 F.3d 916, 924 (CA7 2019), *In re Weber*, 719 F.3d 72, 81 (CA2 2013), *In re Del Mission Ltd.*, 98 F.3d 1147, 1151–1152 (CA9 1996), and *In re Knaus*, 889 F.2d 773, 774–775 (CA8 1989), with *In re Denby-Peterson*, 941 F.3d 115, 132 (CA3 2019), and *In re Cowen*, 849 F.3d 943, 950 (CA10 2017).

2 In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also had violated §§ 362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F.3d at 926, n. 1. Neither do we.

1 Even though § 362(a)(3) does not require turnover, whether and when the City may sell impounded cars is an entirely different matter. See, *e.g.*, *In re Cowen*, 849 F.3d 943, 950 (CA10 2017) ("It's not hard to come up with examples of ... 'acts' that 'exercise control' over, but do not 'obtain possession of,' the estate's property, e.g., a creditor in possession who improperly sells property belonging to the estate").

2 See, *e.g.*, Ramos, Chicago Seized and Sold Nearly 50,000 Cars Over Tickets Since 2011, Sticking Owners With Debt, WBEZ News (Jan. 7, 2019) (online source archived at www.supremecourt.gov).

3 The 10-year period from 2007 to 2017, for instance, saw a tenfold increase in the number of Chicagoans filing Chapter 13 bankruptcies that involved debt to the City. See Sanchez & Kambhampati, Driven Into Debt: How Chicago Ticket Debt Sends

Black Motorists Into Bankruptcy, ProPublica Illinois (Feb. 27, 2018) (online source archived at www.supremecourt.gov).

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Bankruptcy Case No. XX B XXXXX
	)	
[NAME],	)	Chapter X
	)	
Debtor.	)	Honorable Janet S. Baer
_____	)	
	)	

FINAL PRETRIAL ORDER FOR VIDEO TRIAL

This order will govern the trial on the [MATTER] filed [MOVANT] pursuant to [LEGAL AUTHORITY] (ECF No. XX). Failure to comply with the provisions of this order may result in waiver of claims or defenses, dismissal, default, exclusion or admission of evidence, or other sanction, as justice may require.

This matter is set for trial on **[DATE].** In accordance with General Order No. 20-05, the trial will be held remotely by videoconference using the Zoom for Government videoconferencing platform. No participants will be physically present in the courtroom. The Covid-19 public health emergency constitutes good cause in compelling circumstances for holding the trial remotely by teleconference. Zoom for Government and this order provide appropriate safeguards.

Unless modified by the Court, this order will govern the course of the proceedings.

(1) Pretrial Materials

(a) Joint Pretrial Statement: Counsel for all parties are hereby ordered to confer and together prepare and file with the Court on or before **[DATE]**, a joint document captioned "Pretrial Statement." The Pretrial Statement must contain the following information:

(i) A statement of stipulated facts set forth in numbered paragraphs;

(ii) A statement of disputed material facts set forth in numbered paragraphs;

(iii) Each party's list of witnesses with any objections noted, stating grounds; and

(iv) Each party's list of exhibits it plans to offer with objections noted, stating grounds.

For each witness, the list must provide the witness's name, email address, and telephone number (in case of an interruption in the video or audio portion of the hearing), as well as a brief description of the subject matter of the witness's testimony.

All experts who will or may be called must be included on the witness list and must be specifically designated as "expert." A brief statement of the topic of each expert's testimony must be provided.

(b) Pretrial Briefs: Each party is further ordered to file a "Pretrial Brief" of no more than 5 pages on or before **[DATE]**. Each Pretrial Brief must contain a short statement that sets forth the burden of proof and elements of each claim and each defense, with citations to statutes and cases, if necessary.

(c) Exhibits: Each party must provide all other parties and the Court a copy of all exhibits to be used at trial on or before **[DATE]**. Each exhibit must be pre-marked, e.g., "Debtor's Exhibit 1," and must be provided electronically as a separate pdf (Adobe Acrobat) file and filed on the Court's bankruptcy docket in this case. Attorneys are responsible for ensuring that each pdf can be opened successfully. The Court will not consider any exhibit as evidence unless that exhibit has been offered and admitted into evidence at the trial, even if no objections to the exhibit have been raised in the Pretrial Statement.

(d) Paper Copies: Hard copies of the joint pretrial statement, all pre-trial briefs, and a full set of the exhibits must be delivered to the Judge via the Bankruptcy Court mailroom, 219 S. Dearborn Street, Room 717, no later than **12:00 p.m. on [DATE].**

(2) Participation by Video

(a) Connecting to Zoom: Before the trial date, chambers staff will provide a link or URL (internet address) that will allow participation in the trial. To participate, an attorney or witness must click on the link (paste the URL into the computer's browser and press "Enter") and then follow the instructions.

(b) Required Equipment: Zoom permits access to the video portion via computer and access to the audio portion via either computer or telephone. Witnesses must appear by video.

(i) Video: To use the video portion of Zoom, each attorney and witness must have a computer equipped with (a) a camera capable of sending and receiving video using Zoom; (b) Internet browsing software that will accommodate Zoom; (c) a stable Internet connection and bandwidth sufficient to support Zoom; and (d) Adobe Acrobat Reader for the purpose of reviewing exhibits. It is not necessary to download and install Zoom software.

(ii) Audio: To use the audio portion of Zoom, each attorney and witness must have either (a) a computer equipped with a microphone and speakers or (b) a telephone. If the telephone is a cellular phone, the attorney or witness must be in a location with service adequate to provide clear audio.

(c) Witness Testimony: All witnesses will be placed under oath, and their testimony will have the same effect as if they were testifying in open court. Each witness must testify from a quiet room. Witnesses must situate themselves so that other participants can see them and the witnesses can see the video. While a witness is under oath and testifying, no person may be in the same room, the witness may have no documents in the room except exhibits the parties have submitted, and the witness may not communicate in any fashion with anyone other than the questioning attorney and the judge. If the witness and the witness's attorney need to communicate, the attorney must request a recess.

(d) Subpoenas to Third-Party Witnesses: Each subpoena to a third-party witness must state the following in the box for the "Place" to appear: "The trial will be conducted remotely by videoconference in accordance with the attached Pretrial Order." A copy of the Pretrial Order must be attached to the subpoena and served on the witness.

(3) Technical Pretrial Conference. On **[DATE] at [TIME]** the Court will hold a technical pretrial conference to test the video technology. All parties and witnesses (except third-party witnesses) must participate. All participants are admonished not to discuss the substance of the trial at the pretrial conference and instead limit their comments to the functioning of the video technology and related procedural matters. The technical pretrial conference will also take place via Zoom, and the procedure for connecting to Zoom will be the same as provided above.

(4) Courtroom Formalities. Though held remotely by videoconference, the trial constitutes a judicial proceeding. No one except the assigned court reporter or another person that the Court directs may record the audio or video of the trial. Formalities of a courtroom will be observed. Participants must dress appropriately and must conduct themselves in a suitable manner.

Dated: [DATE]

Enter:

_____

The Honorable Janet S. Baer
United States Bankruptcy Judge

A 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.

Earlier versions of this paper were distributed in February 2020, May 2020, July 2020, and November 2020.

This version includes two Supplements to the July 2020 version: Chapter XIV (November 2020) and Chapter XV (April 2021). The Supplements are, effectively, "pocket parts."

The text has not materially changed since July 2020. **"SUPP XIV"** and **"SUPP XV"** are inserted in the text to alert the reader to the supplemental materials in Chapters XIV and XV.

Earlier versions of the paper have been published at 93 AMER. BANKR. L. J. 571 (2019), and as an ebook by the American Bankruptcy Institute, https://store.abi.org/sbra-a-guide-to-subchapter-v-of-the-u-s-bankruptcy-code.html

Table of Contents

A Guide to the Small Business Reorganization Act of 2019

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

I. Introduction

The Small Business Reorganization Act of 2019 (the "SBRA"),[1] signed by the President on August 23, 2019, enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and made conforming amendments to several sections of the Bankruptcy Code and statutes dealing with appointment and compensation of trustees in title 28.[2] SBRA also revised the definitions of "small business case" and "small business debtor" in § 101(51C) and § 101(51D), respectively.[3] It took effect on February 19, 2020, 180 days after its enactment.

Under § 101(51D), as amended, a debtor could not qualify as a small business debtor if its debts (with some exceptions) exceeded $ 2,725,625. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"),[4] enacted and effective March 27, 2020, amended

[1] Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.).

[2] Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code. Sections of the Bankruptcy Code added by the SBRA are referred to as "New § ___" in the text of this paper.

Section 3 of SBRA also enacts changes relating to prosecution of preference actions under 11 U.S.C. § 547 and to venue for certain proceedings brought by a trustee. These amendments apply in all bankruptcy cases.

SBRA § 3(a) amends § 547(b) to require that a trustee seeking to avoid a preferential transfer must exercise "reasonable due diligence in the circumstances of the case" and must take into account a party's "known or reasonably knowable" affirmative defenses under § 547(c). SBRA § 3(a).

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than $ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was $ 13,650.

[3] SBRA § 4(1)(A)-(B).

[4] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

the SBRA to increase the debt limit to $ 7.5 million for purposes of subchapter V for one year and made certain technical corrections. **SUPP XV**

Appendix A is a chart that lists sections of the Bankruptcy Code that SBRA affected and summarizes the changes, as affected by the CARES Act.

The purpose of SBRA is "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs."[5] A sponsor of the legislation stated that it allows small business debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business," which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."[6] Courts have taken the legislative purpose of SBRA into account in their application of the new law.[7]

It is likely that SBRA will have a significant impact. A preliminary estimate is that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would qualify as a small business debtor and that about 25 percent of individuals in chapter 11 cases would qualify as a small business.[8] The economic circumstances arising from the

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[5] H.R. REP. NO. 116-171, at 1 (2019), *available at* https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf.

For a summary of small business reorganizations under the Bankruptcy Code, see Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 BANKRUPTCY LAW LETTER, no. 10, Oct. 2019, at 1-4. **SUPP XIV**

[6] H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc.,* 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. Blackmon, *Revising the Debt Limit for "Small Business Debtors": The Legislative Half-Measure of the Small Business Reorganization Act,* 14 BROOK. J. CORP. FIN. & COM. L. 339, 344-45 (2020).

[7] *In re* Ventura, 615 B.R. 1 , 6, 12-13 (Bankr. E.D.N.Y. 2020); *In re* Progressive Solutions, Inc, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020).

[8] Brubaker, *supra* note 5, at 5-6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?,* CREDIT SLIPS (Sept. 14, 2019), http://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html. Professor Brubaker points out that the percentage may ultimately be higher because pre-SBRA law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under pre-SBRA law because of its obstacles might now do so.

Covid-19 pandemic and the temporary increase of the debt limit under the CARES Act can only increase the number of small business cases.[9]

New subchapter V applies in cases in which a qualifying debtor elects its application. In the absence of an election, the existing provisions of chapter 11 that govern a small business debtor apply with one change. SBRA amends § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in any case of a small business debtor unless the court orders otherwise.[10]

Subchapter V resembles chapter 12 in some aspects.[11] It provides for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee has oversight and monitoring duties and the right to be heard on certain matters. In some cases, the trustee may make disbursements to creditors.

But subchapter V differs from chapter 12 in significant ways. For example, whereas chapter 12 confirmation standards (§ 1225) are similar to those in chapter 13 (§ 1325), subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a). Unlike chapter 12, subchapter V does not provide for a codebtor stay.

Enactment of SBRA required revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") had authority to make changes in the Official Forms prior to the effective date of the SBRA. Changes to the Bankruptcy Rules,

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[9] For a discussion of strategies for creditors in view of the enactment of subchapter V, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 Am. Bankr. Inst. L. Rev. 251 (2020).

[10] SBRA, § 4(a)(11), 133 Stat. at 1086.

[11] As the court observed in *In re Trepetin,* 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020):

> Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

however, take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require.

To take account of the new law, the Rules Committee made changes to the Official Forms and promulgated interim rules (the "Interim Rules") that amend the Federal Rules of Bankruptcy Procedure.[12] The changes to the Official Forms became effective as of the effective date of SBRA. The Rules Committee has recommended that each judicial district adopt the Interim Rules as local rules or by general order. Enactment of the CARES Act required technical revisions in Interim Rule 1020 in and the Official Forms for voluntary petitions.[13] Appendix B summarizes the changes that the Interim Rules make.

SBRA does not repeal existing provisions that govern small business debtors in chapter 11. Those provisions continue to apply to small business debtors who do not elect to proceed under subchapter V. **SUPP XIV** The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee proposes to

[12] On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure ("Interim Rules") to address provisions of SBRA for adoption in each judicial district by local rule or general order and new Official Forms. The proposed Interim Rules and Official Forms reflected changes in response to comments received. ADVISORY COMMITTEE ON BANKRUPTCY RULES, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption, and approved the new Official Forms. The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

The Interim Rules are located on the *Current Rules of Practice & Procedure* page of the U.S. Courts public website (USCOURTS.GOV). The new Official Forms are posted on the *Forms* page of the website, under the *Bankruptcy Forms* table.

[13] On April 6, 2020, the Advisory Committee on Bankruptcy Rules proposed one-year technical amendments to Interim Rule 1020 to take account of the revised definition of "debtor" under the CARES Act, which Sections III(A) and (B) discuss. The Advisory Committee also proposed conforming technical changes to official forms, including Official Forms 101 and 202, which are the forms for the filing of a voluntary petition by an individual and a non-individual, respectively.

On April 20, 2020, the Committee on Rules of Practice and Procedure approved the amendments and recommended their local adoption. It also approved the one-year technical change to the Official Forms.

call cases under the existing provisions "small business cases" and to call cases of electing debtors "cases under subchapter V of chapter 11."

This terminology is technically accurate. Under the SBRA amendments, a "small business debtor" is not necessarily a debtor in a "small business case." Rather, a "small business case" is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case.

The distinction is important for at least one reason. Section 362(n) makes the automatic stay inapplicable in certain circumstances when the debtor in the current case is or was a debtor in a pending or previous small business *case*. Because a subchapter V debtor is not in a small business *case,* § 362(n) will not apply in a later case of the subchapter V debtor. **SUPP XV**

Bankruptcy judges and lawyers will inevitably adopt shorthand expressions to distinguish the three types of cases that are now possible under chapter 11: a non-small business case; a subchapter V case for a small business debtor who elects it; and a non-subchapter V small business case – a "small business case" – for one who does not. This paper refers to a non-small business case as a "standard" chapter 11 case; to the case of an electing small business debtor as a "sub V case;" and to the case of a non-electing small business debtor as a "non-sub V case." And, of course, debtors are either "standard," "sub V" or "non-sub V."

II. Overview of Subchapter V

For electing small business debtors, subchapter V: (1) modifies confirmation requirements; (2) provides for the participation of a trustee (the "sub V trustee") while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) changes several administrative and procedural rules; and (4) alters the rules for the debtor's discharge and

the definition of property of the estate with regard to property an individual debtor acquires postpetition and postpetition earnings (which has implications for operation of the automatic stay of § 362(a)). Only the sub V debtor may file a plan or a modification of it.

This Part provides an overview of these provisions. Later Parts discuss these and other provisions in more detail. Appendix C is a chart that compares provisions of subchapter V with those that govern non-sub V chapter 11, chapter 12, and chapter 13 cases.

A. Changes in Confirmation Requirements

The court may confirm a plan even if all classes reject it. Moreover, the "fair and equitable" requirement for "cramdown" confirmation does not include the absolute priority rule. Instead, the plan must comply with a new projected disposable income requirement (applicable in cases of entities as well as those of individuals). The cramdown requirements for a secured claim are unchanged. (Part VIII).

A plan may modify a claim secured only by a security interest in the debtor's principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor. Such modification is not permitted in standard or non-sub V chapter 11 cases or in chapter12 or 13 cases. (Section VII(B)).

B. Subchapter V Trustee and the Debtor in Possession

Subchapter V provides for the debtor to remain in possession of assets and operate the business with the rights and powers of a trustee unless the court removes the debtor as debtor in possession. (Part V).

The United States Trustee appoints the sub V trustee. The role of the sub V trustee is to oversee and monitor the case, to appear and be heard on specified matters, to facilitate a

consensual plan, and to make distributions under a nonconsensual plan confirmed under the cramdown provisions. (Part IV).

C. Case Administration and Procedures

Subchapter V modifies the usual procedures in chapter 11 cases in several respects. Appendix D summarizes the key events in a subchapter V case and the timeline for them.

No committee of unsecured creditors. A committee of unsecured creditors is not appointed unless the court orders otherwise. (SBRA also makes this the rule in a non-sub V case.) (Section VI(A)).

Required status conference and report from debtor. The court must hold a status conference within 60 days of the filing "to further the expeditious and economical resolution" of the case. Not later than 14 days before the status conference, the debtor must file a report that details the efforts the debtor has undertaken and will undertake to achieve a consensual plan of reorganization. (Section VI(C)).

Time for filing of plan. The debtor must file a plan within 90 days of the date of entry of the order for relief, unless the court extends the time based on circumstances for which the debtor should not justly be held accountable. The existing requirements in a small business case that a plan be filed within 300 days of the filing date (§ 1121(e)) and that confirmation occur within 45 days of the filing of the plan (§ 1129(e)) do not apply in a sub V case. (Section VI(D)).

No disclosure statement. Section 1125, which states the requirements for a disclosure statement in connection with a plan and regulates the solicitation of acceptances of a plan, does not apply in a sub V case, unless the court orders otherwise. Although no disclosure statement is required, the plan must include: (1) a brief history of the business operations of the debtor; (2) a

liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan. (Sections VI(B), VII(B)).

No U.S. Trustee fees. A sub V debtor does not pay U.S. Trustee fees. (Section VI(E)).

D. Discharge and Property of the Estate

1. Discharge – consensual plan

If the court confirms a consensual plan, a sub V debtor (including an individual debtor) receives a discharge under § 1141(d)(1)(A) upon confirmation. The provision in § 1141(d)(5) for delay of discharge in individual cases until completion of payments does not apply in a sub V case. In the case of an individual, the § 1141(d)(1)(A) discharge does not discharge debts excepted under § 523(a).[14] One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

2. Discharge – cramdown plan

If the court confirms a cramdown plan, § 1141(d) does not apply, and confirmation does not result in a discharge. Instead, new § 1192 provides for a discharge, which does not occur until the debtor completes plan payments for a period of at least three years or such longer time not to exceed five years as the court fixes. (Section X(B)).

Under new § 1192, the discharge in a cramdown case discharges the debtor from all debts specified in § 1141(d)(1)(A) and all other debts allowed under § 503 (administrative expenses), with the exception of: (1) debts on which the last payment is due after the first three years of the plan or such other time not exceeding five years as the court fixes; and (2) debts excepted under § 523(a). (Section X(B)). Under § 362(c)(2), the automatic stay remains in effect after

[14] § 1141(d)(2).

confirmation of a cramdown plan until the case is closed or dismissed, or the debtor receives a discharge.

3. Property of the estate

Section 1115 provides that, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. Section 1115 does not apply in a subchapter V case.[15] If the court confirms a plan under the cramdown provisions of new § 1191(b), however, property of the estate includes (in cases of both individuals and entities) postpetition assets and earnings.[16] (Part XI(B)).

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

A. Debtor's Election of Subchapter V

The provisions of subchapter V apply in cases in which a small business debtor elects them.[17] If a small business debtor does not make the election, the current provisions of Chapter 11 governing small business cases apply.

The operative statutory provision is new § 103(i). As amended by the CARES Act, it provides:

> Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of title 11 shall apply.[18]

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[15] New § 1181(a).
[16] New § 1186(a).
[17] One commentator has suggested that a creditor may want to attempt to limit the availability of subchapter V by including in the credit agreement a commitment from the debtor not to make the election or to waive it, noting that such a contractual provision may not be enforceable. Bradley, *supra* note 9, at 264. Professor Bradley suggests alternatively that a creditor could require a "springing" (sometimes referred to as a "bad boy") guarantee from a debtor's insider that would arise if the debtor elected subchapter V. *Id.* at 264-65.
[18] SBRA inserted new subsection (i) in § 103 and renumbered existing subsections (i) through (k) as (j) through (*l*). SBRA § 4(a)(2). Before enactment of the CARES Act, new § 103(*i*) provided:

SBRA added new § 1182, which defined "debtor" in subsection (1) as meaning a "small business debtor,"[19] a term defined in § 101(51D). As the next Section discusses, SBRA also revised the § 101(51D) definition of "small business debtor." The CARES Act amended § 1182(1) so that its definition of "debtor" is the same as the definition of "small business debtor" in revised §101(51D), with a technical correction that it also made,[20] except that the amount of the debt limit is increased to $ 7.5 million.[21] The debt limit in revised § 101(51D) is unchanged.

The CARES Act amendment to new § 1182(1) is effective for only one year after enactment of the statute on March 27, 2020.[22] At that time, the CARES Act provides for the amendment of § 1182(1) to return to its original language, so that "debtor" will mean "a small business debtor." **SUPP XV**

The effect of all these provisions is that, for one year **SUPP XV** after the enactment of the CARES Act, new (and amended) § 1182(1) states the definition of a debtor eligible to be a sub V debtor. After that, new § 101(51D) will state the definition. The only difference in the language of the two statutes is the higher debt limit in the temporary CARES Act version of § 1182(1). (Because the CARES Act does not change the definition of "small business debtor," a debtor with debts in excess of the § 101(51D) limit but below $ 7.5 million that does not elect subchapter V cannot be a small business debtor.)

Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of title 11 shall apply.

[19] SBRA § 2(a).

[20] The technical correction involves the exclusion of public companies. See text accompanying note 39 *infra*.

[21] CARES Act § 1113(a)(1).

[22] CARES Act § 113(a)(5).

The statute does not state when or how the debtor makes the election. Bankruptcy Rule 1020(a) requires a debtor to state in the petition whether it is a small business debtor.[23] In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order for relief. The case proceeds in accordance with the debtor's statement unless and until the court enters an order finding that the statement is incorrect.

Interim Rule 1020(a) as originally promulgated added the requirement that the debtor state in the petition whether the debtor elects application of subchapter V and provided that the case proceed in accordance with the election unless the court determined that it is incorrect. In an involuntary case, the Interim Rule required the debtor to state whether it is a small business debtor and to make the election within 14 days after the order for relief.[24] In response to the CARES Act amendment of new § 1182(1), the revised Interim Rule provides in both instances for the debtor to state whether the debtor is a small business debtor or a debtor as defined in § 1182(1) and, if the latter, whether the debtor elects application of subchapter V.

Revisions to the Official Forms for voluntary chapter 11 cases require the debtor to state whether it is a small business debtor or a § 1182(1) debtor and whether it does or does not make the election.[25] Revised Official Forms also provide for creditors to receive notice of the debtor's statement of its status and the election that it makes.[26]

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[23] FED. R. BANK. P. 1020(a).
[24] INTERIM RULE 1020.
[25] OFFICIAL FORM B101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); OFFICIAL FORM B102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).
[26] OFFICIAL FORM B309E2 is the form for individuals or joint debtors under subchapter V, and OFFICIAL FORM B309F2 is the form for corporations or partnerships under subchapter V. Existing OFFICIAL FORMS B309E (individuals or joint debtors) and B309F (corporations or partnerships) are renumbered as B309E1 and B309F1. Both new forms contain the same information as the existing notices but provide additional information applicable in subchapter V cases.

The new forms require inclusion of the trustee and the trustee's phone number and email address. The new notices state that the debtor will generally remain in possession of property and may continue to operate the business and advise that, in some cases, debts will not be discharged until all or a substantial portion of payments under the plan are made.

Parties in interest may object to a debtor's election to proceed as a small business debtor. Bankruptcy Rule 1020(b) requires an objection to a debtor's statement as to whether it is a small business debtor within 30 days after the later of the conclusion of the § 341(a) meeting or amendment of the statement. Interim Rule 1020(b) makes the same requirement applicable to the statement regarding the election.

Bankruptcy Rule 1009(a) gives a debtor the right to amend a voluntary petition, list, schedule, or statement "as a matter of course at any time before the case is closed." A question is whether a debtor may amend the small business designation or the subchapter V election that the voluntary petition includes. Current Bankruptcy Rule 1020 does not address whether a debtor can amend the small business designation, and Interim Rule 1020 likewise does not address the issue of whether a delayed election should be allowed and, if so, under what circumstances.[27] Part XIII discusses the cases that have considered whether a debtor in a case pending before enactment of SBRA may amend the petition to elect application of Subchapter V.

One problem with permitting a debtor to change the election is that deadlines for conducting a status conference[28] and for filing a plan[29] run from the date of the order for relief. The Advisory Committee in its Report observed, "Should a court exercise authority to allow a delayed election, it is likely that one of the court's prime considerations in ruling on a request to make a delayed election would be the time restriction imposed by subchapter V. . . ."[30] Part XII further discusses this issue.

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[27] The Advisory Committee Note to Interim Rule 1020 states, "The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions."
[28] *See infra* Section VI(C).
[29] *See infra* Section VI(D).
[30] REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES, *supra* note 12, at 3.

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

Under pre-SBRA law, paragraph (A) of § 101(51D) defined a "small business debtor" as a person (1) engaged in commercial or business activities, (2) excluding a debtor whose principal activity is the business of owning or operating real property, (3) that has aggregate noncontingent liquidated secured and unsecured debts[31] as of the date of the filing of the petition or the date of the order for relief in an amount not more than $ 2,725,625,[32] (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor. Paragraph (B) of former § 101(51D) excluded any member of a group of affiliated debtors that has aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

As the previous Section discusses, SBRA amended the § 101(51D) definition of "small business debtor," and the CARES Act made amendments that temporarily increase the debt limit for a sub V debtor to $ 7.5 million and make a technical correction to the exclusion of certain debtors affiliated with public companies from the definition.

The CARES Act effects the debt limit change through an amendment to new § 1182(1) that lasts only one year. **SUPP XV** The language of revised § 1182(1) is identical to the language of § 101(51D), with the technical correction that the CARES Act also makes. Specifically, subparagraphs (A) and (B) of new § 1182(1) are exactly the same as subparagraphs (A) and (B) of § 101(51D), as amended by both SBRA and the CARES Act. For convenience,

[31] § 101(51D)(A). Debts owed to one or more affiliates or insiders are excluded from the debt limit. *Id.* **SUPP XIV**
[32] The amount is revised every three years. § 104. The current amount became effective to cases filed on or after April 1, 2019.

this paper discusses these provisions by reference to § 101(51D) because it continues to apply to a small business debtor that does not elect subchapter V. **SUPP XIV**

SUPP XV SBRA did not change the requirement in § 101(51D) that the debtor be engaged in "commercial or business activities"[33] or the aggregate debt limit, but it modified each of the other requirements.[34] First, revised subparagraph (A) of § 101(51D) requires that 50 percent or more of the debt must arise from the commercial or business activities of the debtor.[35]

Second, amended § 101(51D)(A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real estate.[36]

Third, the requirement that no committee exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in the case of a small business debtor unless the court orders otherwise.)

Finally, SBRA added two additional types of debtors to those that subparagraph (B) excludes from being a small business debtor. One exclusion (in (B)(ii), as amended) was for a corporate debtor subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act of 1934.[37] The second (in (B)(iii), as amended) was for a corporate debtor subject

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[33] In *In re Wright,* 2020 WL 2193240 (Bankr. D. S.C., April 27, 2020), the court held that nothing in the definition limits it to a debtor currently engaged in business and ruled that an individual who had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. *Accord, In re* Bonert*,* 619 B.R. 248, 255 (Bankr. C.D. Cal. 2020); *see In re* Blanchard, 2020 WL 4032411 (Bankr. E.D. La., 2020). **SUPP XV**

[34] SBRA § 4(a)(1).

[35] For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor's income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B). **SUPP XV**

[36] Section 101(51B) defines "single asset real estate" as "real property constituting a single property of project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto." § 101(51B).

[37] § 101(51D)(B)(ii).

to the reporting requirements of those sections that is an affiliate of a debtor.[38] The CARES Act made a technical correction[39] to eliminate the second provision and to insert a new (B)(iii) to exclude "any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c))."[40] Identical provisions are in § 1182(1)(B)(ii) and (iii), as amended by the CARES Act. **SUPP XIV SUPP XV**

SBRA amended the definition of "small business case" in § 101(51C) to exclude a subchapter V debtor. Thus, a "small business case" is a case in which a small business debtor has *not* elected application of subchapter V. In other words, the case of a sub V debtor is *not* a "small business case," even though a sub V debtor necessarily is a "small business debtor." And as a result of the CARES Act amendments increasing the debt limits, a debtor may be a sub V debtor under § 1182(1) (until its expiration) but not a "small business debtor." **SUPP XV**

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases.[41] The trustee is a standing trustee, if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. SBRA § 4(b) amends 28 U.S.C. § 586 to make its provisions for the appointment of standing chapter 12

[38] SBRA § 4(a)(1)(B)(i)(III), amending § 101(51D)(B)(iii).
[39] For a discussion of the issues relating to this provision, *see* Brubaker, *supra* note 5, at 7. Because the issues are of limited or no interest to most practitioners and judges, they are beyond the scope of this paper. The author will address the issues if they arise and readers must do likewise.
[40] CARES Act § 1113(a)(4)(A).
[41] § 1183(a). SBRA § 4(a)(3) amends § 322(a) to provide for a sub V trustee to qualify by filing a bond in the same manner as other trustees.

and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.[42]

The United States Trustee Program has selected a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.[43] The appointment of a sub V trustee in each case instead of a standing trustee appears to be contrary to the expectations of proponents of the SBRA. In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated, "There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee."[44]

B. Role and Duties of the Subchapter V Trustee

The role of the sub V trustee is similar to that of the trustee in a chapter 12 or 13 case. But as later text discusses, a sub V trustee has the specific duty to "facilitate the development of a consensual plan of reorganization." New § 1183(b)(7). Sub V trustees may, therefore, confront issues that are quite different from those that trustees in other cases deal with.[45]

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[42] New § 1181(a). Section 1104, which governs the appointment of a trustee in a non-sub V case, does not apply in sub V cases. In a sub V case, the U.S. Trustee's appointment of the trustee is not subject to the court's approval as it is under § 1104(d).

[43] *See* Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP's Implementation of the HAVEN Act and the SBRA,* 38 AMER. BANKR. INST. J. 12 (Oct. 2019).

[44] *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), *available at* https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

[45] The United States Trustee Program has promulgated its expectations with regard to the duties of the sub V trustee and the trustee's role in the case. U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials [hereinafter SUBCHAPTER V TRUSTEE HANDBOOK]. For a discussion of the sub V trustee's duties and role in the case, and strategic considerations for creditors, see Bradley, *supra* note 9, at 260-62, 267-271.

New § 1183 enumerates the trustee's duties. Section 1106, which specifies the duties of the trustee in a standard chapter 11 case, does not apply in sub V cases.[46] New § 1183, however, makes many of its provisions applicable in some circumstances. As in chapter 12 and 13 cases, the debtor remains in possession of assets and operates the business. If the court removes the debtor as debtor in possession under new § 1185(a), the trustee operates the business of the debtor.[47]

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

In general, the role of the trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan.[48] This role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

First, the sub V trustee has the duty to "facilitate the development of a consensual plan of reorganization."[49] No other trustee has this duty, although a chapter 13 trustee has the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan."[50] One practitioner has suggested that the sub V trustee should be a "financial wizard" who can work with all parties on cash flows, interest rates, payment requirements, and "all the numbers puzzles

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[46] New § 1181(a).
[47] New § 1183(b)(5).
[48] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 1-1, provides an overview of the sub V trustee's duties:

> In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor's payments under the confirmed plan of reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor's bankruptcy estate for the benefit of creditors.

The Handbook notes, "The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case." *Id.* at 2-2. For a summary of the U.S. Trustee Program's views of the sub V trustee's duties, see *id.* at 1-5 to 1-7.
[49] New § 1183(b)(7).
[50] § 1302(b)(4).

that comprise a plan," and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.[51] The United States Trustee Program expects sub V trustees to be proactive in the plan process.[52]

Second, the trustee must appear and be heard at the status conference that new § 1188(a) requires.[53] Although § 105(d) (which does not apply in a sub V case under new § 1181(a)) provides for a status conference in any case on the court's own motion or on the request of a party in interest, it does not require one. Thus, a status conference is not required in any other type of case. Section VI(C) discusses the status conference.

Finally, the trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.[54]

Although the responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor's property, business, and financial condition, a sub V trustee, like a chapter 12 trustee, does not have the duty to investigate the financial affairs of the debtor. Section 704(a)(4) imposes such a

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[51] Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers,* 38 AMER. BANKR. INST. J. 8 (Nov. 2019). *See also* Bradley, *supra* note 9, at 261 ("Trustees seem likely to play the role of mediator.").

[52] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-9, states:

> As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor's counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

When the plan is filed, the Handbook advises the sub V trustee to "review the plan and communicate any concerns to the debtor about the plan prior to the confirmation hearing." *Id.*

[53] New § 1183(b)(3). *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-8 ("The trustee should review the debtor's report carefully. . ." and "should be prepared to discuss the debtor's report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.").

[54] New § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all of these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a standard chapter 11 or a non-sub V case has a broad duty of investigation under § 1106(a)(3) unless the court orders otherwise.

The court may impose the investigative duties that § 1106(a)(3) specifies on the sub V trustee. Under new § 1183(b)(2), the court (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) may order that the sub V trustee perform certain duties of a chapter 11 trustee under § 1106(a). The specified duties are: (1) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3)); (2) to file a statement of the investigation, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate, and to transmit a copy or summary of it to entities that the court directs (§ 1106(a)(4)[55]); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).[56] The same procedures apply to a chapter 12 trustee's duty to investigate under § 1202(b)(2).

[55] Section 1106(a)(4)(B) directs a chapter 11 trustee to transmit the copy or summary to any creditors' committee, equity security holders' committee, and indenture trustee. Committees do not exist in a small business case unless the court orders otherwise under § 1102(a)(3) as amended, and a small business debtor is unlikely to have an indenture trustee as a creditor.

[56] New § 1183(b)(2). In *In re AJEM Hospitality, LLC*, 2020 WL 3125276 (M.D.N.C. 2020), the court on motion of the bankruptcy administrator, and with the consent of the debtor and sub V trustee, authorized the trustee to conduct an investigation limited to the investigation of potential intercompany claims. The court noted, "The language of [§ 1106(a)(3)] specifically allows the Court to limit the scope of an investigation 'to the extent that the court orders . . . .'" *Id*. at *2.

2. Other duties of the trustee

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),[57] a sub V trustee under new § 1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine proofs of claim and object to allowance of any claim that is improper, if a purpose would be served (§ 704(a)(5)); (3) to oppose the discharge of the debtor, if advisable (§ 704(a)(6)); (4) to furnish information concerning the estate and the estate's administration that a party in interest requests, unless the court orders otherwise (§ 704(a)(7)); and (5) to make a final report and to file it (§ 704(a)(9)).[58] Under new § 1183(b)(4), the sub V trustee also has the same duty as chapter 12 and 13 trustees to ensure that the debtor commences timely payments under a confirmed plan (§§ 1202(b)(4), 1302(b)(5)).[59]

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees.[60] The U.S. Trustee Program has developed procedures for reporting by sub V trustees to enable U.S. Trustees to evaluate and monitor their performance.[61]

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[57] Chapter 12 (§ 1202(b)(1)) and chapter 13 (§ 1302(b)(1)) trustees also have the duty of a chapter 7 trustee under § 704(a)(3) to ensure that the debtor performs the debtor's intentions under § 521(a)(2)(B) to surrender, redeem, or reaffirm debts secured by property of the estate. The imposition of this duty in chapter 12 and 13 cases is curious in that § 521(b)(2)(B) applies only in chapter 7 cases. SBRA does not impose this anomalous duty on the sub V trustee.

[58] New § 1183(b)(1).

[59] New § 1183(b)(4).

[60] 28 U.S.C. § 586(a)(3). SBRA § 4(b)(1)(A) amended 28 U.S.C. § 586(a)(3) to include sub V cases within the types of cases that the U.S. Trustee supervises.

[61] SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, ch. 8. *See also* U.S. DEP'T OF JUSTICE, 3 UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL: CHAPTER 11 CASE ADMINISTRATION (Feb. 2020) §§ 3-17.16, 3-17.16.1, 3.17.1.2, 3.17.16.3, 3.17.16.5, 3.17.16.6, https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra,* directs sub V trustees to consult with the U.S. Trustee before filing an objection to confirmation (*id.* at 3-9, 3-10, 3-12), objecting to a claim (*id.* at 3-15), or filing a motion to dismiss or convert (*id.* at 3-17).

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

Under new § 1185(a), the court may remove the debtor as debtor in possession. If the court does so, the sub V trustee has the duties of a trustee specified in paragraphs (1), (2), and (6) of § 1106.[62] New § 1183(b)(5) specifically directs the sub V trustee to operate the debtor's business when the debtor is not in possession. Similar provisions apply in chapter 12 cases.[63]

Under paragraph (1) of § 1106(a), the trustee must perform the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These duties are: (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); (3) to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); (4) to file reports (§ 704(a)(8)); (5) to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9)); (6) to provide required notices with regard to domestic support obligations (§ 704(a)(10)); (7) to perform any obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and (8) to use reasonable and best efforts to transfer patients from a health care business that is being closed (§ 704(a)(12)).[64]

Paragraph (2) of § 1106(a) requires the trustee to file any list, schedule, or statement that § 521(a)(1) requires if the debtor has not done so. Paragraph (6) requires the trustee to file tax returns for any year for which the debtor has not filed a tax return.

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[62] New § 1183(b)(5). New § 1183(b)(5) also requires the sub V trustee to perform duties specified in § 704(a)(8). The specification of the duty is duplicative because the § 704(a)(8) duty is one of the duties listed in § 1106(a)(1) that the sub V trustee must perform.

[63] The court may remove a chapter 12 debtor from possession under § 1204. Under § 1202(b)(5), the chapter 12 trustee then has the duties of a trustee under § 1106(a)(1), (2), and (6). §§ 1106(a), 1202(b).

[64] § 1106(a)(1).

C. Trustee's Disbursement of Payments to Creditors

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

Paragraphs (a) and (c) of new § 1194 contain provisions dealing with the trustee's disbursement of money prior to confirmation. It is not clear, however, how they can have any operative effect. Nothing in subchapter V requires preconfirmation payments to the trustee or authorizes the court to require them.

New § 1194(a) states that the trustee shall retain any "payments and funds" received by the trustee until confirmation or denial of a plan.[65] Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph's direction for their disbursement based on whether the court confirms a plan or denies confirmation indicates that it deals only with money the trustee receives prior to confirmation.

If a plan is confirmed, new § 1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee. The provision is effectively the same as the provisions that govern disbursement of preconfirmation payments in chapter 12 and 13 cases.[66]

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[65] New § 1194(a).

[66] New §§ 1194(a), 1226(a), 1326(a)(2). The chapter 12 provision, § 1226(a), does not specifically provide for fees of a trustee who is not a standing trustee and does not permit a deduction for adequate protection payments. The fees of a non-standing chapter 12 trustee are allowable as an administrative expense and as such are within the scope of the deduction.

The chapter 13 provision, § 1326(b)(2), does not specifically provide for fees of the chapter 13 trustee. It does provide for the trustee to deduct adequate protection payments.

A standing chapter 13 trustee collects a percentage fee as the debtor makes payments. 28 U.S.C. § 586(e)(2) (2018); *see* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, CHAPTER 13 PRACTICE AND PROCEDURE § 17:5 (2019). Thus, the funds a standing chapter 13 trustee has upon denial of confirmation are net of the trustee's fee that has already been paid. A non-standing chapter 13 trustee's fee is included in the deduction because it is an administrative expense.

Provisions for a trustee's disbursement of preconfirmation funds make sense in a chapter 13 case because a chapter 13 debtor must begin making preconfirmation payments to the trustee, adequate protection payments to creditors with a purchase-money security interest in personal property, and postpetition rent to lessors of personal property within 30 days of the filing of the chapter 13 case.[67] If the court denies confirmation in a chapter 13 case, therefore, it is possible that the chapter 13 trustee will be holding money that the debtor paid.

No such provisions for preconfirmation payments exist in a sub V case. Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the court to require the debtor to make preconfirmation payments to the trustee.

Nevertheless, paragraph (c) of new § 1194 authorizes the court, prior to confirmation and after notice and a hearing, to authorize the trustee to make payments to provide adequate protection payments to a holder of a secured claim.[68] But a court can hardly require a sub V trustee to make adequate protection payments as new § 1194(c) contemplates if the trustee has no money to make them.

It is perhaps arguable that the new § 1194(a) and (c) provisions impliedly authorize the court to require a debtor to make preconfirmation payments to the trustee, particularly if the court orders the trustee to make adequate protection payments. But the concept of the sub V debtor remaining in possession of its assets and operating its business includes the debtor retaining control of its funds. It is more appropriate (and simpler) for a court to require the debtor, not the trustee, to make whatever adequate protection or other payments the court orders.

[67] § 1326(a).
[68] New § 1194(c).

2. Disbursement of plan payments by the trustee

Whether the sub V trustee makes disbursements to creditors under a confirmed plan depends on the type of confirmation that occurs. Under new § 1194(b), the trustee makes payments under a plan confirmed under the cramdown provisions of new § 1191(b), unless the plan or confirmation order provides otherwise.[69] If a consensual plan is confirmed under new § 1191(a), however, the trustee's service terminates under new § 1183(c) upon "substantial consummation," and the debtor makes plan payments.[70] Part IX discusses payments under the plan.

D. Termination of Service of the Trustee and Reappointment

1. Termination of service of the trustee

When termination of the trustee's service occurs depends on whether the court confirms a consensual plan under new §1191(a) or confirms a plan that one or more impaired classes of creditors have not accepted under the cramdown provisions of new § 1191(b).

When the court confirms a consensual plan under new § 1191(a), the trustee's service terminates upon substantial consummation,[71] which ordinarily occurs when distribution commences.[72] Confirmation of a plan under the cramdown provisions of new § 1191(b) does not terminate the trustee's service. As just discussed, the trustee continues to serve and makes payments under the plan as new § 1194 requires.

Part IX further discusses these provisions.

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[69] New §1194(b).
[70] New § 1191(a).
[71] Section IX(A) discusses substantial consummation in the context of payments under a consensual plan.
[72] New § 1183(c).

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.[73]

2. Reappointment of trustee

New § 1183(c)(1) provides for the reappointment of a trustee after termination of the trustee's service in two circumstances.

First, new § 1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee's duty under new § 1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.[74] The reason for this provision is unclear. If a debtor seeks modification after cramdown confirmation, the trustee continues to serve, so reappointment is unnecessary. When confirmation of a consensual plan has occurred, the trustee's service terminates upon substantial consummation, after which new § 1193(b) prohibits modification. Perhaps the purpose of the reappointment provision is to make sure that someone appears at the hearing to point this out to the court if a debtor attempts to modify a confirmed consensual plan after its substantial consummation.

Second, new § 1183(c) permits reappointment of the trustee if necessary to perform the trustee's duties under new § 1185(a). New § 1185(a) provides for the removal of the debtor in possession, among other things, for "failure to perform the obligations of the debtor under a plan confirmed under this chapter."[75] Because new § 1185(a) contemplates the postconfirmation removal of the debtor in possession, a trustee must be available to take charge of the assets and

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[73] Section 701(a) directs the U.S. Trustee to appoint an interim trustee promptly after entry of an order for relief under chapter 7. In a converted case, the U.S. Trustee may appoint the trustee serving in the case immediately before entry of the order for relief.

Sections 1202 and 1302 provide for a standing trustee to serve in cases under those chapters, if one has been appointed, or for the U.S. Trustee to appoint a disinterested person to serve as trustee.

[74] New § 1183(c)(1).

[75] New § 1185(a).

the business. Section XII(B) further discusses the postconfirmation removal of the debtor in possession.

E. Compensation of Subchapter V Trustee

If the trustee in a sub V case is a standing trustee, the trustee's fees are a percentage of payments the trustee makes to creditors under the same provisions that govern compensation of standing chapter 12 and chapter 13 trustees.

If the sub V trustee is not a standing trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of § 330(a), without regard to the limitation in § 326(a) on compensation of a chapter 11 trustee based on money the trustee disburses in the case. As Section IV(E)(2) discusses, some observers expected that technical amendments would impose a limit on compensation of five percent of payments under the plan, which is the rule for a non-standing chapter 12 or 13 trustee.[76] **SUPP XIV**

1. Compensation of standing subchapter V trustee

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586.[77] As amended, § 326(a) excludes a subchapter V trustee from its provisions governing compensation of a chapter 11 trustee, and § 326(b) provides that the court may not allow compensation of a standing trustee in a subchapter V case under § 330.

Under SBRA's amendments to 28 U.S.C. § 586(e),[78] the U.S. Trustee Program establishes the compensation for a standing sub V trustee in the same manner it does for standing chapter 12 and 13 trustees.[79] Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12

[76] The observers are bankruptcy judges, lawyers, and professors who have followed and supported enactment of SBRA with whom the author has discussed the issue.
[77] SBRA § 4(a)(4).
[78] SBRA § 4(b)(1)(D).
[79] 28 U.S.C. § 586(e).

and 13 cases are extended to cover subchapter V standing trustees. Thus, the standing subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.

If the service of a standing trustee is terminated by dismissal or conversion of the case or upon substantial consummation of a consensual plan under new § 1181(a) (as Section IX(A) discusses, the trustee does not make payments under a consensual plan), new 28 U.S.C. § 586(e)(5) provides that the court "shall award compensation to the trustee consistent with the services performed by the trustee and the limits on the compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."[80] The limits require reference to the standing trustee's maximum annual compensation, 28 U.S.C. § 586(e)(1)(A), and to the maximum percentage fee, 28 U.S.C. § 586(e)(1)(B).

2. Compensation of non-standing subchapter V trustee

Questions have arisen concerning the provisions of the new statute for compensation of a subchapter V trustee who is not a standing trustee.

Section 330(a) permits the court to award compensation to trustees. Sections 326(a) and (b) impose limits on compensation of trustees. SBRA does not amend § 330(a), but it does amend §§ 326(a) and (b). Under a "plain meaning" interpretation of these provisions as amended, a non-standing sub V trustee is entitled to "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" under § 330(a), and §§ 326(a) and (b) do not impose any limits on compensation. **SUPP XIV**

[80] 28 U.S.C. § 586(e)(5).

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error.[81] The drafters of subchapter V intended that provisions for compensation of non-standing sub V trustees be the same as those for non-standing chapter 12 and 13 trustees.

Specifically, § 326(b) limits compensation of a non-standing chapter 12 or chapter 13 trustee to "five percent upon all payments under the plan." Although it appears the drafters intended this limitation to apply to compensation of sub V trustees, the language of the SBRA amendments to § 326(b) do not make this limitation applicable to a non-standing sub V trustee.[82] Observers close to the legislative process expected a technical amendment to resolve this issue

[81] See *supra* note 76.

[82] A full understanding of the issue requires further elaboration.

Section 330(a) provides for the allowance of compensation to "trustees," subject to § 326 (and other sections). SBRA does not amend § 330(a).

SBRA did not change the provisions of subsections (a) and (b) of § 326(a) with regard to compensation of trustees other than sub V trustees. Thus, § 326(a) limits the compensation of a chapter 11 (and chapter 7) trustee to a percentage of moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor.

Section 326(b) deals with compensation of trustees in chapter 12 and 13 cases in two ways. First, it provides that a standing chapter 12 or 13 trustee is not entitled to compensation under § 330(a); instead, a standing chapter 12 or 13 trustee receives compensation, and collects percentage fees, under 28 U.S.C. § 586(e). Second, § 326(b) limits the compensation of a non-standing chapter 12 or 13 trustee to "five percent upon all payments under the plan." § 326(b). The exact language of § 326(b) is that the limitation applies to a "trustee appointed under section 1202(a) or 1302(a) of this title." *Id.*

Generally, then, pre-SBRA § 326(a) dealt with chapter 7 and 11 cases and § 326(b) dealt with chapter 12 and 13 trustees. Without an amendment, a sub V trustee would be a chapter 11 trustee, and § 326(a) would apply. Similarly, unamended §326(b) would not apply because it is for chapter 12 and 13 cases.

SBRA § 4(a)(4)(A) amended § 326(a) by excluding sub V trustees from its application. SBRA § 4(a)(4)(B) amended § 326(b) to prohibit a standing sub V trustee from receiving compensation under § 330. SBRA's amendments to 28 U.S.C. § 586(e) provide for compensation of a standing sub V trustee under its provisions, so the same provisions that govern compensation of standing chapter 12 and 13 trustees apply. SBRA § 4(b)(1).

What the SBRA amendments did not do was add "§ 1183" (the new subchapter V section that calls for the appointment of a sub V trustee) before "§ 1202(a) and 1302(a)" (the sections under which chapter 12 and 13 trustees are appointed) in the language quoted above. Without this insertion, amended § 326(b) does not limit the compensation of a non-standing sub V trustee. As the next footnote discusses, one reading of amended § 326(b) is that nothing authorizes compensation of a non-standing sub-V trustee.

by making the five percent limitation also applicable to sub V trustees.[83] Technical corrections in the CARES Act, however, did not address this issue.[84] **SUPP XIV**

3. Deferral of non-standing subchapter V trustee's compensation

A standing sub V trustee receives compensation as a percentage of payments the trustee makes from funds paid by the debtor under a plan. The percentage fees of a standing trustee are necessarily deferred until payments are made.

A non-standing trustee's compensation is allowable as an administrative expense, which has priority under § 507(a)(2) subject only to claims for domestic support obligations. Under § 1129(a)(9)(A), a plan must provide for payment of administrative expenses in full on or before the effective date of the plan.[85] This requirement applies in subchapter V cases to confirmation of a consensual plan under new § 1191(a).[86]

New § 1191(e) permits payment of administrative expense claims through the plan if the court confirms it under the cramdown provisions of new § 1191(b).[87] Accordingly, a non-standing sub V trustee faces deferral of payment of compensation for services in the case.

As Section IV(E)(2) discusses, it is possible that a technical amendment to § 326(b) will impose a limitation on a non-standing trustee's compensation to five percent of payments under

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[83] Such an amendment would also clarify that a non-standing trustee is entitled to compensation. As amended, § 326(b) applies to cases under subchapter V, chapter 12, and chapter 13. Before and after the amendment, § 326(b) states that the court "may allow reasonable compensation under section 330 of this title to a trustee appointed under section 1202(a) or 1302(a) of this title," but it does not state that the court may allow compensation under § 330 of a trustee appointed under new § 1183. § 326(b). Because § 330(a) is subject to § 326, and § 326(b) does not provide for compensation of a non-standing sub V trustee, it may be arguable that a sub V trustee is not entitled to compensation. The position of the United States Trustee Program is, "Case-by-case trustees are compensated through § 330(a)(1) which allows for 'reasonable compensation for actual, necessary services rendered by the trustee . . . and by any paraprofessional person employed by such person.'" SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-21.

[84] The technical corrections in the CARES Act involved the exclusion of public companies from the definition of a small business debtor and unclaimed funds in subchapter V cases. CARES Act § 1113(a)(4).

[85] § 1129(a)(9)(A).

[86] New § 1191(a).

[87] New § 1191(e).

the plan. If this occurs, a non-standing trustee's compensation may arguably be limited to five percent of payments as they are made.

F. Trustee's Employment of Attorneys and Other Professionals

Section 327(a) permits a bankruptcy trustee to employ attorneys and other professionals "to represent or assist the trustee in carrying out the trustee's duties." SBRA does not modify this provision for subchapter V cases. If a standing sub V trustee is appointed, the standing trustee presumably would follow the practice of standing trustees in chapter 12 and 13 cases and not retain counsel or other professionals except in exceptional circumstances.

A non-standing sub V trustee's employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances.[88] In this regard, a person serving as a sub V trustee should have a sufficient understanding of applicable legal principles to perform the

[88] *See In re* Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 (E.D.N.C. 2020). The court declined to approve the sub V trustee's application to approve the employment of the trustee's law firm, stating, "[A]uthorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA." *Id.* at *2. In a footnote, the court cautioned that "overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved." *Id.* at *2 n. 2.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-17 to 3-18, states:

> Although the trustee may employ professionals under section 327(a), SBRA is intended to be a quick and low cost process to enable debtors to confirm consensual plans in a short period with less expense while returning appropriate dividends to creditors. Therefore, the services required of outside professionals, if any, will be limited in many cases. This is especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. See 11 U.S.C. § 1184. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether the employment of the professional is warranted under the specific circumstances of each case.

trustee's monitoring and supervisory duties, and appear and be heard on specified issues, without the necessity of separate legal advice.

A question exists whether a trustee who is not an attorney may appear and be heard in a bankruptcy case. Section 1654 of title 28 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.[89]

The statute applies only to natural persons; it does not permit a corporation or other entity to appear in federal court except through licensed counsel.[90]

Courts have applied the rule to prohibit an individual who serves as the trustee for a trust or as the personal representative of an estate from representing the trust or estate unless the trust or estate has no creditors and the individual is the sole beneficiary.[91] Because a bankruptcy trustee acts as the representative of the estate[92] and creditors have an interest in the estate, the same rule would appear to require a non-attorney trustee to retain a lawyer in order to appear and be heard in a bankruptcy court. **SUPP XV**

The nature of reorganization proceedings in bankruptcy courts and the facilitative, advisory, and monitoring role that subchapter V specifically contemplates for the trustee suggest that the rule applicable in a federal lawsuit between discrete parties should not be extended to apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

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[89] 28 U.S.C. § 1654.
[90] *E.g.*, Rowland v. California Men's Colony*,* 506 U.S. 194, 202 (1993) ("[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.").
[91] *E.g.*, **SUPP XV** Guest v. Hansen, 603 F.3d 15 (2d Cir. 2010) (estate); Knoefler v. United Bank of Bismarck*,* 20 F.3d 347 (8th Cir. 1994) (trust); C.E. Pope Equity Trust v. United States, 818 F.2d 696 (9th Cir. 1987) (trust).
[92] § 323(a).

In this regard, 28 U.S.C. § 1654 and the case law establishing the rule have their roots in 18th and 19th century practice in federal courts[93] when the availability of bankruptcy relief was either nonexistent or short-lived.[94] The statute could not have contemplated a reorganization case involving many parties and many inter-related moving parts that involve business issues and often require negotiations and compromise to achieve a successful outcome for all the parties. In other words, a bankruptcy reorganization is quite different from a lawsuit that involves discrete parties asserting claims and defenses to establish their rights and obligations.

This distinction is particularly important in a subchapter V case. Specific duties of the sub V trustee are to facilitate the development of a consensual plan of reorganization,[95] and to appear and be heard on confirmation and other significant issues that relate to confirmation.[96] The statute makes it clear that the trustee's primary role is to work with the parties and then to *report* to the court, not to engage in litigation with them.

A nonlawyer trustee does not need an attorney to work with the parties on business issues, to investigate and obtain information about the debtor and its business, to facilitate confirmation, and to report to the court. When the time comes to report to the court, the trustee should be permitted to perform the reporting function without a lawyer.

Assuming that the nonlawyer trustee is knowledgeable about reorganization law and practice (and a sub V trustee who is not knowledgeable should not be a sub V trustee), neither

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[93] Section 35 of the Judiciary Act of 1789 is the statutory predecessor to 28 U.S.C. § 1654 (2018) and contained substantially the same language. *See* United States v. Dougherty, 473 F.2d 1113, 1123 n. 10 (D.C. Cir. 1972).

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), provided "that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

[94] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States,* 3 Am. Bankr. Inst. L. Rev. 5, 12-23 (1995). *See also* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 1:2.

[95] New § 1183(b)(7).

[96] New § 1183(b)(3).

the debtor, creditors, nor the court need a lawyer to present the trustee's reports and views to the court. In short, unless a sub V trustee needs to *litigate* something, the trustee does not need counsel. The statute and case law governing federal *litigation* should not be extended to the trustee's appearance in court to *report*.

The subchapter V trustee's primary role is analogous to the role of an examiner in a standard chapter 11 case,[97] or an expert witness that a court appoints.[98] Such parties provide information to the court and the parties and may do so without counsel. A sub V trustee with similar advisory duties should similarly be permitted to provide information to the court without the necessity of having to do so through a lawyer.[99]

Finally, the trustee is an officer of the court. The court need not insist that its officer hire a lawyer to hear what the officer has to say.

If a nonlawyer is the sub V trustee, the trustee's ability to appear in court without a lawyer is critical to accomplishment of the objective of subchapter V of providing debtors – and creditors – with the opportunity to accomplish an expeditious and economic reorganization, hopefully on a consensual basis. A requirement for employment of counsel adds an additional layer of expense that should not ordinarily be necessary and that threatens accomplishment of

[97] § 1106(b). Although bankruptcy courts often authorize an examiner to employ counsel or other professionals, § 327(a) does not provide authority for an examiner to employ a professional person. *See generally* 5 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 99:29 (3d ed. 2019). *See also In re* W.R. Grace & Co., 285 B.R. 148, 156 (Bankr. D. Del. 2002) ("[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings. The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals." (citation omitted)).

[98] FED. R. EVID. 706.

[99] In some jurisdictions, some chapter 7 panel trustees are not lawyers. The author's informal discussions with bankruptcy judges indicate that in some courts nonlawyer trustees appear without counsel when the matter does not require actual litigation.

subchapter V's primary objective.[100] Moreover, if a nonlawyer trustee must have a lawyer, the additional expense may as a practical matter preclude the appointment of a nonlawyer trustee.

If a court determines that the rule prohibiting a nonlawyer trustee from appearing in federal court requires the trustee to retain counsel in order to be heard, economic considerations may lead the court to limit the services that will be compensated to those for which a lawyer is legally required. Non-compensable services might include, for example, work in connection with the investigation of the debtor and its business or negotiations or development of business information to facilitate a consensual plan. And because it is the trustee, not the lawyer, who is to be heard, any written report concerning confirmation and other matters would seem to be the responsibility of the trustee, not the lawyer.

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

The debtor, as debtor in possession, remains in possession of assets of the estate.[101] A sub V debtor in possession has the rights, powers, and duties of a trustee that a standard chapter 11 debtor in possession has, including the operation of the debtor's business.[102] The court may

[100] This consideration suggests that a court may invoke § 105(a) to permit a nonlawyer to appear without counsel as being "necessary or appropriate" to carry out the provisions of the Bankruptcy Code.
[101] New § 1186(b).
[102] New § 1184. Section 1107(a), which provides for the debtor to remain in possession with the rights, powers, and duties of a trustee, is inapplicable in a sub V case. New § 1181(a). New § 1184 replaces § 1107(a) in sub V cases.

remove the debtor as debtor in possession under new § 1185(a). The court may reinstate the debtor in possession.[103]

B. Duties of Debtor in Possession

Upon the filing of a voluntary case, a small business debtor must file documents required of a small business debtor under §§ 1116(1)(A) and (B).[104] If a small business debtor elects to proceed as a sub V debtor, §1116 is inapplicable, but new § 1187(a) requires the sub V debtor to comply with §§ 1116(1)(A) and (B) upon making the election.[105]

The timing of the election does not change the time for the debtor to file the required documents from the date of the filing of the petition. If the debtor makes the election in the petition (as Interim Rule 1020(a) requires), § 1187(a) requires the debtor to file the documents at that time. If the debtor does not make the election in the petition, § 1116(1) is applicable and requires the debtor to append the documents to the petition. In an involuntary case, the debtor must file the documents within seven days after the order for relief.[106]

The documents that § 1116(1) requires are: the debtor's most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.[107]

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[103] New § 1185(b).
[104] New. § 1187(a).
[105] Section 1116 does not apply in a sub V case, § 1181(a), but new § 1187 incorporates all its requirements. In view of this, it is unclear why § 1116 does not apply in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee.
[106] Section 1116(1) requires a small business debtor in an involuntary case to file the required documents within seven days after the order for relief. Interim Rule 1020(a) permits a debtor to make the subchapter V election within 14 days after entry of the order for relief in an involuntary case. New § 1187(a) requires compliance with the requirements of § 1116(1) upon the debtor's election to be a subchapter V debtor.

Unless and until the debtor makes the election, § 1116 applies. Accordingly, the debtor must comply with § 1116(1) and file the required documents within seven days after the order for relief, regardless of when the debtor makes the election.
[107] § 1116(1).

SBRA does not change a small business debtor's duty under § 308 to file periodic reports.[108] Under § 308(b), the periodic reports must contain information including: (1) the debtor's profitability; (2) reasonable approximations of the debtor's projected case receipts and cash disbursements; (3) comparisons of actual case receipts and disbursements with projections in earlier reports; (4) whether the debtor is in compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and (5) if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.[109]

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7).[110] Thus, the debtor's senior management personnel and counsel must: (1) attend meetings scheduled by the court or the U.S. Trustee (including initial debtor interviews, scheduling conferences, and § 341 meetings, unless waived for extraordinary and compelling circumstances[111]); (2) timely file all schedules and statements of financial affairs (unless the court after notice and a hearing grants an extension not to exceed 30 days after the order for relief, absent extraordinary and compelling circumstances); (3) file all postpetition financial and other reports required by the Bankruptcy Rules or local rule of the district court;[112] (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other

[108] New § 1187(b).
[109] § 308.
[110] New § 1187(b).
[111] As in non-sub V cases, the debtor and counsel must attend the initial debtor interview scheduled by the U.S. Trustee and must attend the § 341 meeting of creditors, at which the U.S. Trustee presides. *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-3, 3-5. The U.S. Trustee expects the sub V trustee to participate in both. *Id.*
[112] That is not a typo. The statute specifies local rule of the district court.

government filings and pay all taxes entitled to administrative expense priority; and (6) allow the U.S. trustee to inspect the debtor's business premises, books, and records.[113]

A sub V debtor in possession has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).[114]

The duties under § 1106(a)(1) include the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a).[115] These provisions include duties: to be accountable for all property received; to examine and object to proofs of claim if a purpose would be served; to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise; to file reports; to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee; to provide required notices with regard to domestic support obligations; to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.

Other § 1106(a) duties applicable to the sub V debtor under new § 1184 are the duties under § 1106(a)(5) through (a)(8): to file a plan;[116] to file tax returns for any year for which the

[113] § 1118.
[114] New § 1184.
[115] § 1106(a)(1).
[116] The duty under § 1106(a)(5), applicable to the sub V debtor under new § 1184, is to "as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case." New § 1184.

The § 1106(a)(5) language is somewhat problematical in a sub V case. First, § 1121 (dealing with who may file a plan) does not apply in a sub V case because only the debtor may file a plan. Second, the statutory deadline of 90 days for the debtor to file a plan, new § 1189(b), is inconsistent with the "as soon as practicable" direction in § 1106(a)(5). § 1106(a)(5).

Nevertheless, the clear import of the statutory scheme is that the sub V debtor has a duty to file a plan.

debtor has not filed a tax return; to file postconfirmation reports as are necessary or as the court orders; and to provide required notices with regard to any domestic support obligations. [117]

C. Removal of Debtor in Possession

New § 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.[118] "Cause" includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case." This language is identical to § 1104(a),[119] which provides for appointment of a trustee in a standard or non-sub V chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case. **SUPP XV**

New § 1185(a) also provides for removal of the debtor in possession "for failure to perform the obligations of the debtor" under a confirmed plan, as Sections V(C) and XII(B) discuss. Sections 1104(a) and 1204(a) do not contain this ground for removal of a debtor in possession.[120]

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[117] § 1106(a)(5-8).

[118] New § 1181(a). Sections 1104 and 1105, which deal with appointment of a trustee and termination of the trustee's appointment, are inapplicable in a sub V case.

Section 1104 also permits appointment of a trustee if it is "in the interests of creditors, any equity security holders, and other interests of the estate." New § 1185(a) does not include this reason as "cause" for removing a debtor in possession.

Section 1104 also permits the appointment of an examiner. Subchapter V has no provision for appointment of an examiner. As Section IV(B)(1) notes, the court may authorize a trustee to investigate for cause shown under new § 1183(b)(2).

[119] Section 1104 does not apply in a sub V case. New § 1181(a).

[120] New § 1185(a).

If the court removes the debtor in possession, the trustee has the duty to operate the business of the debtor,[121] and other duties that Section IV(B)(3) discusses. The trustee cannot, however, file a plan.[122] **SUPP XV**

New § 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing.[123] Section 1202(b) contains identical language in chapter 12 cases, and § 1105 similarly permits the court to terminate the appointment of a chapter 11 trustee and restore the debtor to possession and management of the estate and operation of the debtor's business.[124]

Like §§ 1104(a) and 1204(a), new § 1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists.[125] A potential issue is whether removal of the debtor for failure to perform under a confirmed plan is mandatory if the failure is not material or if the debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at

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[121] *Id*.§ 1183(b)(5).
[122] *Id*.§ 1189(a) (stating that only the debtor may file a plan).
[123] *Id*.§ 1185(b).
[124] §§ 1105, 1202(b). If the debtor is removed from possession, a question arises whether the attorney (and other professionals employed by the debtor) is entitled to compensation for services rendered to the debtor after the removal.

The Supreme Court in *Lamie v. United States Trustee,* 540 U.S. 526, 124 S. Ct. 1023 (2004), ruled that an attorney for a former chapter 11 debtor in possession who provides services after conversion to chapter 7 is not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney. The same principle applies when a trustee is appointed in a chapter 11 case, thus removing the debtor as debtor in possession.

Subchapter V does not address this issue. If the *Lamie* ruling precludes compensation of a sub V debtor's attorney after removal and the debtor cannot find an attorney to provide counsel without compensation, the debtor will not have a realistic chance of obtaining reinstatement or filing a plan.
[125] New § 1185(a).

the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

VI. Administrative and Procedural Features of Subchapter V

Subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. These features include elimination of the committee of unsecured creditors and the requirement of a separate disclosure statement unless the court orders otherwise; the requirement of a status conference; an expedited timetable for the filing of a plan; elimination of U.S. Trustee fees; and a modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a).

A. Elimination of Committee of Unsecured Creditors

SBRA amends § 1102(a)(3) to provide that a committee of unsecured creditors will not be appointed in the case of a small business debtor unless the court for cause orders otherwise.[126] Prior to the amendment, § 1102(a)(3) permitted the U.S. Trustee to appoint a committee unless the court, for cause, ordered that a committee not be appointed. The other provisions of § 1102[127] (dealing with appointment of committees) and § 1103 (dealing with powers and duties of committees) do not apply in a sub V case unless the court orders otherwise.[128]

Although SBRA eliminates the appointment of a committee of unsecured creditors in both sub V and non-sub V cases unless the court orders otherwise, the Interim Rules did not

[126] SBRA § 4(a)(11).
[127] The other provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).
[128] New § 1181(b).

change the requirement of Bankruptcy Rule 1007(d) that a debtor in a voluntary chapter 11 case file a list of its 20 largest unsecured creditors, excluding insiders.

The requirement of the list serves two purposes. First, an objection to the debtor's designation of itself as a small business debtor or to its election of subchapter V[129] must be served on the creditors on the Rule 1007(d) list under Interim Rule 1020(c). Second, if the court directs the appointment of a committee, the list provides the information that the U.S. Trustee needs to identify the largest unsecured creditors for purposes of selecting committee members from the holders of the largest claims willing to serve under § 1102(b)(1).

B. Elimination of Requirement of Disclosure Statement

Section 1125 regulates postpetition solicitation of acceptances or rejections of a plan. It requires that creditors receive "adequate information"[130] about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.[131] The court must hold a hearing on approval of the disclosure statement after at least 28 days' notice before solicitation of votes on the plan may occur.[132]

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing,[133] so that solicitation may occur without prior notice and hearing on the disclosure statement.[134] The hearing on approval of the disclosure statement may be combined with the hearing on confirmation.[135] In addition, the court in a small business case may determine that the plan itself provides adequate

[129] See Section III(A).
[130] Section 1125(a)(1) defines "adequate information" as information that would enable "a hypothetical investor of the relevant class to make an informed judgment about the plan." § 1125(a)(1).
[131] § 1125(b).
[132] FED. R. BANKR. P. 3017(a).
[133] § 1125(f)(3)(A).
[134] § 1125(f)(3)(B).
[135] § 1125(f)(3)(C).

information and that a separate disclosure statement is not necessary,[136] and may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B.[137]

In a sub V case, § 1125 is inapplicable unless the court orders otherwise.[138] Thus, the debtor need not file a disclosure statement in connection with its plan unless the court requires it. If the court orders that § 1125 apply, the provisions of § 1125(f) apply.

A sub V debtor's plan must contain certain information that a disclosure statement typically contains, including: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization. New § 1181(a)(1). **SUPP XV** It does not require that the plan contain "adequate information," and it does not provide for judicial review of the required information. Material or intentional errors or omissions might provide a basis for denial of confirmation for the debtor's lack of good faith in proposing the plan.[139]

C. Required Status Conference and Debtor Report

Section 105(d) permits, but does not require, the court to convene a status conference in a case under any chapter, on its own motion or on request of a party in interest.[140] Section 105(d) does not apply in a sub V case.[141] Instead, new § 1188(a) makes a status conference mandatory and requires the court to hold it not later than 60 days after the entry of the order for relief in the case.[142] The court may extend the time for holding the status conference if the need for an

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[136] § 1125(f)(1).
[137] § 1125(f)(2).
[138] New § 1181(b).
[139] § 1129(a)(3). *See also* Brubaker, *supra* note 5, at 10.
[140] § 105(d).
[141] New § 1181(a).
[142] **SUPP XV**

extension is "attributable to circumstances for which the debtor should not justly be held accountable."[143] **SUPP XV** The statutory purpose of the status conference is "to further the expeditious and economical resolution" of the case.

Not later than 14 days prior to the status conference, the debtor must file, and serve on the trustee and all parties in interest, a report that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."[144] The trustee has the duty to appear and be heard at the status conference.[145] **SUPP XV**

Neither subchapter V nor the Interim Rules specify how the court schedules the status conference, the agenda for the status conference, or the contents of the debtor's report. The practitioner must consult local rules, orders, and procedures to determine how the bankruptcy judge will address these matters and the judge's expectations about the report and the status conference.[146]

Some courts include the time for the status conference in the Notice of Chapter 11 Bankruptcy Case that the clerk sends at the outset of the case. Others schedule it in a separate notice, or include it in a scheduling order, that the clerk or debtor's counsel mails to parties in interest.

New § 1188(a) states only that the purpose of the status conference is "to further the expeditious and economical resolution" of the subchapter V case, and new § 1188(c) requires only that the report detail "the efforts the debtor has undertaken and will undertake to attain a

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[143] New § 1188(b).
[144] New § 1188(c).
[145] New§ 1183(b)(3).
[146] For example, the New Jersey bankruptcy court has promulgated a mandatory form for the debtor's report, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms. Bankruptcy courts in the District of Maryland, https://www.mdb.uscourts.gov/content/local-bankruptcy-forms, and in the Central District of California, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms, have published suggested forms.

consensual plan of reorganization." While some courts are scheduling the status conference without further direction, others have provided more specific instructions.

For example, a scheduling order for the status conference may remind counsel that senior management must attend the conference, that the report will be covered, and that the debtor should be prepared to discuss any anticipated complications in the case (such as adversary proceedings, discovery, or valuation disputes), the timing of the confirmation hearing and related procedures and deadlines, and monthly operating reports.

A scheduling order may also outline specific items to be included in the report, which may include one or more of the following: (1) the efforts the debtor has undertaken or will undertake to obtain a consensual plan of reorganization, as new § 1188(c) requires; (2) the goals of the reorganization plan; (3) any complications the debtor anticipates in promptly proposing and confirming a plan, including any need for discovery, valuation, motion practice, claim adjudication, or adversary proceeding litigation; (4) a description of the nature of the debtor's business or occupation, the primary place of business, the number of locations from which it operates, and the number of employees or independent contractors it utilizes in its normal business operations; and the goals of the reorganization plan; (5) any motions the debtor contemplates filing or expects to file before confirmation; (6) any objections to any claims or interests the debtor expects to file before confirmation and any potential need to estimate claims for voting purposes; (7) the estimated time by which the debtor expects to file its plan; (8) whether the debtor is current on all required tax returns; (9) other matters or issues that the debtor expects the court will need to address before confirmation or that could have an effect on the efficient administration of the case.

Regardless of whether the court specifies its requirements with regard to the debtor's report or sets an agenda for the scheduling conference, counsel for the parties should anticipate that the court will be interested in any of these matters that the case involves and that debtor's counsel must ultimately address in connection with plan confirmation. Creditors may use the status conference as an opportunity to obtain information about the financial affairs of the debtor and to articulate their views and concerns about the debtor's operations, prospects for a feasible plan, and other matters.[147]

D. Time for Filing of Plan

Only the debtor may file a plan.[148] The debtor has a duty to do so.[149]

The deadline for the sub V debtor to file the plan is 90 days after the order for relief.[150] The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable,[151] the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221.[152] New § 1193(a) permits preconfirmation modification of a plan.[153] **SUPP XV**

Section 1121(e) requires that a debtor in a small business case file a plan within 300 days of the filing date,[154] and § 1129(e) requires that confirmation occur within 45 days of the filing

[147] *See* Bradley, *supra* note 9, at 256, 272-73, 281.
[148] New§ 1189(a).
[149] New§ 1184. Note 116 discusses the debtor's duty to file a plan.
[150] New§ 1189(b). **SUPP XV**
[151] *Id.*
[152] The court in *In re Trepetin,* 617 B.R. 841, 848-49 (Bankr. D. Md. 2020), found guidance for determining whether to extend the deadline in a chapter 12 case that addressed the issue under § 1221, *In re Gullicksrud,* 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016).
[153] New § 1193(a).
[154] § 1121(e).

of the plan.[155] These requirements do not apply in a subchapter V case.[156] They continue to apply in the case of a small business debtor who does not elect subchapter V. The schedule for the filing of the plan in a sub V case thus differs from the schedule in a non-sub V case in two ways. First, a sub V debtor must file a plan much more promptly than a non-sub V debtor – 90 days instead of 300.[157] Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

SUPP XV As in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal.[158] Section 1112(b)(1) states that the court *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interest of creditors and the estate, unless the court determines that the appointment of a trustee or an examiner *under § 1104* is in the best interests of the estate.[159] Because § 1104 does not apply in a sub V case,[160] the court apparently has no alternative to conversion or dismissal.

E. No U.S. Trustee Fees

28 U.S.C. § 1930(a)(6)(A) requires the quarterly payment of U.S. Trustee fees in chapter 11 cases based on disbursements in the case. SBRA amends this subparagraph to except cases under subchapter V from this requirement.[161]

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[155] § 1129(e).
[156] New § 1181(a).
[157] Because of the short time to file a plan, counsel for a sub V debtor should promptly request the court to issue a bar order establishing a deadline for the filing of proofs of claim if the court by local rule or general order has not fixed a deadline for filing proofs of claim in sub V cases.
[158] § 1112(b)(4)(J).
[159] 1112(b)(1).
[160] New § 1181(a).
[161] SBRA § 4(b)(3).

F. Modification of Disinterestedness Requirement for Debtor's Professionals

Section 327(a) permits employment of professionals by a debtor in possession in a chapter 11 case only if, among other things, the professional is a "disinterested person." A person who holds a claim against the debtor is not a disinterested person under the term's definition in § 101(14)(A).[162] A disinterested person cannot not have an interest "materially adverse to the interest of the estate."[163]

These provisions disqualify an attorney or other professional to whom the debtor owes money at the time of filing because the professional is a creditor. Moreover, because payment of amounts owed to the professional prior to filing would in most instances be a voidable preference under § 547 and result in the professional having a material adverse interest to the estate in a preference action, the debtor's professionals must either waive any unpaid fees or forego representation of the debtor.

New Section 1195 addresses this issue in part. It provides that a person is not disqualified from employment under § 327(a) solely because the professional holds a prepetition claim of less than $ 10,000.[164]

Depending on what the debtor's plan will propose to pay to unsecured creditors, the economic impact of the new provision may be limited. An important practical implication is that debtor's counsel will no longer have to explain to accountants and other professionals who are not familiar with bankruptcy practice that they must waive their fees to provide services to the debtor in the case – something that may be contrary to their standard practice of declining to provide services if the client fails to pay fees in a timely manner.

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[162] § 327(a).
[163] § 101(14)(C).
[164] New § 1195.

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

Section 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse.[165] If the election is made, the claim is allowed as secured to the extent it is allowed. The election may be made at any time prior to the conclusion of the hearing on the disclosure statement.[166] Alternatively, if the disclosure statement is conditionally approved under Bankruptcy Rule 3017.1 and a final hearing on the disclosure statement is not held, the election must be made within the date fixed for objections to the disclosure statement under Bankruptcy Rule 3017.1(a)(2) or another date fixed by the court.[167]

Interim Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the § 1111(b) election may be made not later than a date the court may fix.[168]

Courts are taking varied approaches to scheduling the date for the § 1111(b) election. Many have decided not to address it unless a party requests it. Others are fixing the date by reference to the date the plan is filed (such as 14 or 30 days after the plan's filing) in a scheduling or other order or notice. When the court on its own does not set a date and a party anticipates that a creditor will make the election, the party should request that the court establish a deadline. **SUPP XIV**

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[165] § 1111(b). For a discussion of strategic considerations for creditors regarding the § 1111(b) election, see Bradley, *supra* note 9, at 275-76. **SUPP XIV**
[166] FED. R. BANKR. P. 3014.
[167] FED. R. BANKR. P. 3017.1.
[168] INTERIM RULE 3017.

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

Bankruptcy Rule 3017: (1) requires the court to fix the time for holders of claims or interests to vote to accept or reject a plan on or before approval of the disclosure statement; (2) provides that the record date for creditors and holders of equity securities is the date that the order approving the disclosure statement is entered or another date fixed by the court; (3) permits the court to set the date for the hearing on confirmation in connection with approval of the disclosure statement; and (4) requires that, upon approval of the disclosure statement, the court must fix the date for transmission of the plan, notice of the time for filing acceptances or rejections, and notice of the hearing on confirmation.[169]

New Interim Rule 3017.2 provides for the court to establish all these times in a subchapter V case in which the disclosure statement requirements of § 1125 do not apply.[170]

I. Bar Date for Filing of Proof of Claim

Bankruptcy Rule 3003 governs the filing of proofs of claim or interest in a chapter 11 case. The Interim Rules made no change in its provisions.

Rule 3003 does not establish a deadline for filing a proof of claim. Instead, Rule 3003(c) provides that the court "shall fix and may extend the time within which proofs of claim or interest may be filed."

Many courts have adopted procedures for fixing the bar date for the filing of proofs of claim at the outset of the case. Some are including the bar date in the Notice of Chapter 11 Bankruptcy Case that the clerk sends. Others establish the deadline in a separate document, such as a scheduling order or other notice. A lawyer representing a creditor in a subchapter V case

[169] FED. R. BANKR. P. 3017.1.
[170] INTERIM RULE 3017.2.

who is accustomed to the usual practice in chapter 11 cases – the issuance of a separate bar date order – must check local practice to make sure that she knows the deadline.

Some courts have set the bar date as 70 days after the filing of the petition. This is the same time that Bankruptcy Rule 3002(c) establishes in chapter 12 and 13 cases. Others have set the date as 90 days after the § 341(a) meeting of creditors.

An advantage of fixing the bar date as 70 days after the filing date is that it expires before the deadline under new § 1189(b) for the debtor to file a plan, which is 90 days after the order for relief. If a debtor must know with certainty what the claims in the case are before it can file its plan, the debtor will need to ask the court to extend the time until the bar date has expired. The debtor will have to establish that the need for the extension is "attributable to circumstances for which the debtor should not justly be held accountable" under new § 1189(b).

The court cannot shorten the time for a governmental unit to file a proof of claim, which is 180 days after the order for relief under § 502(b)(9). Although it would be helpful for tax claims to be filed before the debtor files a plan, this should rarely be an obstacle. Most taxes are self-assessed by the debtor upon filing a return. If the debtor does not know its tax liability, it is unlikely that the taxing authority does either. A debtor might not be able to accurately calculate the exact amount of interest and penalties, but it should know the principal amount. **SUPP XV**

VII. Contents of Subchapter V Plan

The requirements for the contents of a sub V plan are contained in §§ 1122 and 1123 (with two exceptions) and in new § 1190. An important provision is that new § 1190(3) permits

modification of a claim secured only by a security interest in real property that is the principal residence of the debtor if the loan arises from new value provided to the debtor's business.[171]

Section 1122 states rules for classification of claims in a chapter 11 plan, and § 1123 states what provisions a plan must and may have. Two provisions in § 1123 – (a)(8) and (c) – are not applicable in sub V cases.[172]

Official Form 425A, which is a permissible, but not required, form for a chapter 11 plan, has been modified and may be used in a subchapter V case. Courts may adopt local forms for subchapter V plans[173] or make the use of Official Form 425A mandatory and provide guidance on its preparation.[174]

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

Section 1123(a)(8) requires the plan for an individual debtor to provide for payment to creditors of all or such portion of earnings from postpetition services or other future income as is necessary for the execution of the plan.[175] Section 1123(c) prohibits a plan filed by an entity other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.[176]

SBRA replaces § 1123(a)(8) with a similar provision applicable to all debtors in new § 1190, which contains additional provisions for the content of a plan. Section 1123(c) is superfluous in a subchapter V case because only the debtor can propose a plan.[177]

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[171] New § 1190(3).
[172] New § 1181(a).
[173] E.g., *Debtor's Chapter 11, Subchapter V Plan* (D. Md.) (suggested), available at https://www.mdb.uscourts.gov/content/local-bankruptcy-forms; *Chapter 11 Subchapter V Small Business Debtor's Plan of Reorganization [or Liquidation]* (D. New Jersey) (mandatory), available at http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms; *Plan of Reorganization* (W.D. Wisconsin) (suggested), available at https://www.wiwb.uscourts.gov/forms.
[174] E.g., *SBRA Plan Instructions*, available at http://www.canb.uscourts.gov/forms/district.
[175] § 1123(a)(8).
[176] § 1123(c).
[177] New § 1189(a).

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

New § 1190 contains three provisions governing the content of the plan.

First, new § 1190(1)[178] requires information that would otherwise be included in a disclosure statement. The plan must include: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan.

Second, new § 1190(2) requires the plan to provide for the submission of "all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." In an individual case, this provision replaces the similar rule in the inapplicable § 1123(a)(8). In non-individual cases, it imposes a new requirement.

Because a plan ordinarily must provide for payment of creditors from the debtor's income, the requirement for the submission to the trustee of income as necessary for the execution of the plan states nothing more than a feasibility requirement.

New § 1190(2) raises interpretive issues regarding the requirement that future income be submitted to the "supervision and control" of the trustee.

If a consensual plan is confirmed under new § 1191(a), new § 1194 does not contemplate that the trustee make the payments. Moreover, new § 1183(c)(1) provides for termination of the trustee's service upon substantial consummation of a consensual plan under new § 1191(a). Under § 1101(2), "substantial consummation" occurs upon (among other things[179])

[178] No apparent reason exists for using numbers for the subsections of this section instead of the customary lower-case letters.

[179] Substantial consummation also requires transfer of all or substantially all of the property proposed by the plan to be transferred, § 1101(2)(A) (2018), and assumption by the debtor or by the successor to the debtor of the business or of the management of all or substantially all of the property dealt with by the plan, § 1101(2)(B).

"commencement of distribution under the plan."[180] An issue is whether a consensual plan must provide for submission of future income to the trustee's supervision and control when the trustee's service will terminate once the first plan payment is made.[181]

The third content provision in new § 1190(3) changes the rule of § 1123(b)(5) that a plan may not modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence. The same antimodification rule applies in chapter 13 cases under § 1322(b)(2).

New § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value have been "used primarily in connection with the small business of the debtor."[182]

Courts have considered whether the prohibition on modification of a residential mortgage applies when the property in which the debtor resides has nonresidential characteristics or uses, usually in chapter 13 cases.[183] For example, the property may be a multi-family dwelling that does or can generate rental income or a farm. The debtor may use it for business purposes, or it may include additional tracts or acreage beyond a residential lot.

The issue in such cases is whether the claim is secured by property other than the debtor's residence. Some courts have ruled that antimodification protection extends to a mortgage

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[180] § 1101(2)(C).
[181] *See infra* Section IX(A).
[182] New § 1190(3). For a discussion of strategies for lenders to consider to preclude application of the subchapter V exception to the anti-modification rule, see Bradley, *supra* note 9, at 282-83. Professor Bradley suggests lenders might require more than half of the loan proceeds to be used for personal expenses or that, in the case of a proposed loan secured by a second mortgage, the lender instead pay off the first mortgage and refinance that amount so that most of the loan is not for the business. *Id.*
[183] *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 5:42.

secured by any real property that the debtor uses, at least in part, as a residence. Other courts, however, have concluded that the debtor's use of real property as a residence does not alone mean that the debt is secured only by the debtor's principal residence, and that a mortgage on property the debtor uses as a residence is subject to modification if the property has sufficient nonresidential characteristics or uses.[184]

The court in *In re Ventura*[185] concluded that application of new § 1190(3) requires a different analysis. There, an individual operated a bread and breakfast business in her residence through a limited liability company she owned. In her chapter 11 case filed prior to SBRA's enactment, the court had ruled that she could not modify the mortgage on the property, applying the cases holding that a debtor may not modify a mortgage on property in which she resides even if she uses it for other purposes.

After SBRA's effective date, the debtor amended her petition to elect application of subchapter V. In addition to permitting her to proceed under subchapter V,[186] the court addressed the lender's contention that she could not invoke § 1190(3) because the proceeds from the mortgage had been used to acquire the property.[187]

The court concluded that § 1190(3) specifically permits the modification of a residential mortgage if the conditions of subparagraphs (A) and (B) exist. The questions, therefore, were whether the mortgage proceeds were "not used primarily to acquire the real property" (new § 1190(3)(A)) and were "used primarily in connection with the small business of the debtor" (new § 11903(3)(B)).[188]

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[184] *Id.*
[185] *In re Ventura,* 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
[186] *Id.* at 7-14. Part XIII discusses the court's ruling on the availability of subchapter V in the case.
[187] The lender also argued that § 1190(3) could not be applied to a transaction arising prior to its effective date. Part XIII discusses the court's ruling rejecting this contention.
[188] *In re Ventura,* 615 B.R. 1, 23 (Bankr. E.D.N.Y. 2020).

The court focused on two terms in subparagraph (A). "Primarily," the court said, means "for the most part," "of first importance," or "principally," rather than "substantial." The phrase "real property," the court continued, refers back to the real property that is the debtor's residence.[189]

Based on these definitions, the court phrased the question of subparagraph (A)'s application in the case before it as "whether the Mortgage proceeds were used primarily to purchase the Debtor's Residence."[190] The inquiry thus differs from the issue under § 1123(b)(5) (and § 1322(b)(2) in chapter 13 cases) that, under the court's prior ruling, prohibited modification of the mortgage because the debtor resided in the property, regardless of its other uses. New § 1190(3), the court explained, "asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor's residence."[191]

Subparagraph (B), the court stated, required it to determine "whether the mortgage proceeds were used primarily in connection with the debtor's business."

The court concluded that subparagraphs (A) and (B) directed it "to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor's business activities."[192]

The court proposed five factors to consider in this analysis: "(1) Were the mortgage proceeds used primarily to further the debtor's business interests; (2) Is the property an integral part of the debtor's business; (3) The degree to which the specific property is necessary to run

[189] *Id.* at 24.
[190] *Id.*
[191] *Id.*
[192] *Id.*

the business; (4) Do customers need to enter the property to utilize the business; and (5) Does the business utilize employees and other businesses in the area to run its operations."[193]

The court found that the debtor bought the property to operate it as a bed and breakfast, that its primary purpose was the offering of rooms for nightly fees, that the debtor's LLC provided additional services to guests for additional fees, and that the mortgage proceeds were used to purchase the building that houses the business. The court ruled that the evidence was sufficient to hold a full evidentiary hearing to determine whether the debtor could use § 1190(3) to modify the mortgage.[194]

A business debtor may grant a security interest in a principal residence as additional collateral without receiving new value, perhaps in connection with a workout involving forbearance or restructuring of the debt. A potential issue is whether the new § 1190(3) exception to the antimodification rule applies in this situation when the debtor receives no additional loan proceeds.

C. Payment of Administrative Expenses Under the Plan

If the court confirms a plan under the cramdown provisions of new § 1191(b), new § 1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date.[195] Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 502(f).

[193] *Id.* at 25.
[194] *Id.*
[195] New § 1191(e).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of the trustee and of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.[196] **SUPP XIV**

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

Under pre-SBRA law, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits so-called "cramdown" confirmation "if the plan does not discriminate unfairly, and is fair and equitable" with regard to each impaired class that has not accepted it.[197] Section 1129(b)(2) states the rules for the "fair and equitable" requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)).[198] The effects of confirmation are the same regardless of whether cramdown confirmation occurs under § 1129(b).

New § 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual if an unsecured creditor invokes it.[199] Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual

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[196] The permission to pay these priority claims "through the plan" without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. *See* Brubaker, *supra* note 5, at 15-16.
[197] § 1129(b)(1).
[198] § 1129(b)(2).
[199] New § 1181(a). **SUPP XV**

debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.[200]

If all the applicable requirements in § 1129(a) are met except for the projected disposable income rule of paragraph (a)(15), new § 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.[201] This paper refers to it as a "consensual plan."

New § 1191(b) states the rules for cramdown confirmation. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case.[202] In general, new § 1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)). The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims remain applicable in a sub V case.[203] **SUPP XIV**

Cramdown confirmation under new § 1191(b) does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as the next Section discusses. For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* do not accept the plan. Unless a class consists of only one creditor, a single creditor cannot invoke the projected

[200] INTERIM RULE 1007(b).
[201] New § 1191.
[202] § 1181(a).
[203] New § 1191(c)(1).

disposable income requirement, which a single creditor can do in a standard or non-sub V case even if all impaired classes accept the plan.[204]

Importantly, the effects of confirmation differ depending on whether confirmation occurs under new § 1191(a) (where all classes have accepted it) or under new § 1191(b) (where one or more – or even all – classes have not accepted it).[205]

B. Cramdown Confirmation Under New § 1191(b)

1. Changes in the cramdown rules and the "fair and equitable" test

Discussion of the revised cramdown rules in a sub V case begins with a summary of the key provisions that govern cramdown confirmation under pre-SBRA law.

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan.[206] Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.[207]

Section 1129(b) permits cramdown confirmation if all the requirements for confirmation in § 1129(a) are met except the requirement of paragraph (a)(8) that all impaired classes accept it. Section 1129(b), however, does not affect the confirmation requirement of § 1129(a)(10) that

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[204] § 1129(a)(15). One may view the projected disposable income requirement for cramdown confirmation as protection for a dissenting class of unsecured creditors that substitutes for the inapplicable absolute priority rule. *See In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020). In absolute priority rule theoretical terms, it recognizes "sweat equity" (i.e., future income) as "new value" that permits equity owners to retain their interests. The inability of a single creditor to invoke the projected disposable income rule is consistent with the inability of a single creditor to invoke the absolute priority rule under § 1129(b); both apply only if a class does not accept.

[205] Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (Part IX); compensation of the trustee (Section IV(E)); postconfirmation modification of the plan (Section VIII(C)); discharge (Part X); contents of property of the estate (Part XI); and postconfirmation default and remedies (Part XII).

[206] § 1129(a)(8).

[207] § 1129(a)(10).

at least one impaired class of creditors accept the plan. Cramdown confirmation under § 1129(b) is not available if no impaired class of creditors has accepted the plan.

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).[208] In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.[209]

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.[210] Instead, new § 1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.[211] New § 1191(c) states a new "rule of construction" for the requirement that a plan be "fair and equitable."[212] It replaces the "fair and equitable" requirements of §1129(b), which do not apply in a subchapter V case.

The debtor may invoke new § 1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, new § 1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income test applicable to all debtors.[213]

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[208] § 1129(b)(2)(B).
[209] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d] (Richard Levin & Henry J. Sommer eds., 16th ed. 2019)
[210] New § 1181(a).
[211] New § 1191(b).
[212] New § 1191(c).
[213] New § 1191(d).

Under the cramdown rules in new § 1191(b), if all other confirmation standards are met, the court must confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. These two general standards are the same as the ones that govern in a cramdown under § 1129(b).

It does not appear that the new statute effects any change in the unfair discrimination requirement. **SUPP XV** New § 1191(c) does, however, provide a new "rule of construction" in subchapter V cases for the condition that a plan be "fair and equitable," to replace the detailed definition of that term that § 1129(b) contains.

The following text explains the requirements of the "fair and equitable" test in sub V cases.

2. Cramdown requirements for secured claims

Subchapter V does not change existing law about permissible cramdown treatment of secured claims. With regard to a class of secured claims, a subchapter V plan is "fair and equitable" if it meets the existing rules for secured claims stated in § 1129(b)(2)(A).

Subchapter V does limit the ability of a partially secured creditor with an unsecured deficiency claim to block cramdown confirmation. An undersecured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a standard or non-sub V case because of the absence of an accepting impaired class of claims, which § 1129(a)(10) requires.[214] This requirement is inapplicable for cramdown confirmation in a sub V case under new § 1191(b).

[214] § 1129(a)(10).

In addition, the creditor cannot invoke the absolute priority rule with regard to the unsecured portion of its claim. **SUPP XIV**

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

New § 1191(c) does not state a "fair and equitable" rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the "best efforts" test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.[215]

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

The projected disposable income (or "best efforts") requirement is in new § 1191(c)(2).[216]

The plan must provide that all of the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.[217] Alternatively, the plan may provide that the value of property to be distributed under the

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[215] The court in *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020), reasoned that the projected disposable income is a substitute for the absolute priority rule. See also *supra* note 204.

[216] New § 1191(c)(2). Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under new § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

[217] New § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

This was the chapter 13 rule until the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. BAPCPA in 2005, which amended 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.

Presumably, the amended chapter 13 provision takes account of the fact that the "means test" standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.[218] **SUPP XV**

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.[219] Like the chapter 12 requirement (and unlike chapter 11 cases), it applies to entities as well as individuals.

Key confirmation issues are: (1) How is projected disposable income determined? (2) How does the court determine whether the required period should be longer than three years; and (3) If so, how does the court determine how much longer the period must be?

i. Determination of projected disposable income

The Bankruptcy Code does not define "projected disposable income," but it defines "disposable income" in chapters 12[220] and 13.[221] In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.[222]

New § 1191(d) defines disposable income as income that is received by the debtor and that is not "reasonably necessary to be expended" for these specified purposes:

— the maintenance or support of the debtor or a dependent of the debtor;[223] or

— a domestic support obligation that first becomes payable after the date of the filing of the petition;[224] or

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The difference in how the debtor must use projected disposable income may affect the timing of payments to unsecured creditors but appears to have no material effect on the amount of money that must be paid under the plan or how much of it goes to unsecured creditors. *See id.* § 8:68.

[218] The projected disposable income tests in chapters 11 and 12 also contain this alternative, but the chapter 13 one does not.

[219] See § 1225(b). Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. New § 1191(c)(2) does not contain this provision, raising the possibility that a creditor could insist on commitment of disposable income to pay more than the allowed amount of the claim. *See* Brubaker, *supra* note 5, at 13. It seems unlikely that Congress could have intended such a result that is inconsistent with the common-sense principle, even if unstated, that payment of the full amount of the claim (perhaps with interest) resolves it.

[220] § 1225(b)(2).

[221] § 1325(b)(2).

[222] § 1129(a)(15).

[223] New § 1191(d)(1)(A).

[224] New § 1191(d)(1)(B).

— payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.[225]

The definition of disposable income in new § 1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2). It is also substantially the same definition as in § 1325(b)(2), except that § 1325(b)(2) permits a deduction for charitable contributions. The chapter 11 provision incorporates the chapter 13 definition.[226]

The definition of disposable income in all cases is substantially the same. But the manner of determining permissible deductions in calculating disposable income differs materially with regard to expenditures for the "maintenance or support" of the debtor and the debtor's dependents.

In chapter 13 cases, the so-called "means test" standards govern the deductions that an "above-median"[227] debtor may take in calculating disposable income.[228] The means test rules do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.[229]

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[225] § 1191(d)(2).
[226] § 1129(a)(15).
[227] Generally, an "above-median" debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a "below-median" debtor is one whose income is below the median. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 8:12. The rules for determining the debtor's status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the "means test" rules for determination of disposable income; and § 1325(b)(4), which defines "applicable commitment period" for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an "above-median" debtor must use the means test rules and pay projected disposable income for five years. A "below-median" debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor's plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, §§ 4:9, 8:12.
[228] § 1325(b)(3).
[229] In chapter 11 cases, § 1129(a)(15) states that projected disposable income is "as defined in [§ 1325(b)(2)]." §1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of "amounts reasonably necessary to be expended" under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in

New § 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are "reasonably necessary to be expended" for "maintenance or support" in new § 1191(d)(1) in sub V cases is the same as it is in chapter 12 and below-median chapter 13 cases, and as it was in chapter 13 cases prior to the introduction of the means test standards in BAPCPA.[230] The case law on disposable income in such cases should provide guidance in making such determinations.

With regard to expenditures for the business, income is not "disposable income" under new § 1191(d)(2) if it is "reasonably necessary to be expended" for expenditures "necessary for the continuation, preservation, or operation" of the business.[231] The rule contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that are anticipated (*e.g.,* the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.,* increasing inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

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§ 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

[230] Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor's dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that new § 1191(d)(1) states. For a discussion of application of the "reasonably necessary" standard for expenditures for maintenance and support in chapter 13 cases, see W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 8:28.

[231] New § 1191(d)(2).

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.[232] As later text discusses, an extension of the period that the debtor must make payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or to grow the business.

Another question arises if a debtor is a "pass-through" entity for income tax purposes (*e.g.*, a subchapter S corporation or an entity taxed as a partnership, including a limited liability company). Such a business does not pay tax on its income. Rather, its income is "passed through" to its owners, who must pay tax on it regardless of whether the income is distributed to them. Payment of profits to owners of a business does not easily fit within the concept of an expenditure reasonably necessary for its continuation, preservation, or operation.

If the debtor's disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income[233] but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

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[232] *See, e.g.*, Hammrich v. Lovald (*In re* Hammrich), 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve); *In re* Schmidt, 145 B.R. 983 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re* Kuhlman, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re* Janssen Charolais Ranch, Inc., 73 B.R. 125 (Bankr. D. Mont. 1987) (dicta) (reserve is allowable). *But* see Broken Bow Ranch, Inc. v. Farmers Home Admin. (*In re* Broken Bow Ranch, Inc.), 33 F.3d 1005 (8th Cir. 1994).

[233] Payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

Courts will have to decide whether distributions to owners to pay taxes the owners incur are an appropriate expenditure that is "reasonably necessary for the continuation, preservation, or operation of the business" when the debtor is not obligated to pay the tax. **SUPP XIV**

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

A projected disposable income test applies in cases under chapter 12[234] and 13[235] and in standard chapter 11 and non-sub V cases of individuals.[236] Each section prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the "commitment period," but only chapter 13 specifically uses the term by defining the "applicable commitment period" – the period for which the debtor must use projected disposable income to pay unsecured creditors – as three years for "below-median" debtors and five years for "above-median" debtors.[237]

For sub V cases, new § 1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.[238] The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the chapter 11 and above-median chapter 13 tests.[239]

New § 1191(c)(2) contains no standards for fixing the commitment period. And because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent under the tests in other chapters may not provide guidance.

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[234] § 1225(b).
[235] § 1325(b).
[236] § 1129(a)(15).
[237] § 1125(b)(4).
[238] New § 1191(c)(2).
[239] The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A), and five years for above-median debtors, § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

In chapters 12 and 13 and in non-sub V chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor wants.[240] Case law dealing with the length of a plan under the other tests does not deal with the issue that new § 1191(c)(2) presents.[241]

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[240] In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

In chapter 13 cases, the court has no choice to make. The statute fixes the "applicable commitment period" as three years for a below-median debtor and five years for an above-median debtor. The only dispute for the court is whether the debtor is below-median or above-median.

In chapter 11 cases, § 1129(a)(15) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

[241] The court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years. §§ 1222(c), 1322(d).

In chapter 13 cases, the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

In a non-sub V chapter 11 case, § 1129(a)(15) sets the commitment period as the longer of five years or the period for which the plan provides payments. Thus, the terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments.

Until enactment of BAPCPA in 2005, which increased the minimum commitment period in chapter 13 cases for above-median debtors to five years, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. § 1322(c) (2000) (current version at § 1322(d) (2018)) (BAPCPA renumbered subsection (c) as subsection (d)); *see* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:9. And the pre-BAPCPA projected disposable income test required use of projected disposable income for only three years, regardless of the length of the plan. 11 U.S.C. § 1325(b)(1)(B) (2000) (current version at 11 U.S.C. § 1325(b)(4) (2018)).

The pre-BAPCPA rules for chapter 12 cases were different, and BAPCPA did not change them. As in pre-BAPCPA chapter 13 cases (and as in cases of below-median chapter 13 debtors under current law), the maximum duration of a plan under § 1222(c) is three years unless the court approves a longer period for cause. But unlike pre-BAPCPA chapter 13, the chapter 12 projected disposable income test in § 1225(b)(1) requires use of projected disposable income during any longer period that the court approves.

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under §1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA

Courts will have to determine what facts and circumstances justify a longer commitment period and, if so, how much longer the period should be.

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.[242]

Courts will also have to decide how to proceed when a creditor or trustee asks to fix the commitment period for a longer time than proposed in the debtor's plan.[243] The authority of the court to fix the commitment period implies authority to order more payments than the debtor's plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court's determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

The court's authority to fix the commitment period implies that the court may raise the issue *sua sponte.*

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amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

Although the case law deals with the question of how long a plan should be, it does so in the context of a debtor's proposal of a longer period. The case law does not consider the different question of whether the court should require the debtor to make payments for a longer period than the plan proposes.

[242] *See* 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (Richard Levin & Henry J. Sommer eds., 16th ed. 2019) (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

[243] Subchapter V does not expressly give the trustee standing to object to confirmation. The trustee's duty to appear and be heard at the confirmation hearing, new § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee's views on any confirmation issue to the court.

If the trustee is not a lawyer, a trustee's "objection" may initiate a dispute that requires legal representation, whereas a trustee's report bringing potential issues to the attention of the court may not. *See supra* Section IV(F). Unless the court concludes as a legal matter that it has no independent duty to determine compliance with confirmation requirements, it makes no practical difference, unless the trustee plans to appeal an adverse determination. Failure to object might be a waiver of it for appellate purposes.

5. Requirements for feasibility and remedies for default

New § 1191(c)(3) adds two additional factors to the "fair and equitable" analysis.

First, new § 1191(c)(3)(A) requires that the debtor will be able to make all payments under the plan,[244] or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan.[245] The requirement strengthens the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposes it.[246]

Second, new § 1191(c)(3)(B) 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.[247] Section XII(B) discusses remedies for default in the plan. **SUPP XIV**

6. Payment of administrative expenses under the plan

New § 1191(e) permits confirmation of a plan under new § 1191(b) that provides for payment through the plan of administrative expense claims and involuntary gap claims. Section VII(C) discusses this provision.

C. Postconfirmation Modification of Plan

The rules for postconfirmation modification in new § 1193 differ depending on whether the court has confirmed a consensual plan under new § 1191(a) or a cramdown plan under new § 1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case.[248]

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[244] New § 1191(c)(3)(A)(i).
[245] § 1191(c)(3)(A)(ii).
[246] § 1129(a)(11).
[247] New § 1191(c)(3)(B). **SUPP XIV**
[248] New § 1181(a).

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

If the court has confirmed a consensual plan under new § 1191(a), new § 1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under new § 1191(a).[249] The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote.[250] These are the same rules that govern postconfirmation modification in standard and non-sub V cases under § 1127(b).

2. Postconfirmation modification of cramdown plan confirmed under new § 1191(b)

If the plan has been confirmed under new § 1191(b), new § 1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the court fixes.[251] The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of new § 1191(b).[252]

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. In these chapters, postconfirmation modification is permitted at any time prior to the completion of payments under the plan, on condition that the modified plan meet confirmation requirements.[253] Unlike

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[249] § 1193(b).
[250] § 1193(d).
[251] § 1193(c).
[252] The provisions of new § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.
[253] §§ 1229, 1329.

the provisions in the other chapters, new § 1193(c) does not permit modification at the request of creditors or the trustee.[254] **SUPP XIV**

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

Subchapter V has different provisions for the disbursement of payments to creditors and the role of the trustee depending on whether the court confirms a consensual plan or a cramdown plan.

A. Debtor Makes Plan Payments and Trustee's Service Is Terminated Upon Substantial Consummation When Confirmation of Consensual Plan Occurs Under New § 1191(a)

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other than § 1129(a)(15),[255] the court must confirm the plan.[256] Confirmation of a consensual plan under new § 1191(a) leads to the termination of the trustee's service under new § 1183(c)(1) when the plan has been "substantially consummated."[257] The debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest.[258]

Under § 1101(2), "substantial consummation" generally occurs upon "commencement of distribution under the plan."[259] Unless the plan implicates other requirements for substantial consummation, the sub V trustee's service terminates under new § 1183(c)(1) when the first payment under the plan occurs.

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[254] New § 1193(c).
[255] Section 1129(a)(15) states chapter 11's projected disposable income requirement, which applies only in the case of an individual. *See supra* Section VIII(B)(4).
[256] New § 1191(a).
[257] § 1183(c)(1).
[258] § 1183(c)(2).
[259] § 1101(2)(C). "Substantial consummation" under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A) and (2) assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(B).

Arguably, a sub V trustee could make the first payment under the plan, although the statute does not appear to require this. But it is clear that, at least after the first payment, the sub V trustee no longer exists and cannot make payments thereafter.

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

When the court confirms a cramdown plan, new § 1194(b) provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise.[260] Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.[261]

Because the sub V trustee must make payments under a cramdown plan, the trustee's service does not terminate upon its substantial consummation. The trustee's service continues, at a minimum, until the trustee has made the required disbursements. Subchapter V does not specify when the trustee's service is terminated under a cramdown plan. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge, as Section X(B) discusses. That seems to be the appropriate time for the trustee or the debtor to

[260] New § 1194(b). Curiously, paragraph (b) of new § 1194 is titled "Other Plans," even though it applies exclusively to plans confirmed under the cramdown provisions of new § 1191(b) and no other provisions of new § 1194 deal specifically with payments under a consensual plan confirmed under new § 1191(a).
[261] § 1226(c), 1326(c).

request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.[262]

New § 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.[263] The statute contains no standards for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because new § 1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee. In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.[264] Courts vary as to whether the debtor may make direct payments to other types of creditors.

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated and postpetition payments due on leases or executory contracts that are being assumed. In such

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[262] *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-16 ("Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee.").

[263] New § 1194.

[264] W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:10.

instances, the trustee usually disburses the amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the plan does not modify.[265]

Some courts require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.[266] In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as Section VIII(B)(4) discusses. **SUPP XV**

X. Discharge

The discharge that a debtor receives in a sub V case and its timing depend on whether consensual or cramdown confirmation occurs.

A. Discharge Upon Confirmation of Consensual Plan Under New § 1191(a)

Section 1141(d) governs discharge in a chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan. It does not apply when the court confirms a cramdown plan.[267]

Section 1141(d)(5) does not apply in a sub V case.[268] The omission is material only in an individual case because (d)(5) applies only when the chapter 11 debtor is an individual. Section 1141(d)(5) has two primary effects in an individual case.[269]

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[265] *Id.*
[266] *Id.*
[267] New § 1181(c).
[268] New § 1181(a).
[269] Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been

First, § 1141(d)(5) prohibits entry of a discharge order until the individual has completed payments under the plan unless the court orders otherwise for cause.[270]

Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable.[271]

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under new § 1191(a).[272] Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in § 502(g) (claims from the rejection of an executory contract or unexpired lease lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising

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liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.

Subparagraph C of § 1141(d)(5) provides the court may not grant a discharge under either subparagraph (A) or (B) if the court finds that § 522(q)(1) is applicable, certain criminal proceedings are pending, or the debtor is liable for a debt described in § 522(q)(1). The same grounds for discharge are in § 727(a)(12). Section 522(q)(1) denies a debtor an exemption of assets in excess of an aggregate amount of $ 170,350 (as of April 1, 2019; it is subject to adjustment every three years) under circumstances described in subparagraphs (A) or (B) of § 522(q)(1) unless the court finds under § 522(q)(2) that certain exempt property is reasonably necessary for the support of the debtor or any dependent.

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B) denies the exemption if the debtor owes a debt arising from (1) violation of state or federal securities laws; (2) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under the federal securities laws; (3) any civil remedy under 18 U.S.C. § 1964; or (4) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

[270] § 1141(d)(5)(A).

[271] § 1141(d)(5)(B).

[272] The individual debtor also does not have to deal with the § 522(q) issues discussed in footnote 258, although they rarely arise.

after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan.[273]

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.[274] Only an individual is entitled to a discharge in a chapter 7 case.[275] An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.[276]

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order. Section 1141(d) has two exceptions applicable in a sub V case.

First, in the case of an individual debtor, a § 1141(d)(1)(A) discharge does not discharge the individual from any debt that is excepted under § 523(a).[277] No such exceptions to the § 1141(d)(1)(A) discharge exist for a debtor that is not an individual.

Second, the § 1141(d)(1)(A) discharge does not discharge any debtor from any debt (1) specified in § 523(a)(2)(A) or (B) that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 of the United States Code; or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid.[278]

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[273] § 1141(d)(1)(A).
[274] § 1141(d)(3).
[275] § 727(a)(1).
[276] § 727(a).
[277] § 1141(d)(1)(A).
[278] § 1141(d)(6).

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

When the court confirms a cramdown plan, § 1141(d) does not apply, except as provided in new § 1192.[279] Instead, the debtor receives a discharge under new § 1192.

New § 1192 provides for discharge to occur "as soon as practicable" after the debtor completes all payments due within the first three years of the plan, "or such longer period not to exceed five years as the court may fix."[280] Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with cramdown confirmation under new § 1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The cramdown discharge under new § 1192 discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions discussed below, unless § 1141(d), the plan, or the confirmation order provides otherwise.

The new § 1192 discharge also applies to "all other debts allowed under [§ 503] and provided for in the plan."[281] Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;[282] compensation of the trustee and professionals employed by the trustee and the debtor;[283] and claims for goods the debtor received within 20

[279] New § 1181(c).
[280] New § 1192. Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. New § 1192 contains no provision for an earlier discharge.
[281] New § 1192.
[282] § 503(b)(1).
[283] § 503(b)(2).

days of the filing.[284] The discharge provision recognizes that a plan confirmed under new § 1191(b) may provide for the payment of administrative expenses through the plan.[285]

New § 1192 excepts certain debts from discharge. First, new § 1192 does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court.[286] Again, any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation. Second, new § 1192(2) excepts any debt "of the kind specified in [§ 523(a)]."[287] The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual under § 1141(d)(2).

It is unclear whether the § 523(a) exceptions apply when a debtor that is not an individual receives a discharge under § 1192. In the case of a non-individual, the § 1141(d) discharge is not subject to the exceptions in § 523(a). Section 1141(d)(2) makes the § 523(a) exceptions applicable, but expressly limits application of § 523(a) to a debtor who is an individual.

New § 1192(2), in contrast, states, without qualification, that debts "of the kind specified" in § 523(a) are excepted from discharge. Because § 523(a) specifies various debts, the conclusion is that a debt listed in § 523(a) is excepted from the § 1192 discharge.[288]

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[284] § 503(b)(9).

[285] New § 1191(c). Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). New § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under new § 1191(b). *See supra* Section VI(C).

New § 1191(e) also permits payment of claims specified in § 507(a)(3) through the plan. Section 507(a)(3) provides a priority for "involuntary gap claims" allowed under § 502(f).

[286] New § 1192(1).

[287] New § 1192(2).

[288] Without discussing this issue, some commentators have stated this conclusion. 5 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 107:17 (3d ed. 2019); James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, *Norton Bankr. L. Adviser*, Oct. 2019, Part IX.

The language of § 523(a) permits a different conclusion. As amended, § 523(a) begins as follows:

> A discharge under section 727, 1141, *1192,* 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – [defined in paragraphs (1) through (19) of § 523(a)].[289]

(The other listed sections are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.)

As amended, therefore, § 523(a) states that a discharge under new § 1192 does not discharge an *individual* debtor from the listed types of debts. This amendment would be superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), new § 1192 alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

In other words, although new § 1192 states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of a non-individual has no operative effect. Section 523(a), as amended, applies only to individuals.

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a new § 1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the new § 1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and "any debt that is otherwise nondischargeable."[290] The use of the words "otherwise nondischargeable" logically refers to § 523(a), which applies only to individuals.

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[289] § 523(a) (language inserted by amendment in italics).
[290] H.R. REP. NO. 116-171, at 8.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law – one would expect the House Judiciary Committee Report to point that out. It does not.[291] To the contrary, the Report's explanation that the exceptions are for "any debt that is otherwise nondischargeable" demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Limited case law under chapter 12 supports the conclusion that the § 523(a) exceptions may apply to a new § 1192 discharge of a non-individual debtor. The chapter 12 discharge provision, § 1228(a)(2),[292] has the same language as new § 1192, and the prefatory language of § 523(a) as amended refers to § 1228 and new § 1192 in the same way.

In two corporate chapter 12 cases, the corporate debtors contended that the § 523(a) exceptions to the chapter 12 discharge did not apply to them because § 523(a) states that it only excepts debts of an individual.[293] Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

In *In re JRB Consolidated, Inc.*,[294] the court reasoned that the operative language in § 1228(a)(2) ("debts of the kind" specified in § 523(a)) "does not naturally lend itself to also incorporate the meaning 'for debtors of the kind' referenced in § 523(a)."[295] Instead, the court concluded, "debts of the kind" is limited to the types of debts that the subparagraphs of § 523(a)

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[291] Retired Bankruptcy Judge A. Thomas Small, Jr., submitted testimony in support of the legislation. Judge Small's explanation of the new § 1192 discharge similarly made no reference to the § 523(a) exceptions to the discharges of non-individuals. Testimony of A. Thomas Small, *supra* note 44.

[292] The chapter 12 discharge provision, § 1228(a)(2), excepts from discharge any debt "of a kind specified" in § 523(a). The language also appears in § 1228(c)(2), which governs the so-called "hardship" discharge that a debtor who cannot complete plan payments may receive under § 1228(b).

[293] *In re* Breezy Ridge Farms, Inc., 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009); *In re* JRB Consol., Inc., 188 B.R. 373 (Bankr. W.D. Tex. 1995).

[294] *In re JRB Consol.*, 188 B.R. at 373.

[295] *Id.* at 374.

identify.[296] Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.[297]

The court in *In re Breezy Ridge Farms, Inc.*,[298] adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)[299] apply to debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)" that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms.[300] The *Breezy Ridge Farms* court explained that its interpretation harmonized the provisions of § 1228 and § 523(a):

> Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.[301]

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge under subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is nondischargeable.[302] Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting.[303] If the debtor does not list the creditor, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of a proof of claim and a timely request for the determination, unless the creditor had

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[296] *Id.*
[297] *Id.*
[298] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.
[299] Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. *See supra* Section X(A).
[300] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.
[301] *Id*.
[302] § 523(c)(1).
[303] FED. R. BANKR. P. 4007(c).

actual notice of the deadlines in time to do so.[304] The clerk's office must give at least 30 days' notice of the deadline.[305] **SUPP XV**

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

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.[306] Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, new § 1186 provides that, if the court confirms a plan under the cramdown provisions of new § 1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.[307] New § 1186 applies to debtors that are entities as well as individuals.

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

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

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).[308]

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[304] § 523(a)(3).
[305] The new Official Forms for the notice of the filing of a sub V case (Form B309E2 for cases of individuals and Form B309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.
[306] New § 1181(a).
[307] § 1186.
[308] § 541.

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

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

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,[309] unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).[310] Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.[311] In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.[312]

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

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

[310] § 541(a)(6).

[311] *Id.*

[312] §§ 1207(a), 1306(a).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,[313] and earnings from postpetition services,[314] both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.[315] New § 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).[316] New § 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

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

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

New § 1186 deals with property of the estate when cramdown confirmation occurs under new § 1191(b). It provides that property of the estate consists of property of the estate under

[313] § 1115(a)(1).
[314] § 1115(a)(2).
[315] New § 1181(a).
[316] New § 1186(a)

§ 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of new § 1186 when it applies begins with an explanation of what happens when it does not, *i.e.,* when the court confirms a consensual plan under §1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.[317]

The vesting of property of the estate in the debtor means that the automatic stay with regard to acts against property terminates. Section 362(c)(1) provides, "[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate."[318] Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.[319]

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

New § 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1114(b) provides for vesting of property of the estate in the debtor upon

[317] §§ 1227(b), 1327(b).
[318] § 362(c)(1).
[319] § 1141(b).

confirmation. New § 1186, however, keeps the property in the estate when cramdown confirmation occurs.

The purpose seems to be to maintain judicial supervision of a debtor's assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation[320] and makes payments under the plan,[321] and discharge does not occur until the debtor has completed payments for the specified period.[322]

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.[323] New § 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these concepts, the provisions of new § 1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

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

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

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

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

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.[324] The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

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

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?[325]

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

[325] Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

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

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, new § 1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.[326]

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

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

[326] New § 1186.

XII. Default and Remedies After Confirmation

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

A. Remedies for Default in the Confirmed Plan

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

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in new § 1191(c) provide the source of remedies for default. Cramdown confirmation requires that the plan provide "appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made."[327] The only specific remedy in new § 1191(c)(3)(B) is "the liquidation of nonexempt assets." [328]

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include

[327] New § 1191(c)(3)(B).
[328] *Id*.

secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

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

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

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

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

New Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or "for failure to perform the obligations of the debtor under a plan confirmed under this subchapter."[329] If removal of the debtor in possession occurs after the trustee's service has been terminated upon

[329] New § 1185(a). Section V(C) discusses removal for cause.

substantial consummation of a consensual plan confirmed under new § 1191(a), new § 1183(c)(1) provides for reappointment of the trustee.

New § 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. A specific duty is operation of the business of the debtor. The duties do not include liquidation of the debtor's assets. Nothing in subchapter V appears to authorize the trustee to do so.

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

Property of the estate issues arise when reappointment of the trustee based on the debtor's default occurs after confirmation of a consensual plan under new § 1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan or confirmation order provides otherwise.[330] If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no "debtor in possession" to be removed.

Under this view, new § 1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the

[330] *See supra* Section XI(B).

estate remains property of the estate under new § 1186[331]) or because the plan or confirmation order so provides.

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

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.[332] Moreover, if the plan was a consensual one confirmed under new § 1191(a), postconfirmation modification under new § 1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan). Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.[333]

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes

[331] *See supra* Section XI(B).
[332] New § 1193(b).
[333] § 721.

"material default by the debtor with respect to a confirmed plan."[334] Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.[335]

1. Postconfirmation dismissal

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

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under new § 1191(a).[336] Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.[337]

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.[338] Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the

[334] § 1112(b)(4)(N).
[335] § 702(d).
[336] *See supra* Section X(A).
[337] *E.g.,* National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt."); *In re* T&A Holdings, LLC, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) ("[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan."); *In re* Potts, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).
[338] New § 1192.

case is dismissed prior to the entry of discharge.[339] Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause, (1) § 349(b)(1) provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and (2) § 349(c) revests property of the estate in the entity in which such property was before the filing of the case.[340]

2. Postconfirmation conversion

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of

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

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

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

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

[340] § 349.

the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under new § 1191(a), but not when cramdown confirmation occurs under new § 1191(b) because new § 1186 keeps property in the estate.[341]

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not revest property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.[342] Other courts have ruled that property of the estate

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[341] *See supra* Section XI(B).

[342] *E.g.,* Bell v. Bell (*In re* Bell), 225 F.3d 203, 216 (2d Cir. 2000); National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("Property which revested in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case."); Lacy v. Stinky Love, Inc. (*In re* Lacy), 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re* L & T Machining, Inc., 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re* Sundale, Ltd., 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re* Canal Street Limited Partnership, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re* K & M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz 1997); Carter v. Peoples Bank and Trust Co. (*In re* BNW, Inc.), 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.,* 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. "[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor's pre-confirmation estate. . . ."); *In re* TSP Indus., Inc., 117 B.R. 375 (Bankr. N.D. Ill. 1990). *See also* Pioneer Liquidating Corp. v. United States Trustee (*In re* Consol. Pioneer Mortgage Entities), 264 F.3d 803 (9th Cir. 2001) (holding that "language and purpose" of liquidating plan demonstrated that assets vested in debtor upon confirmation revested in estate upon conversion); 6 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 14:13 (3d ed. 2019) (discussing different approaches to revesting of assets upon conversion after confirmation).

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

upon conversion consists of property owned by the debtor at the time of commencement of the case,[343] on the confirmation date,[344] or on the date of conversion.[345]

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

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

An alternative argument is that the provision in new § 1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that new § 1185(a) requires the revesting of property of the estate upon removal of the debtor in possession after default under a consensual plan; otherwise, § 1185(a) has no effective operation in that circumstance. If so, the same result follows if conversion occurs.

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

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[343] Smith v. Lee (*In re* Smith), 201 B.R. 267 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9th Cir. 1998).
[344] Carey v. Flintridge Lumber Sales, Incl (*In re* RJW Lumber Co.), 262 B.R. 91 (Bankr. N.D. Ca. 2001).
[345] *In re* Midway, Inc., 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

XIII. Effective Date and Retroactive Application of Subchapter V

Section 5 of SBRA provides:

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

This language does not restrict application of subchapter V to cases filed on or after the effective date of February 19, 2020. It thus differs from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which provided that most of its provisions did not apply "with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act."[346]

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

One court rejected the debtor's argument, concluding, "Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect."[347] The court observed that to rule otherwise would create a "procedural quagmire" in that the debtor would be unable to comply with the statute's requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA's effective date. The debtor's failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[348]

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[346] Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).
[347] *In re* Double H Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. 2020).
[348] *Id.* at 554.

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.[349] Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor's amendment to the petition to elect subchapter V in an existing case means that the case proceeds under subchapter V unless and until the court orders otherwise;[350] the court need not approve the election.[351]

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.[352]

SUPP XIV

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[349] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020); *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re* Moore Properties of Person County, LLC, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re* Progressive Solutions, Inc., 615 B.R. 894 (Bankr. C.D. Cal. 2020). *Accord,* **SUPP XIV** *In re* Blanchard, 2020 WL 4032411 (Bankr. E.D. La. 2020); *In re* Trepetin, 617 B.R. 841 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re* Bonert, 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re* Bello, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

[350] *See supra* Section III(A).

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

[352] *In re* Ventura, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020) ("Given that the Debtor's case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor."); *In re* Progressive Solutions, Inc., 615 B.R. 894, 899-900 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord,* **SUPP XIV** *In re* Trepetin, 617 B.R. 841 (Bankr. D. Md. 2020).

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

> The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC.*[353] The *Moore Properties* court and others[354] have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*[355] in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

One canon, said the *Landgraf* Court, is that "a court is to apply the law in effect at the time it renders its decision."[356] The conflicting one is that "[r]etroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[357]

The *Landgraf* Court explained that the presumption against retroactive application arises from "[e]lementary considerations of fairness . . . that individuals should have an opportunity to

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months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.

The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor's conduct and potential prejudice to creditors.

Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case. **SUPP XIV**

[353] *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).
[354] *In re* Ventura, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020); *In re* Body Transit, Inc., 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020)
[355] Landgraf v. USI Film Products, 511 U.S. 244, 264-71 (1994).
[356] *Id.* at 264, *quoting* Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974).
[357] *Id.* at 264, *quoting* Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988).

know what the law is and to conform their conduct accordingly," and from the principle that "settled expectations should not be lightly disrupted."[358] The presumption against retroactivity particularly applies, the Court reasoned, to "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance."[359] The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee's appeal after a bench trial was pending, did not apply to the employee's action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank*.[360] At issue in *Security Industrial* Bank was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest on exempt personal property.[361] The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

The Court in *Security Industrial Bank* recognized that the Constitution's bankruptcy clause[362] "has been regularly construed to authorize the retrospective impairment of contractual obligations"[363] but that the bankruptcy power could not be exercised "to defeat traditional property interests" because the bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.[364] The Court thus recognized

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[358] *Id.* at 265.
[359] *Id.* at 271. Among other cases, the Court cited United States v. Security Industrial Bank, 459 U.S. 70, 79-82 (1982), which the text discusses next.
[360] United States v. Security Industrial Bank, 459 U.S. 70 (1982).
[361] 11 U.S.C. § 522(f)(1)(B).
[362] U.S. Const. Art. I, § 8, cl. 4.
[363] United States v. Security Industrial Bank, 459 U.S. 70, 74 (1982), *citing* Hanover National Bank v. Moyses, 186 U.S. 181 (1902).
[364] *Id.* at 75, *citing* Louisville Joint Stock Bank v. Radford, 295 U.S. 555 (1935).

a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.[365]

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."[366]

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created "none of the taking or retroactivity concerns" that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank.* [367] With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not "alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights."[368]

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

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. New § 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from

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[365] *Id.*
[366] *Id.* at 81, *citing* Holt v. Henley, 232 U.S. 637 (1913) and Auffm'ordt v. Rasin, 102 U.S. 620 (1881).
[367] *In re Moore Properties of Person County, LLC,* 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).
[368] *Id.*

personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.[369] The third change is that new § 1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.[370]

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.[371]

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under new § 1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.[372]

New § 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does

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[369] See *supra* Section VII(A).

[370] See *supra* Section VII(B).

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

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

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

[372] *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of new § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.

not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of "fair and equitable" for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.[373]

The court concluded, "The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking."[374]

The court acknowledged that, if a case were pending for an extended period of time on SBRA's effective date, the case "could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights."[375] In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider "the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make its application offend '[e]lementary considerations of fairness' such that the parties 'have an opportunity to know what the law is and to conform their conduct accordingly.'"[376]

Because the application of new subchapter V in the existing case did not violate the Supreme Court's rulings in *Landgraf* or *Security Industrial Bank,* the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.[377]

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[373] *Id.* See *supra* Section VIII(B)(3), (4).
[374] *Id.*
[375] *Id.*
[376] *Id., quoting* Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994), and *citing In re* Progressive Solutions, Inc., 615 B.R. 894 (Bankr. E.D. Cal. 2020).
[377] *Id.*

The bankruptcy court in *In re Body Transit*[378] applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA's effective date to reject the secured creditor's contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor's argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor's assets and business, would also have the right to file a plan.[379]

The court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.[380] In addition, the court noted that a debtor's ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would unduly prejudice a party.[381] The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.[382]

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its

[378] *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020).
[379] The court had scheduled a hearing on the creditor's motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.
[380] *Id.* at 408.
[381] *Id.* at 408-09, *citing In re* Cudeyo, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re* Brooks, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re* Romano, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re* Bendi, Inc., 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).
[382] 213 B,R. at 409.

burden of showing prejudice in the case before it.[383] The court summarized, "[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor's right to amend its petition under [Bankruptcy Rule] 1009."[384]

In *In re Ventura,*[385] an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA's effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a "residence" based on her use of it as a bed and breakfast. After the court had ruled that the exception applied as long as the debtor used any party of the property for her residence,[386] the court scheduled a hearing on confirmation of the lender's plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA's effective date.[387]

The court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had

[383] *Id.* at 409.
[384] *Id.* at 410.
[385] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
[386] Other courts have accepted the debtor's position. *See generally* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, AND ADAM M. GOODMAN, *supra* note 66, § 5:42 (2d ed. 2019).
[387] *In re* Ventura, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020).

vested rights at the time of the amendment in that its plan was ripe for confirmation.[388] The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

The *Ventura* court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit.* In addition, the court concluded that the revision of the definition of "small business debtor" does not appear to affect contractual or vested property rights.[389]

The court then addressed whether the exception in new § 1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender's property rights that vested prior to SBRA's effective date. The court held that, because the debtor had discharged her personal liability in

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

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

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

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

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

[389] *Id.* at 16-17, *citing* Moore Properties of Person County, LLC, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).

her previous chapter 7 case, application of new § 1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the court observed, even if the debt had not been discharged, new § 1190(3) might not "raise significant Constitutional doubts to warrant only prospective application."[390] Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of new § 1190(3) to modify the mortgage would not violate the lender's Fifth Amendment rights.[391] The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.[392]

The *Ventura* court found no prejudice to the lender based on the history of the case, including the fact that the lender's plan was before the court for confirmation. The court saw no Constitutional issues and declined to treat its prior rulings as creating "vested" rights. The court reasoned, "Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender]."[393]

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a small subchapter V debtor under SBRA's revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-

[390] *Id.* at 17.
[391] *Id.* at 17.
[392] *Id.* at 24-25. Section VII(B) discusses this aspect of the court's ruling in connection with consideration of new § 1190(3).
[393] *Id.* at 18.

by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.[394] **SUPP XV**

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to $ 7.5 million.[395] Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than $ 7.5 million cannot amend its petition to elect application of subchapter V. **SUPP XV**

SUPP XIV

[394] *In re* Body Transit, Inc., 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).
[395] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See supra* Section III(B).

XIV. Supplement (November 2020)

I. Introduction

******Insert text at end of note 5 on page 2***

Amendments to the Bankruptcy Code in 1994 permitted a qualifying small business debtor to elect small business treatment. As amended, § 1121(e) provided that, in a small business case, only the debtor could file a plan for 100 days after the order for relief and that all plans had to be filed within 160 days. In addition, amended § 1125(f) permitted parties to solicit acceptances or rejections of a plan based on a conditionally approved disclosure statement and permitted a final hearing on the disclosure statement to be combined with the hearing on confirmation.

The Bankruptcy Abuse Protection and Consumer Protection Act of 2005 ("BAPCPA") significantly changed the small business provisions. Importantly, it eliminated the debtor's option to choose small business treatment. As such, a business that qualifies as a small business debtor became subject to all of the provisions governing small business cases.

BAPCPA replaced both § 1121(e) and § 1125(f).

BAPCPA's § 1121(e)(1) extended the exclusive time for the debtor to file a plan to 180 days and imposed a new 300-day deadline for the filing of a plan. BAPCPA also added § 1129(c) to require confirmation of a plan in a small business case within 45 days of its filing, unless the court extended the time.

BAPCPA's § 1125(f) added a provision that permitted the court to determine that the plan provided adequate information such that a separate disclosure statement was not required.

BAPCPA also added § 1116 to prescribe additional filing, reporting, disclosure, and operating duties applicable only to small business debtors.

Although some of BAPCPA's small business provisions facilitated chapter 11 reorganization for a small business debtor, others appeared to reflect skepticism about the prospects for success of a small business debtor in a chapter 11 case and specific, more intensive supervision of the administration of their cases. In practice, reporting and confirmation requirements applicable to small business debtors remained burdensome or unworkable for many small businesses. *See, e.g., Am. Bankr. Inst. Comm'n to Study the Reform of Chapter 11: 2012-14 Final Report & Recommendations*, 23 Am. Bankr. Inst. L. Rev. 1, 324 (2015) (For many small or medium-sized businesses, "the common result of plan confirmation extinguishing pre-petition equity interests in their entirety [are] unsatisfactory or completely unworkable.").

Because SBRA did not repeal SBRA's provisions relating to a "small business debtor," a small business debtor that does not elect subchapter V is in a small business case and subject to the provisions that BAPCPA added.

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******Insert text on page 4***

(For a summary of key features of a non-sub V case governed by the provisions for small business cases, see footnote 5).

****

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

B. Revised Definitions of "Small Business Debtor" and "Small Business Case"

******Insert text at end of note 31 on page 13***

The court in *In re Parking Management, Inc.,* 620 B.R. 544 (Bankr. D. Md. 2020), considered subchapter V's eligibility debt limits, noting that courts had addressed similar

language governing debt limitations in chapter 12 and 13 cases. The court observed that the standards in those cases provide useful guidance but that subchapter V cases involve more complex creditor relationships. *Id.* at *5. The court concluded that claims for damages arising from the rejection of unexpired leases were contingent, *id.* at *5-7, and that the debtor's obligations under a note pursuant to the Paycheck Protection Funding Program of the CARES Act were both contingent and unliquidated, *id.* at 9-12. Because these debts were not included in the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

For a discussion of the debt limitation requirements for eligibility in chapter 13 cases, *see generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 12:8, 12:9 (2020).

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******Insert new paragraph in text at end of footnote 33 on page 14; see new Section III(C) in SUPP XV that replaces this text***

In *In re Thurmon,* 625 B.R. 417 (Bankr. W.D. Mo., Dec. 8, 2020), the court concluded that a debtor must be currently engaged in business to be eligible for subchapter V. The court reasoned, "The plain meaning of 'engaged in' means to be actively and currently involved. In § 1182(a)(1)(A) of the Bankruptcy Code, 'engaged in' is written not in the past or future but in the present tense."

Although the U.S. Trustee timely raised the issue of eligibility by objecting to the sub V election, the U.S. Trustee did not request a hearing on it. Accordingly, the ruling on eligibility occurred in connection with the hearing on confirmation of the plan, which all impaired classes of creditors had accepted.

The only party objecting to the plan was the U.S. Trustee, who contended that the court could not confirm the plan of the non-sub V debtors because it was not accompanied by a

disclosure statement. The *Thurmon* court overruled the objection and confirmed the plan in the unusual circumstances of the case. The court reasoned that (1) the U.S. Trustee had in essence waived the right to request a disclosure statement by not requesting that the court require a disclosure statement while the eligibility objection was pending; and (2) the plan substantially complied with disclosure statement requirements by containing "adequate information."

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******Insert text on page 14***

SBRA did not change the eligibility rule that a "small business debtor" does not include a debtor that is "a member of a group of affiliated debtors" that has aggregate debts in excess of the debt limit. § 110(51D)(B)(i). The temporary CARES Act amendment to § 1182(1) retains the exclusion in the same language.

In *In re 305 Petroleum, Inc.,* 622 B.R. 209 (Bankr. S.D. Miss. 2020), four affiliated debtors filed chapter 11 cases. Each of them had elected subchapter V, but one was a single asset real estate debtor that was ineligible for subchapter V. In this opinion, the court considered whether the three debtors were also ineligible because the debt of all of the affiliates exceeded $ 7.5 million. Without including the SARE debtor, the debt of all of the affiliates was less than $ 7.5 million.

The court concluded that the debts of all filing affiliates were included in the debt limit and that, therefore, none of them were eligible because their collective debts exceeded $ 7.5 million.

The court analyzed the issue under the definition of small business debtor in § 101(51D) and reached the correct result under its provisions. Paragraph (B) of § 101(51D) excludes "any member of a group of affiliated *debtors*" (emphasis added) if the group's debts collectively

exceed the limit. "Debtor" is defined in § 101(13) as a person "concerning which a case under [title 11] has been commenced." Because all of entities had filed and they were affiliates, each was a member of a group of affiliated debtors with aggregate debts in excess of the limit. Therefore, none of them were eligible.

But because the case arose after the CARES Act, the applicable statute is § 1182(1), as the original text discusses. Although § 1182(1) uses the same language as § 101(51D), the outcome is potentially different.

As amended by the CARES Act, § 1182(1)(A) defines "debtor" for purposes of subchapter V and is in subchapter V. Because § 1182(1)(A) defines "debtor," the definition of "debtor" in § 101(13) arguably does not apply. Because § 1182(1)(A) excludes an SARE debtor, it is not a member of the group of "affiliated debtors" for purposes of the exclusion in § 1182(1)(B)(i), and its debts are not included in determining eligibility. In other words, "debtors" in § 1182(1)(B)(i) means "debtors" under (1)(A), which does not include an SARE.

An argument in favor of this reading is that, if Congress had intended otherwise, it would have used "persons" in (B)(i), or more simply, "affiliates", so that § 1182(1)(B)(i) would read as follows:

(B)(1) Debtor. -- The term "debtor"—

(B) does not include –

(i) any member of a group of [*affiliates* or *affiliated persons*] that has [debts greater than $7.5 million].

Under this analysis, the non-SARE debtors in *350 Petroleum* would be eligible for subchapter V because the SARE entity is excluded.

The argument in favor of including the debts of the SARE debtor is that Congress in the CARES Act amendments did not intend to change the eligibility requirements of § 101(51D) other than to increase the debt limit. Moreover, the contrary interpretation involves a circular definition of "debtor." It requires use of the § 1182(1) definition of "debtor" to determine the meaning of "debtors" in one part of the definition. This creates an ambiguity that leads to an interpretation that uses the general definition of debtor in § 101(13) as the proper definition of the term in (1)(B). The ineligibility of all of the debtors in *350 Petroleum* then follows.

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******Insert text on page 15***

In *In re Serendipity Labs, Inc.,* 620 B.R. 679 (Bankr. N.D. Ga. 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 of the debtor entitled to vote on the debtor's bankruptcy filing. The debtor argued that, in determining whether the public company was an "affiliate" within the definition of § 101(2)(a), the court should count only the shares with power to vote on the matter before the court, *i.e.,* the bankruptcy filing.

Section 101(2)(a) defines "affiliate" to include "an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." The *Serendipity Labs* court noted that the Bankruptcy Code does not define "voting securities" but that the Securities Exchange Commission in 17 C.F.R. § 230.405 defined "voting securities" as " securities the holders of which are presently entitled to vote for the election of directors." The court concluded that this unambiguous definition is the appropriate one to use for purposes of § 101(2)(a). 620 B.R. at 683. All of the public company's shares met this requirement.

Analyzing a split of authority on the issue in other contexts, the *Serendipity Labs* court ruled that the language of § 101(2)(a) did not limit the meaning of "voting securities" to those entitled to vote on the matter before the court. The court reasoned that "power to vote" in § 101(2)(a) modifies only the holding of securities, not their ownership or control. Because the public company owned more than 20 percent of the debtor's voting securities, it was an affiliate. Accordingly, the debtor, as an affiliate of an issuer, was ineligible for subchapter V. 620 B.R. at 685.

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IV. The Subchapter V Trustee

******Insert text on page 26***

Some of them, however, have indicated that it is unlikely that this will occur in the foreseeable future.

****

E. Compensation of Subchapter V Trustee

******Insert text on page 27***

In *In re Tri-State Roofing,* 2020 WL 7345741 (Bankr. D. Idaho 2020), the court ruled that § 326(b) does not prevent an award of compensation to a sub V trustee under § 330(a)(1) and that it does not place a cap on such compensation.

******Insert text on page 29***

Some of the observers have indicated that it is unlikely that this will occur in the foreseeable future.

Although SBRA addresses compensation of a standing trustee upon conversion or dismissal of a sub V case prior to confirmation in its amendment of 28 U.S.C. § 586(e)(5), it

does not address allowance or payment of compensation of a non-standing trustee in those circumstances.

If the case is converted, the sub V trustee may file an application for compensation, and the allowed amount will be entitled to administrative expense priority under § 503(b)(1), subject in priority to administrative expenses in the chapter 7 case. § 726(b).

Dismissal of the case raises the prospects that the sub V trustee may find the compensation disputed if the trustee seeks payment under applicable nonbankruptcy law and that the trustee will not be paid, given the debtor's distressed financial circumstances.

A trustee may seek to avoid the former issue by filing an application for compensation in response to a motion to dismiss and requesting that the court rule on it, preferably before dismissal of the case. Allowance of an administrative expense claim in dismissed case, however, may still leave the sub V trustee without compensation. In allowing compensation to the sub V trustee after dismissal of the case, the court in *In re Tri-State Roofing,* 2020 WL 7345741 at *1, n. 1 (Bankr. D. Idaho 2020), observed, "[A]dministrative expense claims are not monetary judgments but rather entitle the claimant to receive a distribution from the bankruptcy estate. If there are no funds currently held by the Trustee, it is difficult to understand how this claim would be paid." (Citation omitted).

A potential solution to all of these problems is to request that the court condition dismissal on allowance and payment of the trustee's compensation.

In re Slidebelts, Inc., 2020 WL 3816290 (Bankr. E.D. Cal. 2020), supports this proposition. There, the debtor in a standard chapter 11 case sought its dismissal for the purpose of obtaining a loan under the Paycheck Protection Funding Program of the CARES Act of the case and then re-filing a case under subchapter V. Professionals employed by the committee of

unsecured creditors requested that the court condition dismissal on allowance and payment of their fees.

The court observed that § 349(b)(3) ordinarily revests the property of the estate in the debtor, but that, as the Supreme Court recognized in *Czyzewski v. Jevic Holding Corp.,* 137 S.Ct. 973, 979 (2017), the court may order otherwise "for cause." The court reasoned that committee professionals had rendered services in reliance on provisions of the Bankruptcy Code for payment of their compensation in the case. This reliance, the court concluded, constituted "cause" under § 349(b) for conditioning dismissal on allowance and payment of the committee professionals. *Id.* at * 3. **SUPP XV**

In standard chapter 11 cases, cash collateral or debtor in possession financing orders often provide for a so-called "carve-out" to provide money to pay professionals employed by the debtor and the committee of unsecured creditors. It seems appropriate to include the sub V trustee in any carve-out in a subchapter V case.

Even if the case does not involve cash collateral or debtor in possession financing – or if the cash collateral or financing order does not provide for a carve-out – it may be advisable for the sub V trustee, the debtor, or both to request that the court require the debtor to make regular payments to a fund dedicated to the payment of professional fees. **SUPP XV**

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VI. Administrative and Procedural Features of Subchapter V

C. Required Status Conference and Debtor Report

Note: Section VI(J) in SUPP XV updates text previously in this Section.

****

D. Time for Filing of Plan

Note: Section VI(J) in SUPP XV updates text previously in this Section.

****

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

******Insert text on page 48***

If the court does not establish a deadline for making the § 1111(b) election, a creditor may nevertheless decide to make the election in response to the filing of the debtor's plan. In *In re VP Williams Trans, LLC,* 2020 WL 5806507 (Bankr. S.D.N.Y. 2020), the court overruled the debtor's objection to the § 1111(b) election in this situation.

The court rejected the debtor's argument that the creditor had to file the election before the filing of the plan, concluding that Bankruptcy Rule 3014 provides for the court to set the deadline. Because no one had asked the court to set a deadline, the court permitted the election, noting that the creditor had filed it before any actions to solicit votes or any steps in contemplation of confirmation had occurred. The court also rejected the debtor's arguments that the creditor had waived its right to make the election by filing a proof of claim that did not invoke § 1111(b). *Id.* at 6.

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******Insert text at end of footnote 165 on page 48***

Section VIII(D) discusses the operation and effect of the § 1111(b) election and how courts have applied it in subchapter V cases.

****

VII. Contents of Subchapter V Plan

C. Payment of Administrative Expenses Under the Plan

******Insert text on page 57***

In *In re Seven Stars on the Hudson Corp.,* 618 B.R. 333, 347 n. 82 (Bankr. S.D. Fla. 2020), the court observed that a sub V plan cannot provide for the deferred payment of postpetition rent obligations under a lease of nonresidential real property.

The court reasoned that § 1191(e) permits payment of claims of administrative expense claims allowed under § 503(b) but that § 365(d)(3), not § 503(b), governs postpetition rent obligations. The court concluded, "As such, even though new Section 1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent." *Id.* Even if the court permitted the debtor to proceed under subchapter V in its case that began prior to its enactment, the court ruled, it could not confirm a plan that did not provide for full payment of postpetition rent on the effective date of the plan in accordance with earlier orders of the court.

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VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

******Insert text on page 58***

Importantly, both consensual confirmation and cramdown confirmation require compliance with all of the requirements of § 1129(a) except those specifically mentioned above. Sections VIII(D) and (E) (in this SUPP XIV, *infra*) discuss confirmation issues that have arisen in subchapter V cases under provisions that SBRA did not change.

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B. Cramdown Confirmation Under New § 1191(b)

2. Cramdown requirements for secured claims

******Insert text on page 62***

Section 1129(b) states different requirements for cramdown confirmation for secured and unsecured claims. Compliance with the absolute priority rule, for example, is not a requirement for confirmation of a plan over a secured creditor's objection if the unsecured class accepts the plan. The absolute priority rule arises from cramdown requirements relating to unsecured claims in § 1129(b)(2)(B), but it is not in the requirements for cramdown of a secured claim in § 1129(b)(2)(A).

In a sub V case, paragraph (1) of § 1191(c) makes the § 1129(b)(2)(A) cramdown requirements applicable to secured claims, and paragraphs (2) and (3) impose additional requirements, the commitment of disposable income and a finding of feasibility.

It is unclear whether the additional requirements apply when only the secured creditor rejects the plan. Without discussing the issue, the court in *In re Pearl Resources, LLC,* 622 B.R. 236, 267-70 (Bankr. S.D. Tex. 2020), concluded that the plan, accepted by unsecured creditors,

complied with the additional requirements in confirming the plan over the objections of secured creditors.

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

i. Determination of projected disposable income

******Insert new text on page 67***

The projected disposable income test has its genesis in chapter 13, which contemplates periodic, usually monthly, payments to the trustee for disbursement to creditors in accordance with the plan. In some cases, the amount of the monthly payment may increase by a specified amount at one or more specified times.[396] In any event, chapter 13 plans typically provide for the debtor to pay a regular fixed amount.

While fixed payment plans are the standard in individual cases where material variations in income are not expected, debtors in business cases may be concerned that unpredictable changes in the economy may depress earnings or increase expenses and make it difficult or impossible to pay a fixed amount. Creditors, on the other hand, may expect that, if conditions improve, the debtor should pay more.

Thus, a debtor might propose, or creditors might insist on, the payment of *actual* disposable income over the required period rather than a fixed monthly amount. Variations could include minimum or maximum requirements or some percentage of disposable income in excess of specified amounts.

[396] Such plans are commonly referred to as "step" plans. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 8:23 (2020).

Such provisions are clearly permissible in a consensual plan that arises from negotiations between the debtors and creditors. The statutory requirements seem flexible enough that a debtor's plan that included them would satisfy the PDI test. Whether a court could impose such provisions is a more difficult question, in part because of difficulties in defining how to calculate projected disposable income when the payment is not fixed and in specifying how the debtor accounts for and reports it.

A debtor must also pay careful attention to the drafting of such a provision. *In re Patel,* 621 B.R. 245 (Bankr. E.D. Cal. 2020), illustrates the issues that arise when a plan provides for payment other than fixed amounts.

There, the chapter 11 plan of the individual debtors, confirmed in 2011, provided for payment to creditors of all of the debtor's "disposable income as defined in § 1129(a)(15)(B)" in quarterly payments over seven years. The plan required reports every 120 days, but the debtor stopped making them after 24 months.

The debtor never made any payments, and an unsecured creditor filed a motion to convert the case to chapter 7 based on the default. The debtor contended that no default existed because there had been no disposable income.

Construing the plan as a contract and applying state contract law, the court concluded that disposable income included income from all sources, not just income from the business, as the debtor argued, and that the debtor had fiduciary or contractual duties under the plan to account for disposable income. Accordingly, although state law ordinarily places the burden on the creditor to show a default, the court concluded that the debtor must show the completion of payments to receive a discharge.

The court concluded that the debtor had not shown that he had not had any disposable income and converted the case to chapter 7.

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5. Requirements for feasibility and remedies for default

******Insert text on page 70***

Courts have addressed objections based on feasibility in the context of the facts in the case.

In *In re Ellingsworth Residential Community Association, Inc.,* 2020 WL 6122645 (Bankr. M.D. Fla. 2020), the court confirmed the plan of a homeowners association over the objection of a creditor that it was not feasible because its funding depended on a proposed assessment of owners that had not yet been approved.

Based on testimony from the president of the association that the plan was feasible and that the homeowners would approve the assessment, the court found that the assessment would be approved and that the debtor would therefore be able to make payments as proposed. As part of its ruling, the court imposed a requirement that the homeowners approve the assessment within four months, in default of which the court would find the debtor in breach of the plan.

In *In re Pearl Resources, LLC,* 622 B.R. 236 (Bankr. S.D. Tex. 2020), the court confirmed the plan of the jointly administered debtors over the objections of several creditors that the plan was not feasible because its projections with regard to disposable income were speculative and subject to market conditions.

The court observed, *id.* at 269 (footnotes omitted):

> The new requirement [of § 1191(C)(3)(A)] fortifies the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is

not likely to be follow by liquidation or the need for further reorganization unless the plan proposed it. . . .The feasibility requirement for confirmation requires a showing that the debtor can realistically carry out its plan. Though a guarantee of success is not required, the bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.

The court found that expert testimony with regard to the plan's feasibility was credible and confirmed the plan. In addition, the court found that the plan's provision for the liquidation of assets in the event of default satisfied the requirement of § 1191(c)(3)(B) that the plan contain appropriate remedies.

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******Insert text at end of note 247 on page 70***

It is arguable that § 1191(c)(3) does not require that the plan provide appropriate remedies if the court concludes that the debtor will be able to make all plan payments.

Paragraph (3) has three parts. Subparagraph (3)(A) contains two of them, stated in the alternative. Clause (3)(A)(i) requires that the debtor *will* be able to make all payments under the plan, while clause (3)(A)(ii) requires only a *reasonable likelihood* that the debtor will be able to make the plan payments. The two alternative provisions make no sense because the first necessarily incorporates the second. (If the debtor will be able to make all payments it must be true that there is a reasonable likelihood that it will.) The first provision is superfluous as a practical matter because the court never has to make a distinction and decide that a debtor will be able to make payments; finding a reasonable likelihood is always sufficient.

The third part of paragraph (3) is subparagraph (B), which requires that the plan contain appropriate remedies. It makes sense as an independent directive. Moreover, it is connected to

subparagraph (A) with "and"; such a connection between two requirements normally means that both must be satisfied.

The puzzling language in subparagraph (A), however, provides the basis for an argument that a drafting error occurred.

The three parts make more sense if the remedies requirement applies only when the court concludes there is a reasonable likelihood that the debtor will make payments, not that it will be able to. Under such an interpretation, the alternative requirements are: (1) a finding that the debtor will be able to make payments; or (2) a finding that there is a reasonable likelihood that the debtor will make payments *and* the plan provides appropriate remedies. This reading gives meaning to both parts of subparagraph (A).

The issue may be of immense academic and theoretical interest, but it is unlikely ever to arise. A debtor might argue that its prospects are so certain that the court should conclude that it will make payments such that it does not matter whether the plan contains appropriate remedies. But a debtor may not want to propose a plan that does not propose appropriate remedies because doing so subjects the plan to a more stringent feasibility requirement. Moreover, it seems risky to let confirmation depend on a bankruptcy judge's willingness to make a fine distinction between the two feasibility standards and, more critically, a determination that the debtor satisfies the higher one.

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Insert new Sections VIII(D) and VIII(E) beginning on page 72

D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases

As Sections VIII(A) and (B) explain, both consensual and cramdown confirmation require that the plan meet all of the requirements of § 1129(a) except those noted. This Section

discusses confirmation issues under § 1129(a) that do not involve subchapter V provisions but that are critical to achieving confirmation.[397]

1. Classification of claims; unfair discrimination

A plan must designate classes of claims, with some exceptions such as priority tax claims, and interests, § 1123(a), and specify any class that is not impaired, § 1123(b). Classification is particularly critical if the debtor wants consensual confirmation because consensual confirmation requires that all classes of claims and interests accept the plan or not be impaired. § 1129(a)(8).[398] The classification rule in § 1122(a) is that the claims or interests in a class must be "substantially similar." **SUPP XV**

Two cases have considered the classification of secured claims in subchapter V plans.

In *In re New Hope Hardware, LLC,* 2020 WL 6588615 (Bankr. N.D. Ga. 2020), the debtor sought confirmation of a consensual plan that put two creditors, each secured by a separate vehicle, in the same class. Only one of them accepted the plan. The court concluded that, because each creditor had rights in different collateral, the claims were not substantially similar, and the classification therefore violated § 1122(a). *Id.* at * 3.

In *In re Olson,* 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), however, the court confirmed a plan that provided for a class of "miscellaneous secured claims." **SUPP XV**

[397] For a review and application of requirements for confirmation in a subchapter V case, see *In re Pearl Resources, LLC,* 622 B.R. 236 (Bankr. S.D. Tex. 2020). **SUPP XV**

[398] It is also important in the cramdown context because cramdown confirmation still requires that the plan comply with the provisions of the Bankruptcy Code. § 1329(a)(1). But a court in the cramdown situation might overlook the issue if the treatment of all members of the class complies with the cramdown requirements anyway.

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

Consensual confirmation requires acceptance by all impaired classes of claims and interests. § 1129(a)(8). This includes holders of equity interests if the plan impairs them. *In re New Hope Hardware, LLC,* 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020).

If a creditor does not vote on the plan, the question is whether the creditor is deemed to have accepted the plan.

In *In re Olson,* 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), the court concluded that holders of impaired claims that did not vote were bound by the classes that accepted the plan and confirmed it in the absence of any accepting vote in one class. The court relied on *In re Ruti-Sweetwater, Inc.,* 836 F.2d 1263, 1267-68 (10th Cir. 1988).

The court in *In re New Hope Hardware, LLC,* 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), reached the opposite conclusion. The court reasoned that, in the absence of acceptance by the impaired class of equity interests, the plan did not comply with the mandate of § 1129(a)(8) that the class either accept the plan or not be impaired.[399]

3. Classification and voting issues relating to priority tax claims

A debtor often owes taxes to the Internal Revenue Service as well as to state and local tax authorities that are entitled to priority under § 507(a)(8). Section 1129(a)(9)(C) requires that a plan pay the claims over a period ending not later than five years after the entry of the order for relief in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than "convenience class" creditors paid in cash as § 1122(b) permits). A

[399] The court nevertheless confirmed the plan based on acceptances by all of the holders of equity interests that occurred at the confirmation hearing.

priority tax claim must be paid with interest at the rate that applicable nonbankruptcy law requires. § 511.

Holders of priority tax claims often do not vote on chapter 11 plans that comply with § 1129(a)(9)(C). It does not appear that acceptance by a priority tax claimant is an additional requirement for confirmation under § 1129(a). Section 1123(a)(1) expressly excludes priority tax claims from its requirement that the plan designate classes of claims, thus recognizing that voting by such creditors is not required. **SUPP XV** The court in *In re New Hope Hardware, LLC,* 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), confirmed a plan that provided for treatment of a priority tax claim in compliance with § 1129(a)(9)(C) even though the tax claimant did not accept the plan.

Although § 1123(a)(1) does not require classification of a priority tax claim, chapter 11 plans often provide for them in a class. Better practice is to place each taxing authority in its own class or to state the treatment for each one separately.

4. Timely assumption of leases of nonresidential real estate

Section 365(d)(4)(A) provides for the automatic rejection of a lease of nonresidential real property unless it is assumed within 120 days after the date of the order for relief. The court may, prior to the expiration of the deadline, extend it for 90 days, for cause. § 365(d)(4)(B). If the lease is rejected, the debtor must immediately surrender the leased property to the lessor. § 365(d)(4)(A).

In *In re Motif Designs, Inc.,* 2020 WL 7212713 (Bankr. S.D. Mich., Dec. 4, 2020), the sub V debtor obtained an extension of time to file its plan but had not sought to assume the lease. The plan, however, provided for the debtor to continue to occupy the property for about four months after the confirmation hearing. Because the plan provided for occupancy of the property

in violation of § 365(d)(4), the court denied confirmation because the plan did not meet the requirement of § 1129(a)(1) that the plan comply with the applicable provisions of the Bankruptcy Code. **SUPP XV**

E. § 1129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases

Although the cramdown requirements in § 1129(b) do not apply in subchapter V cases, § 1181(a), the provisions of § 1129(b)(2)(A) govern determination of what is "fair and equitable" with regard to secured claims for purposes of cramdown confirmation under § 1191(c)(1). This Section discusses issues relating to cramdown treatment of secured claims in subchapter V cases that involve § 1129(b)(2)(A) and other statutes that SBRA did not affect.

1. The § 1111(b)(2) election

The § 1111(b)(2) election comes into play when a secured creditor is undersecured in that its claim exceeds the value of the property in which it has a lien. Before discussing its operation and effects, it is useful to review the general rule for allowance of secured claims in a bankruptcy case under § 506(a).

Section 506(a) provides that an allowed claim of a creditor secured by a lien on property in which the estate has an interest is secured "to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." Simply put, § 506(a) gives the secured creditor a secured claim equal to the value of the encumbered property and an unsecured claim for the deficiency. Bankruptcy professionals colloquially refer to this

result as the "bifurcation" of the claim into a secured claim and an unsecured claim.[400] If the secured obligation is "nonrecourse" – *i.e.,* the debtor is not personally liable and the creditor can collect its debt only from the encumbered property – the creditor does not have an unsecured claim in the case.

Assume, for example,[401] that a secured creditor has a claim of $ 100,000 secured by property worth $ 30,000. Under § 506(a), bifurcation results in the creditor having two claims: a secured one for $ 30,000 and an unsecured one for $ 70,000. If the claim is non-recourse, the creditor has no unsecured claim.

Section 1111(b) modifies the treatment of secured claims in chapter 11 cases in two ways.

First, § 1111(b)(1) provides that a secured claim will be allowed or disallowed under § 506(a) regardless of whether the creditor has recourse against the debtor. The effect is that a nonrecourse secured creditor has an allowed unsecured claim against the debtor.

Second, § 1111(b)(2) permits a secured creditor to elect to have its entire claim treated as a secured claim, with two exceptions discussed later. In the example, therefore, the electing secured creditor has a secured claim of $ 100,000 and no unsecured claim.

Whether the undersecured creditor makes the election may make a significant difference in how much it must receive for the plan to comply with cramdown requirements.

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[400] *See generally see* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, CHAPTER 13 PRACTICE AND PROCEDURE § 5:5 (2020).

[401] The example is taken from the excellent explanation of § 1111(b) in *In re Body Transit, Inc.,* 619 B.R. 816, 831-33 (Bankr. E.D. Pa. 2020).

Section 1129(b)(2)(A) states three alternative ways to satisfy the "fair and equitable" requirement for cramdown confirmation with regard to a secured claim. They apply in a sub V case under § 1191(c)(1).[402]

The most common alternative, in clause (i) of § 1129(b)(2)(A), is for the secured creditor to retain its liens and receive deferred cash payments. Alternatively, a plan is "fair and equitable" if it provides for sale of the encumbered property and attachment of liens to the proceeds, § 1129(b)(2)(A)(ii), or for the realization by the creditor of the "indubitable equivalent" of the claim, § 1129(b)(2)(A)(iii).

The specific statutory language with regard to permissible cramdown treatment of a secured claim through deferred cash payments is that the creditor must receive "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of [the creditor's] interest in the estate's interest in such property." § 1129(b)(2)(A)(i)(II).

The somewhat complicated language effectively states two requirements. First, the deferred cash payments must total at least the amount of the allowed secured claim. Second, the *value* of the stream of payments must be equal of the value of the encumbered property. The second requirement requires application of an appropriate present value interest or discount rate. For purposes of the example, we assume it is six percent.

If the creditor in the example does not make the § 1111(b)(2) election, application of the cramdown rules is straightforward: the plan must propose to pay the entire amount of the secured claim, $ 30,000, with interest at six percent. Payment of the claim in full satisfies the first part of the test, and the provision for interest satisfies the second one. Thus, a plan could amortize

[402] See Section VIII(B)(2).

$ 30,000 over, say, five years at six percent interest, in monthly payments of $ 580, a total of $ 34,800. The plan must treat the deficiency claim of $ 70,000 as an unsecured claim, usually included in the class of general unsecured claims.[403]

Such a provision would not, however, satisfy the first cramdown requirement if the creditor elected § 1111(b)(2). The total of payments is only $ 34,800, $ 65,200 short of the amount of the allowed secured claim, $ 100,000.[404]

Payment of the claim over five years would require an additional $ 1,087 per month, a total monthly payment of $ 1,667.

A longer amortization period would lower the monthly payment because there is more time to pay the claim and because more interest is paid. The following chart shows payment schedules that would satisfy both § 1129(b)(2)(A)(II) requirements (amounts rounded except monthly payment on last line). Whether a court would conclude that the longer lengths of time are "fair and equitable" is, of course, another question.

[403] When a debtor's only debts are the undersecured claim and those of unsecured creditors and the deficiency claim of the undersecured creditor is large enough to prevent acceptance by the unsecured class, a debtor in a non-sub V case cannot confirm a plan because no impaired class of creditors has accepted it. § 1129(a)(10). If an undersecured creditor makes the § 1111(b)(2) election, it loses the ability to block confirmation in this way.

Debtors have attempted to classify the deficiency claim in a separate class so that it is possible that the class of general unsecured creditors accepts it. Debtors usually do not succeed in such "gerrymandering." *See generally* NORTON BANKRUPTCY LAW & PRACTICE § 113:8.

Because confirmation in a sub V case does not require any accepting class, an undersecured creditor's loss of the ability to prevent acceptance by the unsecured class does not matter for confirmation purposes. Unless the plan provides for a significant payment on the unsecured portion of the claim, therefore, an undersecured creditor may have little if anything to lose by making the § 1111(b)(2) election.

[404] This assumes that the interest payments of $ 4,800 count in satisfying the total of payments requirements. It is not clear that they do. *See In re* Body Transit, Inc., 619 B.R. 816, 833, n. 25 (Bankr. E.D. Pa. 2020), *citing* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[5][b].

Payment Schedules Providing for Payments Totaling $ 100,000 With a Value of $ 30,000

Amortization Period (a)	Payment On $30,000 (b)	Interest Paid at 6% (c)	Total of Payments ($ 30,000 + Interest payments) (d)	Remaining Balance ($ 100,000 – (d)) (e)	Monthly Payment on Remaining Balance ((e)/months) (f)	Total Monthly Payment (b) + (f) (g)
5 years	$ 580	$ 4,800	$ 34,800	$ 65,200	$ 1,067	$ 1,667
10 years	$ 333	$ 9,968	$ 39,968	$ 60,032	$ 500	$ 883
15 years	$ 253	$ 15,568	$ 45,568	$ 54,432	$ 302	$ 555
20 years	$ 215	$ 21,583	$ 51,583	$ 48,417	$ 202	$ 417
25 years	$ 193	$ 27,987	$ 57,987	$ 42,013	$ 140	$ 333
30 years	$ 180	$ 34,751	$ 64,751	$ 35,249	$ 98	$ 278
53 yrs, 4 mos	$ 156.43	$ 70,113	$ 100,113	$ 0.00	$ 0.00	$ 156.43

Section 1111(b)(1)(B) states two exceptions to the availability of the § 1111(b)(2) election.

One of the exceptions applies when the encumbered property is sold under § 363 or is to be sold under the plan. If the creditor has recourse against the debtor, the § 1111(b)(2) election is not available when the property is being sold. § 1111(b)(1)(B)(ii).

The other exception applies when the undersecured creditor's interest in the encumbered property is of "inconsequential value." § 1111(b)(1)(B)(ii). Two courts have considered whether a creditor's interest was "inconsequential" in the context of a subchapter V case. They are required reading for judges and practitioners dealing with § 1111(b) elections in subchapter V cases.

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), involved a taxi business that owned a single taxi medallion in which its only creditor held a security interest to secure a debt of $ 576,927. The debtor contended that the value of the medallion was $ 90,000; the creditor claimed it was worth $ 200,000.

The court noted that courts have taken different approaches to determining whether property is of inconsequential value, but concluded that, under any approach, it was impossible to conclude that the medallion's value was inconsequential, whether it was worth $ 90,000 or $ 200,000. *Id.* at * 3. The court then reviewed the different approaches.

The "most obvious approach," the court said, it to determine and apply the plain meaning of the word "inconsequential." Nothing that various dictionaries defined the word as "irrelevant," "of no significance," "unimportant", and "able to be ignored," the court concluded as "an abstract matter" that neither value was inconsequential. 2020 WL 5806507 at *3.

The court acknowledged that "some context is required," and that "[a]n item of a certain value might be relatively 'inconsequential' to a multi-billion dollar company." 2020 WL 5806507 at *3. But the court could not conclude that the value of the medallion was "irrelevant," "of no significance," or something that is "able to be ignored" when it was the debtor's most important and valuable asset, essential to its reorganization, regardless of its value. *Id.*

The court noted that, if the debtor owned the medallion outright and proposed to abandon it under § 554 (which permits abandonment of an asset that is "of inconsequential value or benefit to the estate"), it could not conceivably be treated as having inconsequential value. The court found no justification for giving the term a different meaning in § 1111(b) than it has in § 554. 2020 WL 5806507 at *3.

The *VP Williams Trans* court then considered the view that the value of the asserted security interest should be compared to the value of the collateralized asset. Under this approach, a junior security interest that is "almost completely out-of-the-money" has

inconsequential value. 2020 WL 5806507 at *4.[405] The court saw no difference between this view and valuation in the abstract but concluded that it did not matter in the current case because the creditor held the only security interest in the collateral and, therefore, the value of its lien equaled the value of the collateral.

Next, the *VP Williams Trans* court discussed the view that the court should compare the value of the security interest to the amount of the debt.[406] Under this approach, the court explained, a secured claim might have inconsequential value if the collateral is worth only a small fraction of the total claim. The court questioned application of this view when the value of the collateral is not small by itself but is significantly less than the debt. 2020 WL 5806507 at *4.

To illustrate, the court assumed that only one secured creditor with a $ 200,000 debt holds a security interest in collateral worth $ 100,000, which would not be "inconsequential." The result should not be different, the court reasoned, when the claim is $ 2,000,000 because the value of the collateral, and therefore the value of the secured claim, is the same. The court observed that denying the § 1111(b)(2) election to the $ 2 million claimant would result in a debtor having greater rights to retain and use collateral "against the secured creditor's will" when the debtor's economic interests are actually far more out-of-the-money. 2020 WL 5806507 at *4.

Under yet another approach, the *VP Williams Trans* court continued, a secured claim may be deemed inconsequential if the § 1111(b)(2) election would give rise to a claim that could not as a practical matter be amortized fully under the cramdown confirmation standards in

[405] The court cited McGarey v. MidFirst Bank (*In re* McGarey), 529 B.R. 777 (D. Ariz. 2015).
[406] The court cited *In re* Wandler, 77 B.R. 728, 733 (Bankr. N.D. 1987).

§ 1129(b)(2)(A)(i), discussed above.[407] The court reasoned that this view conditioned a creditor's right to the § 1111(b)(2) election on the debtor having a feasible way to deal with it. The court found nothing in the statute to suggest that "'feasibility' from the debtor's perspective was intended to be a limit on a creditor's right to invoke section 1111(b)." 2020 WL 5806507 at *4.

Finally, the *VP Williams Trans* court considered and rejected the analysis of the *Body Transit* court, discussed below, that took policy considerations into account in making the "inconsequential value" determination. Later text discusses the court's reasoning, following discussion of *Body Transit.*

After its discussion of the various approaches to the determination of "inconsequential value," the *VP Williams Trans* court concluded that the case before it was not difficult because the creditor's interest was not inconsequential under any of them. 2020 WL 5806507 at *6.

In *In re Body Transit, Inc.,* 619 B.R.816, 835 (Bankr. E.D. Pa. 2020), the court ruled that the correct methodology is to compare the value of the lien position to the total amount of the claim.

The court reasoned that the statutory text of § 1111(b)(1)(B)(ii) "explains how to value [the creditor's interest in the collateral] and then directs the court to determine whether the value is inconsequential. The statutory text does not state how to make that second determination of 'inconsequentiality.'" 619 B.R. at 835. To make the second determination, the court continued, the court must "compare the value of the collateral to something else, and the statutory text offers no guidance there." *Id.*

[407] The court cited *In re* Wandler*,* 77 B.R. 728, 733 (Bankr. N.D. 1987) (Holding that collateral worth $ 15,000 was "inconsequential" in context of claim of $ 390,000 and reasoning that payments having a nominal amount of $ 390,000 but an actual current value $ 15,000 would not be realistic).

The court concluded that the proper comparison is between the value of the collateral to the total amount of the claim. The court stated, *id.* at 835, *quoting* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[3][a] (Levin & Sommers, eds., 16th ed. 2020) (footnotes omitted):

> Section 1111(b) is intended to preserve creditors' nonbankruptcy rights, not enhance them.... Since "inconsequential" is not synonymous with "zero," plain meaning would suggest that "inconsequential value" has to include something more than zero value. This leads to the view that a creditor whose lien is almost, but not quite, out-of-the-money should be treated as if [it] were wholly unsecured, which is for practical purposes the status the creditor would likely ascribe to itself outside of bankruptcy with collateral of little or inconsequential value. Put another way, it [sic] if the collateral's value is inconsequential when compared to the total debt owed to the creditor, the creditor should be treated as unsecured, not secured [for purposes of § 1111(b)(1)(B)].

The court then turned to consideration of whether the creditor's interest was of "inconsequential value" when the value of the collateral was $ 80,000, 8.2 percent of the amount of the secured debt, $ 970,233. The court stated, 619 B.R. at 836:

> [T]he "inconsequential value" determination is not a bean counting exercise; the determination cannot be based solely on a mechanical, numerical calculation. Some consideration must be given to the policies underlying both the right to make the § 1111(b) election and the exception to that statutory right. In other words, while "the numbers" provide an important starting point in deciding how much value is "inconsequential," the court also must consider other relevant circumstances presented in the case and make a holistic determination that takes into account the purpose and policy of the statutory provisions that govern the reorganization case.

Under this analysis, the court concluded that the value of the creditor's interest was inconsequential and that it could not make the § 1111(b)(2) election.

In the court's view, the purpose of the § 1111(b)(2) election is to protect the creditor from determination of its secured claim at a time when the value of its collateral is temporarily depressed, which could permit the debtor to realize a considerable gain upon its sale when the market rebounds. 619 B.R. at 833. The court reasoned that the case before it involving a fitness club and exercise equipment as collateral "does not resemble the classic fact pattern that Congress designed § 1111(b) to prevent. [The creditor] is not a secured creditor being cashed out during a temporary decline in the value of its collateral, with the Debtor seeking to retain such collateral and obtain the windfall benefit of a market correction in the foreseeable appreciation that restores value to the collateral." *Id.* at 619 B.R. at 836.

Rather, the court found, any increase in the value of the debtor's enterprise would most likely be "attributable to some combination of market forces, the entrepreneurial efforts and acumen of the Debtor's principal and, perhaps, the investment of additional capital." 619 B.R. at 836.

These circumstances, the court reasoned, supported the conclusion that the collateral was of "inconsequential value" within the meaning of § 1111(b)(1)(B)(i). The court also found support for its conclusion in the purposes and policies underlying subchapter V. *Id.* at 837.

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), discussed earlier, rejected consideration of the policies that *Body Transit* invokes.

With regard to the intended purpose of the § 1111(b)(2) election, the court reasoned, "Section 1111(b) is not conditioned on a temporary decline in collateral value; it is available to secured creditors who are not happy with a value that a debtor has proposed, and who are not

happy with the prospect of having to live with a judge's decision as to what the value of the collateral is." *Id.* at 5.

The *VP Williams Trans* court reasoned that the desire of Congress to foster small business reorganization had no bearing on the interpretation of § 1111(b). "Congress also desire to foster other forms of chapter 11 reorganizations," the court said, "but section 1111(b) applies in all chapter 11 cases, including subchapter V. If Section 1111(b) was supposed to give way in a subchapter V case, or to have a different application in such a case, that was for Congress to say, and Congress did not do so." 2020 WL 5806507 at *6.

2. Realization of the "indubitable equivalent" of a secured claim -- § 1129(b)(2)(A)(iii)

One of the ways for a plan to meet the "fair and equitable" requirement for cramdown treatment of a secured claim under § 1129(b)(2)(A) (applicable in subchapter V under § 1191(c)(1)) is to provide for the creditor to realize the "indubitable equivalent" of its claim. The court in *In re Pearl Resources, LLC,* 622 B.R. 236 (Bankr. S.D. Tex. 2020), examined and applied this provision in confirming a subchapter V plan of jointly administered debtors over the objection of creditors holding statutory mineral property liens under Texas law.

The total of the creditors' claims was $ 1,151,287 million. Their statutory liens extended to all of the debtors' gas and oil properties, valued at approximately $ 35 million. The plan provided that the creditors: (1) would retain their liens on one property, valued at $ 7,440,000; (2) would release their liens on all other properties; and (3) would receive pro rata payments from disposable income on a quarterly basis for two years. The plan further provided that, if the claims were not paid in full, with interest, in two years, the debtors would sell portions of the retained collateral to pay the claims in full. In addition, the plan provided that, if the debtors did

not pay the claims in full within 34 months, the creditors would receive a lien in the debtor's interest at that time in another property. *Id.* at 248-49.

The creditors rejected the plan and objected to its confirmation. Among other things, they argued that the plan was not fair and equitable because it did not provide for them to retain their existing liens and did not provide the indubitable equivalent of their claims. 622 B.R. at 266-67.[408] The court overruled their objections and confirmed the plan.

The court explained that the indubitable equivalent requirement is tied to a "claim," not to the property securing the claim. Thus, the court rejected the argument that the plan could not modify their lien rights in any fashion and still meet the indubitable equivalent standard 622 B.R. at 270.

The court then addressed the creditors' argument that the plan did not meet the indubitable equivalent requirement because it reduced their 29 to 1 value-to-debt equity cushion to a 6 to 1 cushion. The court provided the following review of case law, 622 B.R. at 271-72 (original footnotes omitted):[409]

> The Fifth Circuit has expressly recognized that one accepted method of providing indubitable equivalence is the exchange of collateral. Whether the indubitable equivalent offered is equivalent is a matter left to the discretion of the bankruptcy court in its careful reliance upon sufficient facts. Courts should not accept offers of indubitable equivalence lightly and should insist on a high degree of certainty. Moreover, indubitable equivalence

[408] The creditors also objected on the grounds that the plan did not meet the disposable income requirement of § 1191(c)(2) and the feasibility requirements of § 1191(c)(3). 262 B.R at 266. The court concluded that the plan met these requirements and that it provided adequate remedies for default. *Id.* at 267-70.

[409] In footnotes to the first paragraph of the quoted text, the court cited: *In re* Sun Country Dev, Inc., 764 F.2d 406, 408 (5th Cir. 1985); *In re* Walat Farms, Inc., 70 B.R. 330, 336 (Bankr. E.D. Mich. 1987) ("a bankruptcy court is permitted, indeed required, to make these determinations on a case by case basis and to order confirmation of a plan which indubitably protects and pays the claim of an objecting creditor"); *In re* Swiftco, Inc., 1988 WL 143714 (Bankr. S.D. Tex. 1988); and *In re* Philadelphia Newspapers, LLC, 418 B.R. 548, 568 (E.D. Pa. 2009), *aff'd* 599 F.3d 298 (3d Cir. 2009).

In re Philadelphia Newspapers ruled that a plan providing for the sale of the creditor's collateral without permitting the creditor to credit bid satisfied the indubitable equivalent requirement. The Supreme Court later ruled to the contrary in *Radlax Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 132 S.Ct. 2065 (2012). The Supreme Court concluded that the specific requirement for credit bidding in § 1129(b)(2)(A)(ii), which permits cramdown when a plan provides for the sale of collateral, precluded an interpretation of the indubitable equivalent standard that permitted sale without credit bidding.

> is a flexible standard. The indubitable equivalent standard requires a showing that the objecting secured creditor will receive the payments to which it is entitled, and that the changes forced upon the objecting creditor are completely compensatory, meaning that the objecting creditor is fully compensated for the rights it is giving up. For example, the Fifth Circuit has stated that the "[a]bandonment of the collateral to the class would satisfy indubitable equivalent, as would a replacement lien on similar collateral."
>
> In *Investment Company of The Southwest*, [341 B.R. 298, 325 (B.A.P. 10th Cir. 2006),]the court recognized that a debtor may be permitted to use some portion of the equity cushion in collateral to help implement a plan without violating the indubitable equivalent standard, as long as the secured creditor remains over-secured beyond a reasonable doubt and has sufficient protection. Courts have approved plans that did not pay a secured lienholder all of its collateral sale proceeds, as long as the court is satisfied that there will always be more value in the remaining collateral than the lender's lien amount.[410] Courts also have routinely held that a partial surrender of collateral to an over-secured creditor provides such creditor with the indubitable equivalent of its claim.[411] A sister Court approved a plan over the objection of a secured creditor finding the debtor had provided the indubitable equivalent because the secured creditor remained over-secured beyond a reasonable doubt and had sufficient payment protection over the life of the plan.[412] In essence, in the bankruptcy context, the indubitable equivalent means that the treatment afforded the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim, and also insure the integrity of the creditor's collateral position.[413]

Applying these standards, the court concluded that the plan provided "virtual certainty" that the claims would be paid in full and that the 6 to 1 value-to-debt ratio provided an equity cushion that was sufficient adequate protection. 622 B.R. at 272.

The court rejected the creditors' arguments that a plan could not modify a Texas statutory mineral lien under any circumstances and that lien-stripping may not be accomplished under any

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[410] The court cited: *In re* Pine Mountain, Ltd., 80 B.R. 171 (B.A.P. 9th Cir. 1987) (Concluding that it was unlikely that creditor's claim would ever become even partially unsecured and that plan provided secured creditor with variety of safeguards and fair interest rates); and Affiliated Nat'l Bank-Englewood v. TMA Assocs., Ltd. (*In re* TMA Associates, Ltd.), 160 B.R. 172, 174 (D. Colo. 1993).
[411] The court cited *In re* May, 174 B.R. 832, 838–839 (Bankr. S.D. Ga. 1994).
[412] The court cited *In re* SCC Kyle Partners, Ltd., 2013 WL 2903453 (Bankr. W.D. Tex.2013).
[413] The court cited 4 COLLIER ON BANKRUPTCY ¶ 506.03 (16th ed. 2020).

circumstances, concluding that § 1123(a)(5)(E) permits a plan to modify any lien as long as it complies with § 1129(b)(2)(A).[414]

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XIII. Effective Date and Retroactive Application of Subchapter V

******Insert text on page 99***

The opposite view is that the inability of a debtor to meet the statutory deadlines when it elects subchapter V after they have expired is not due to a circumstance beyond its control. Because the debtor makes the election after the deadlines expired, the circumstances are within the debtor's control.[415] If the debtor makes the election after expiration of the deadlines and the court does not extend them, the election is nevertheless effective, and the debtor is in default of the deadlines. Thus, the court may dismiss the case under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[416]

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******Add to footnote 349, after "accord" on page 99***

In re Easter, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC,* 2020 WL 5576957 (Bankr. D.

[414] The court cited *In re* Bates Land & Timber, LLC, 877 F.3d 188 (4th Cir. 2017), which permitted cramdown confirmation of a plan providing for a secured creditor to receive property valued at $ 13.7 million and cash of $ 1 million on its $ 14.6 million claim in exchange for the release of prepetition collateral.

The *Pearl Resources* court distinguished two cases on which the creditors relied, *In re CRB Partners, LLC*, 2013 WL 796566 (Bankr. W.D. Tex. 2013), and *In re Swiftco, Inc*., 1988 WL 143714 (Bankr. S.D. Tex. 1988). The court noted that these cases ruled that the plans did not provide the indubitable equivalent of the creditors' claims because of an insufficient equity cushion or reasonable doubt as to payment but recognized that liens could be modified.

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

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

N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan);

******Add to footnote 352, after "accord" on page 99***

In re Easter, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC,* 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan);

******Add to end of footnote 352, on page 100:***

The court in *In re Wetter,* 620 B.R. 243 (Bankr. W.D. Va. 2020), concluded that the *Trepetin* approach to extension of the deadlines in a case converted from chapter 7 to chapter 11 was the proper one. The court denied the debtor's motion to convert to chapter 11, however, because under that approach the court would decline to extend the time to file a plan. **SUPP XV**

******Insert text on page 109***

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

The strategy did not work well for the individual debtors in *In re Crilly,* 2020 WL 3549848 (Bankr. W.D. Okla. 2020). A few hours after dismissal of their chapter 11 case filed in

2018 for cause, the individual debtors filed a new case and elected subchapter V. The debtors filed a motion to extend the automatic stay, which under § 362(c)(3) would expire 30 days after filing the second case unless extended based on a showing that the second case was filed in good faith. Under § 362(c)(3)(C)(i)(III), a filing is presumptively not in good faith if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the previous case.

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

SUPP XV

XV. Supplement (April 2021)

I. Introduction

******Insert text on page 2***

The Covid-19 Bankruptcy Relief Extension Act of 2021[417] amended the CARES Act to extend the increased debt limit for an additional year.

******Insert footnote on page 5 at end of second full paragraph***

. . . of the subchapter V debtor.[418]

****

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

A. Debtor's Election of Subchapter V

******Insert text on page 10 at end of second paragraph***

The Covid-19 Bankruptcy Relief Extension Act of 2021[419] amended the CARES Act to extend the amended provision for an additional year.

******In first line of third paragraph on page 10, change "one year" to "two years"***

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[417] Covid-19 Bankruptcy Relief Extension Act of 2021§ 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

[418] In *In re Abundant Life Worship Center of Hinesville, GA., Inc.,* 2020 WL 7635272 (Bankr. S.D. Ga. 2020), a debtor whose earlier small business case had been dismissed seven months earlier filed a new chapter 11 case and amended the petition to elect subchapter V. The debtor contended that § 362(n)(1) did not apply because, upon its subchapter V election, it ceased being a debtor in a "small business case." *Id.* at *8. The court ruled that the status of the debtor in the current case made no difference: "The statute plainly requires only that the prior case was a small business case, not the subsequent case." *Id.* at * 18.

The debtor also contended that the exception in paragraph (n)(2) of § 362 to the operation of paragraph (n)(1) applied. Section 362(n)(2)(B) provides that paragraph (n)(1) does not apply if the debtor establishes "that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time *the case then pending* was filed" (emphasis added) and that "it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable time."

The court rejected this argument, concluding that the language, "the case then pending" refers to a separate case pending at the time of the filing of the second case. Because the debtor's previous case was not a "case then pending," the court ruled, the exception did not apply. *Id.* at *11-12. The court thus followed *Palmer v. Bank of the West,* 438 B.R. 167 (E.D. Wis. 2010).

[419] Covid-19 Bankruptcy Relief Extension Act of 2021§ 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

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

******Insert text on page 13***

The Covid-19 Bankruptcy Relief Extension Act of 2021[420] amended the CARES Act to extend the increased debt limit for an additional year.

******Delete first three paragraphs and footnotes 33-35 on page 14 and replace with:***

SBRA did not change the requirement in § 101(51D) that the debtor be "engaged in commercial or business activities." Revised paragraph (A), however, adds a requirement that 50 percent or more of the debtor's debt must arise from the debtor's commercial or business activities. Section III(C) discusses eligibility issues that have arisen in individual cases as to whether the debtor is "engaged in commercial or business activities," and Section III(D) considers what constitutes a debt arising from commercial or business activity.

SBRA makes three other definitional changes.

First, amended paragraph (A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real estate.[421]

Second, the requirement that no committee exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in the case of a small business debtor unless the court orders otherwise.)

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[420] Covid-19 Bankruptcy Relief Extension Act of 2021§ 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).
[421] Section 101(51B) defines "single asset real estate" as "real property constituting a single property of project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto." § 101(51B).

******Insert text on page 15 after sixth line***

An individual who does not have regular income may be a chapter 13 debtor in a joint case with the individual's spouse who does have regular income,[422] and an individual who is not a family farmer or fisherman may be a chapter 12 debtor in a joint case with the individual's spouse who is engaged in a farming operation or a commercial fishing operation.[423]

Subchapter V has no such provision. Although an affiliate of an eligible subchapter V debtor may be a subchapter V debtor even if the affiliate is not otherwise eligible, a spouse is not an affiliate as defined in § 101(2).[424]

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******Insert new Sections III(C) and (D) on page 15 before beginning of Part IV; New Section III(C) replaces text that Supp XIV on page 112 added to text at end of footnote on page 14.***

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

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

An individual may want to file a subchapter V case to deal with personal liabilities arising out of guarantees or other obligations related to a failed business in a subchapter V case. Courts have dealt with objections to an individual's election of subchapter V on the ground that the debtor is not "engaged in commercial or business activities" when the business giving rise to the debts is no longer operating.

In *In re Wright,* 2020 WL 2193240 (Bankr. D. S.C. 2020), the court held that nothing in the definition limits it to a debtor currently engaged in business and ruled that an individual who

[422] 11 U.S.C. § 109(e).
[423] 11 U.S.C. § 109(f) (only a family farmer or family fisherman may be a chapter 12 debtor); 11 U.S.C. § 101(18)(A) (definition of family farmer includes spouse); 11 U.S.C. § 101(19A) (definition of family fisherman includes spouse).
[424] *In re Johnson,* 2021 WL 825156 (Bankr. N.D. Tex. 2021).

had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. *Accord, In re Bonert,* 619 B.R. 248, 255 (Bankr. C.D. Cal. 2020); *see In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La., 2020).

Other courts have concluded that a debtor is not eligible for subchapter V in similar circumstances.

In *In re Thurmon,* 625 B.R. 417 (Bankr. W.D. Mo., Dec. 8, 2020), the court concluded that a debtor must be currently engaged in business to be eligible for subchapter V. The court reasoned, "The plain meaning of 'engaged in' means to be actively and currently involved. In § 1182(a)(1)(A) of the Bankruptcy Code, 'engaged in' is written not in the past or future but in the present tense."

Although the U.S. Trustee timely raised the issue of eligibility by objecting to the sub V election, the U.S. Trustee did not request a hearing on it. Accordingly, the ruling on eligibility occurred in connection with the hearing on confirmation of the plan, which all impaired classes of creditors had accepted.

The only party objecting to the plan was the U.S. Trustee, who contended that the court could not confirm the plan of the non-sub V debtors because it was not accompanied by a disclosure statement. The *Thurmon* court overruled the objection and confirmed the plan in the unusual circumstances of the case. The court reasoned that (1) the U.S. Trustee had in essence waived the right to request a disclosure statement by not requesting that the court require a disclosure statement while the eligibility objection was pending; and (2) the plan substantially complied with disclosure statement requirements by containing "adequate information."

In re Johnson, 2021 WL 825156 (N.D. Tex. 2021), similarly held that an individual with business debts arising from the operation of several companies no longer in business was not "engaged in commercial or business activities" and, therefore, did not qualify for subchapter V.

In *Johnson,* the owner and operator of several limited liability companies (the debtor) and the debtor's spouse filed a joint chapter 7 petition, before enactment of subchapter V, to deal with their personal liabilities arising out of the business operations.

At the time of filing, the debtor's companies were defunct, but the debtor, as an employee, managed the business of a limited liability company owned by the debtor's mother. The mother had acquired her interest by inheritance upon the death of her husband, who had originally organized and owned it. The debtor and spouse had no ownership interest in the mother's company.

After the U.S. Trustee filed a complaint objecting to their discharge, and after subchapter V's effective date, the debtor and the spouse filed a motion to convert their case to chapter 11, conditioned on the court's authorization for the case to proceed under subchapter V.

The U.S. Trustee and a number of creditors objected, asserting that a debtor must be "actively carrying out" commercial or business activities at the time of the filing of the petition to be "engaged in" commercial or business activities for purposes of subchapter V eligibility.

The court rejected the "actively carrying out" test as too narrow because it would preclude subchapter V relief for debtors with businesses temporarily closed for unexpected non-financial reasons such as weather, natural disaster, regulatory requirements, or a pandemic. But the court concluded that the inquiry is "inherently contemporary in focus instead of retrospective, requiring the assessment of the debtor's current state of affairs as of the filing of the bankruptcy petition." *Johnson,* 2021 WL 825156 at *6.

Because nothing indicated that the debtor's companies were only temporarily out of business or that the debtor intended to cause any of them to resume operations, the court concluded that the debtor's prior ownership and management of them did not qualify the debtor for subchapter V. *Id.* at *7.

The *Johnson* court advanced three reasons for this conclusion.

First, applying the dictionary definition of "engaged" as "involved in activity: occupied, busy" to the statutory language, the court determined that a person "engaged in business or commercial activities" is a person "occupied with or busy in commercial or business activities – not a person who at some point in the past had such involvement." *Id.* at * 6.

Second, the *Johnson* court noted that the purpose of subchapter V is to facilitate expedience and minimize cost for the reorganization of a small business. Such benefits are essential to the successful the reorganization of a small business that is "currently occupied with/busy in commercial or business activities" but not to a small business no longer so occupied. *Id. at *6.*

Finally, the court relied on interpretations of "engaged in" in eligibility provisions applicable to railroads under subchapter IV of chapter 11 and to chapter 12 debtors that apply a contemporary analysis to eligibility. *Id.* at *7. Thus, a former railroad did not qualify for subchapter IV,[425] and a family farmer must be currently engaged in a farming operation or intend to continue to engage in a farming operation at the time of the filing of the petition. [426]

The *Johnson* court also rejected the debtor's contention that the debtor was engaged in "commercial or business activities" because of his management of the mother's company.

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[425] Hileman v. Pittsburgh & Lake Erie Props., Inc. (*In re* Pittsburgh & Lake Erie Props., Inc.), 290 F.3d 516, 519 (3rd Cir. 2002).
[426] Watford v. Federal Land Bank of Columbia (*In re* Watford), 898 F.2d 1525, 1528 (11th Cir. 1990). *See also In re* McLawchlin, 511 B.R. 422, 427-28 (Bankr. S.D. Tex. 2014).

Applying dictionary definitions of "commerce" and "business" to the eligibility statute's language, the court concluded that a person engaged in "commercial or business activities" is "a person engaged in the exchange or buying and selling of economic goods or services for profit." *Id.* at *8.

Neither the debtor nor the spouse was engaged in the exchange or buying and selling of goods or services for their own profit. Because they had no ownership in the mother's company, the debtor's management of the company could not be for their indirect profit. Accordingly, the debtor's management of the mother's company as an employee and officer did not meet the requirement that the debtor be engaged in commercial or business activities. *Id.* at *8.

The court in *In re Ikalowych,* 2021 Bankr. LEXIS 997 (Bankr. D. Colo. 2021), agreed with the rulings in *Thurmon* and *Johnson* that whether a debtor is engaged in commercial or business activities must be determined as of the petition date. *Id.* at *32-38.[427] The *Ikalowych* court, however, held that an individual was eligible for subchapter V when the limited liability company that the debtor managed and in which the debtor held an indirect 30 percent ownership interest had surrendered its assets to the secured lender immediately before filing, but the individual was still engaged in wind down work relating to the company. *Id.* at *42-46.

Based on the text of the statute, dictionary definitions of "commercial, "business", and "activities", and phrases analogous to "commercial or business activities" in other federal statutes, *id.* at *22-31, the *Ikalowych* court reasoned that the phrase "commercial or business activities" is "exceptionally broad." *Id.* at *22.

[427] The *Ikalowych* court qualified its ruling, *id.* at *38:

> [F]ocusing only on the exact nanosecond the Petition was filed is a bit too narrow. For example, perhaps the Debtor did no work on the Petition Date itself. So, in considering whether the Debtor was engaged in "commercial or business activity" as of the Petition Date, the Court deems relevant the circumstances immediately preceding and subsequent to the Petition Date as well as the Debtor's conduct and intent.

Thus, the *Ikalowych* court interpreted "commercial or business activities" to mean, *id.* at *22:

> [A]ny private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so).

The *Ikalowych* court acknowledged that the facts in *Thurmon* and *Johnson* were similar to, but not the same as, the facts in the case before it. *Id.* at * 43, * 46. The distinguishing factor was the wind down work, which included interactions with the lender and a landlord, cleanup and turnover of leased premises, assisting with payroll, dealing with tax accountants and tax issues, and organization and storage of business records. *Id.* at *42. The court reasoned, "Each category of Wind Down Work itself constitutes 'commercial or business activities' in the broad sense." *Id.* at *46.

The *Ikalowych* court also considered whether the debtor was "engaged in commercial or business activities" based on two other activities.

First, the debtor was the sole owner of a limited liability company that he formed and managed as a mechanism to obtain income through investments and the provision services. This limited liability company owned 30 percent of the operating company just discussed and also received income from the debtor's services as a board member of a cemetery company and as a consultant for other companies. The court concluded, "Managing or directing the operations of a limited liability company is a 'commercial or business activity.'" *Id.* at *40.

Second, the court considered the debtor's employment by an insurance brokerage company (in which the debtor had no ownership interest) to sell its commercial insurance projects, which had begun shortly before filing, qualified as "commercial or business activities."

Under the broad scope of the definition, the court ruled, *id*. at *47 (citations to dictionary definitions omitted):

> [T]he Debtor's work as a wage earner with [the insurance company] constitutes 'commercial or business activities. After all, his role is selling a product in the private marketplace in order to make money for himself and his employer. That is what "commercial activity" and "business activity" means.

The court realized that its conclusion "suggests that virtually all private sector wage earners may be considered as 'engaged in commercial or business activities.' So be it." *Id.* at *47. But the court continued, this does not mean that every private sector wage earner is eligible for subchapter V because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at *48.

Having determined that the debtor was engaged in commercial or business activities, the court turned to the question of whether more than 50 percent of the debts arose from those activities. None of the debts arose from the debtor's work as a salaried employee, so those activities did not make the debtor eligible for subchapter V.

The debtor was liable on personal guarantees of certain debts of the operating company that amounted to 86 percent of the total debt. To "arise from" the debtor's commercial or business activities, the court reasoned, debts "must be directly and substantially connected to the 'commercial or business activities' of the debtor." *Id.* at *51.[428] The court ruled that these debts arose from the debtor's commercial or business activities with both the operating company and the limited liability company that owned 30 percent of it. *Id.* at *52.

[428] The court quoted *In re Woods,* 743 F.3d 689, 698 (10th Cir. 2014), which in the chapter 12 context stated, "a debt 'for' a principal residence 'arises out of' a farming operation only if the debt is directly and substantially connected to the farming operation."

The issue of whether a debtor is "engaged in commercial or business activities" may also arise in a non-individual case. In *In re Two Wheels Properties, LLC,* 2020 WL 7786927 (Bankr. S.D. Tex. 2020),[429] a corporation's charter had been forfeited under state law for tax reasons, state law did not permit its reinstatement in that circumstance, and state law permitted only the liquidation of its assets. The court ruled that, because the corporation could not be "engaged in commercial or business activities" under state law, it was ineligible to be a sub V debtor.

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

Eligibility for subchapter V requires that not less than 50 percent of the debtor's debts must arise from the commercial or business activities of the debtor.[430] Chapter 12 similarly conditions eligibility on a specified percentage of debt arising from a farming or fishing operation.[431] The court in *In re Ikalowych,* 2021 Bankr. LEXIS 997 at *51 (Bankr. D. Colo. 2021), applying chapter 12 case law, concluded that qualifying business debts "must be directly and substantially connected to the 'commercial or business activities' of the debtor." *Id.* at *51.[432]

[429] *Cf. In re* BK Technologies, Inc., 2021 WL 1230123 (Bankr. N.D. W.Va. 2021) (Dismissing sub V case based on bad faith because, among other things, the debtor had liquidated its assets prior to filing the petition and, therefore, was not engaged in business).

[430] The requirement is in paragraph (A) of New § 1182(1), which governs subchapter V eligibility under the CARES Act, which increased the debt limit for subchapter V eligibility. When the increased debt limit sunsets on March 27, 2022, § 101(51D) will govern sub V eligibility. See Section III(B). Paragraph (A) is the same in both statutes. See Section III(B).

[431] For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor's income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B).

[432] The court quoted *In re Woods,* 743 F.3d 689, 698 (10th Cir. 2014), which in the chapter 12 context stated, "a debt 'for' a principal residence 'arises out of' a farming operation only if the debt is directly and substantially connected to the farming operation."

In re Sullivan, 2021 WL 1250805 (Bankr. D. Colo. 2021), examined the question of how to determine whether debts "arose from the commercial or business activities of the debtor" in detail.[433]

The debt in question was the debtor's obligation imposed in a divorce proceeding to pay the former spouse an "equalization payment" for the former spouse's share of the value of the debtor's business that the debtor retained. Shortly after the filing of the case, the COVID-19 pandemic hit and resulted in the liquidation of the business.

Proper characterization of the equalization payment was critical because, if it were not a business debt, the debtor's business debts would be less than 50 percent of the total, and the debtor would be ineligible to be a sub V debtor. Because the court concluded that the equalization debt did not arise from a business or commercial purpose, the court ruled that the debtor was ineligible and denied confirmation of the sub V plan. *Id.* at*7.[434]

The *Sullivan* court began its analysis by noting that, although the Bankruptcy Code does not define when a debt arises from "commercial or business activities," it defines "consumer debts" in § 101(18) as "debts incurred by an individual primarily for a personal, family, or household purpose." In determining whether a debt is for a "personal, family, or household purpose," the court continued, courts have focused on the debtor's purpose in incurring the

[433] The definition in effect under the CARES Act is in § 1182(a)(1). See Section III(C). The *Sullivan* court discussed the definition in § 101(51D)(A), which has the same language, because the case was filed before enactment of the CARES Act, and the CARES Act applies only to cases filed after its enactment.

[434] The situation in *Sullivan* suggests two questions.

The first is whether the former spouse or any other party in interest timely objected to the debtor's sub V election as Interim Bankruptcy Rule 1020(b) requires. The court did not address whether a court may consider an out-of-time objection to the subchapter V election or whether the court may raise the issue *sua sponte* after the time for an objection has expired.

A second, more practical, question is what benefit the debtor expected to gain from a successful subchapter V case. Any debt arising from a separation agreement or divorce decree that is not a domestic support obligation is excepted from discharge under § 523(a)(15), and the sub V discharge of an individual is subject to all exceptions in § 523(a). See Part IX. A plan could not have eliminated the debtor's liability for the equalization payment.

debt,[435] reasoning that a debt incurred with a "profit motive" or an "eye toward profit" is not a consumer debt. *Id.* at 3.[436] The court noted rulings that student loans,[437] alimony obligations,[438] and divorce-related debts are consumer debts.[439]

The debtor argued that the equalization debt arose from business or commercial activities because it represented a transfer of the value of the business, akin to one partner's buy-out of another's interest in a business. The court acknowledged, "[I]t is possible to characterize this debt as a business debt and it is possible to treat many otherwise personal or family debts as debts incurred with an eye toward profit," but noted that the profit motive inquiry raised difficulties: "Probably all courts would agree that the home mortgage debt is a consumer debt and yet the family home is the asset that most families view as their greatest investment – the one that they purchase with an eye toward appreciation in value." *Sullivan,* 2021 WL at 1250805 at *3.

Because the legislative history of the definition of "consumer debt" in § 101(8) indicated that it was adapted from consumer protection laws and because the § 101(8) definition mirrors the definition of consumer debt in the Truth in Lending Act ("TILA"), the court sought further guidance from cases interpreting the TILA. *Id.* at *3.

Cases under the TILA, the court explained, focus on the purpose of the loan transaction. The *Sullivan* court quoted a five-factor test that another court employed in *Sundby v. Marquee*

[435] The court cited *In re* Garcia, 606 B.R. 9, 106 (Bankr. D. N.M. 2019).
[436] The court cited Stewart v. U.S. Trustee (*In re* Stewart), 175 F.3d 769, 806 (10th Cir. 1999) and *In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988).
[437] The court cited Stewart v. U.S. Trustee (*In re* Stewart*)*, 175 F.3d 769, 807 (10th Cir. 1999).
[438] The court cited Stewart v. U.S. Trustee (*In re* Stewart*)*, 175 F.3d 769, 807 (10th Cir. 1999).
[439] The court cited Kestell v. Kestell (*In re* Kestell), 99 F.3d 146, 149 (4th Cir. 1996); *In re* Garcia, 606 B.R. 98, 105 (Bankr. D. N. M. 2019), and *In re* Traub, 140 B.R. 286 (Bankr. D. N.M. 1992).

Funding Group, Inc., 2020 WL 5535357 at * 8-9 (S.D. Ca. 2000) (internal quotations and citations omitted):

1. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be a business purpose.

2. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.

3. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.

4. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.

5. The borrower's statement of purpose for the loan.

The *Sullivan* court concluded that the first four of these factors favored characterization of the equalization debt as a business debt. But the court questioned whether it had a business purpose. "While the debtor characterizes the equalization payment as payment for the [debtor's business], the separation agreement does not describe it in that fashion. Rather, it states that it was a payment 'to equalize the division of marital property . . . .', and [the business] was only one asset of their marital property." *Sullivan,* 2021 WL 1250805 at *4.

The *Sullivan* court next looked to federal tax law as a source for distinguishing between "business" and "personal" payments in that it generally permits a deduction for "ordinary and necessary business expenses," but not for most personal expenses. *Id.* at *4.

The court analyzed the Supreme Court's decision in *United States v. Gilmore,* 372 U.S. 39 (1963), which held that a taxpayer could not deduct legal fees incurred in connection with the division of business interests in a divorce proceeding as a business expense. Rejecting the

taxpayer's argument that the legal fees were a business expense because they were incurred to protect interests in various corporations, the Supreme Court held that the focus should be on "the original character of the claim with respect to which an expense was incurred, rather than its potential consequences on the fortunes of the taxpayer." 372 U.S. at 49. Because the spouse's claims stemmed entirely from the marital relationship, and not from income-producing activity, the Court concluded that the legal fees were not business expenses and denied the deduction. *Id.* at 52. The *Sullivan* court noted that the Supreme Court stated, "[T]he marriage relationship can hardly be deemed an income-producing activity." *Sullivan,* 2021 WL 1250805 at *4, *quoting Gilmore,* 372 U.S. at 52 n. 22.

After analyzing marriage dissolution under state law as an equitable proceeding including the division of marital property to each spouse of what equitably belongs to each spouse, the *Sullivan* court concluded, 2021 WL 1250805 at *4 (citations omitted):

> [T]he equalization payment debt is rooted and grounded in the equitable termination of their marriage. The equitable distribution of their marital property was not a business or commercial transaction – it did not stem from a profit motive. Instead, it was a method of ensuring that each spouse received their fair share of marital property. This is inherently a personal and family-related purpose. The fact that the parties' marital property included a business does not alter the underlying purpose of the property division.

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******Footnote 35 on page 14: New Section III(D) in SUPP XV covers this point.***

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IV. The Subchapter V Trustee

E. Compensation of Subchapter V Trustee

2. Compensation of non-standing subchapter V trustee

******Insert text on page 118 in SUPP XIV at end of first full paragraph***

In *In re Hunts Point Enterprises, LLC,* 2021 Bankr. LEXIS 771 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss it. Because the case revolved around a two-party dispute and the debtor's request for dismissal demonstrated that it no longer wanted to file a plan of reorganization, the court concluded that cause existed for dismissal of the case, conditioned on the debtor's payment of the sub V trustee's compensation.

******Insert text on page 118 in SUPP XIV at end of third full paragraph***

Judges in the Middle District of Florida have included a provision for interim trustee compensation in subchapter V cases in an "Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference."[440] The orders require the debtor to pay $ 1,000 as interim compensation to the sub V trustee within 30 days of the petition date and monthly thereafter. The amount is subject to adjustment upon request of any interested party and the court's approval of the trustee's compensation under § 330. The debtor must include the interim compensation in any cash collateral budget.

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[440] *E.g., In re Nostalgia Family Medicine P.A.,* Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Mar. 26, 2021).

F. Trustee's Employment of Attorneys and Other Professionals

******Delete last paragraph on page 31 and add text***

In *In re McConnell,* 2021 WL 203331 at * 16-18 (Bankr. N.D. Ga. 2021), however, the court determined that 28 U.S.C. § 1654 did not apply to require a nonlawyer panel trustee in a chapter 7 case to retain a lawyer to file an application for the retention of a real estate broker.

The *McConnell* court reasoned, "The nature of proceedings in bankruptcy courts for the administration of estate assets in Chapter 7 cases suggests that the rule of 28 U.S.C. § 1654 applicable in a federal lawsuit between discrete parties should not be extended to apply to a chapter 7 trustee's filing of routine papers that the Bankruptcy Code and Bankruptcy Rules require in connection with the sale of property." *Id.* at 17. The court observed that, without discussing § 1654, bankruptcy courts have recognized that a trustee may file papers in a bankruptcy court without a lawyer in the course of performing the trustee's duties, such as the filing of applications to retain professionals[441] and routine objections to claims.[442] *Id.* at 18 & nn. 59-60.

The nature of reorganization proceedings in bankruptcy courts and the facilitative, advisory, and monitoring role that subchapter V specifically contemplates for the trustee suggest

[441] The court cited: *In re* Garcia, 335 B.R. 717, 726 (B.A.P. 9th Cir. 2005); *In re* Jay, 2018 WL 2176082 at *12 (Bankr. D. Utah 2018), *aff'd* 2019 WL 4645385 (D. Utah 2019) ("[I]n simple cases, trustees should prepare applications to employ realtors or accountants as they are seldom contested and routinely granted."); *In re* McLean Wine Co., Inc., 463 B.R. 838. 848-49 (Bankr. E.D. Mich. 2011) (application to employ other professionals is trustee work); *In re* Peterson, 566 B.R. 179, 195, 207-08 (Bankr. M.D. Tenn. 2017) (application for employment of professionals, including accountant and special counsel, is trustee duty). *Contra, e.g., In re* Yovtcheva, 590 B.R. 307 (Bankr. E.D. Pa. 2018); *In re* Hambrick, 2012 WL 10739279, at * 5 (Bankr. N.D. Ga. 2012); *In re* Holub, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991).

[442] The court cited: *In re* King, 546 B.R. 682, 699 (Bankr. S.D. Tex. 2016) (Routine objection to claim that is unopposed and does not require legal analysis or a brief falls within trustee's duty); *In re* Lexington Hearth Lamp and Leisure, LLC, 402 B.R. 135 (Bankr. M.D.N.C. 2009) (Although the court concluded that compensation is allowed for services that require a law license, *id.* at 142, the court ruled that the filing of objections to claims that require no legal analysis is a trustee duty. *Id.* at 144-45.) *In re* Perkins, 244 B.R. 835 (Bankr. D. Montana 2000); *In re* Holub, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991). *Contra, e.g., In re* Howard Love Pipeline Supply Co., 253 B.R. 790 (Bankr. E.D. Tex. 2000) ("[T]he express duty of the trustee to object to improper claims does not authorize a non-attorney trustee to engage in the unauthorized practice of law.").

that 28 U.S.C. § 1654 likewise should not apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

******Insert in footnote 91 on page 31:***

J. J. Rissell, Allentown, P.A. Trust v. Marchelos, 976 F. 3d 1233 (11th Cir. 2020) (trust);

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V. Debtor as Debtor in Possession and Duties of Debtor

C. Removal of Debtor in Possession

******Insert text on page 38***

Although § 1185(a) does not list the debtor's bad faith as a ground for removal of the debtor from possession, the specified grounds are not exhaustive, and a court may consider it.[443]

******Insert text on page 39***

Even though a sub V trustee cannot file a plan, the court in *In re Young*, 2021 WL 1191621 at *7 (Bankr. D. N.M. 2021), removed the debtor from possession due to gross mismanagement, bad faith, and dishonesty instead of converting the case on those grounds. The court reasoned that, because the sub V trustee was familiar with the case and might be able to liquidate the estate's assets and make distributions to creditors for a lower fee than a chapter 7 trustee would charge, removal of the debtor in possession was a better option than conversion. *Id.* at 7. The court reserved for a later day the possibility that eventual conversion to chapter 7 might be necessary.[444]

[443] *In re* Young, 2021 WL 1191621 at * 6-7 (Bankr. D. N.M. 2021).

[444] Another potential option after a trustee's liquidation of a sub V estate's assets is a so-called "structured dismissal" that would involve payment of allowed administrative expenses and distributions on allowed claims, followed by dismissal of the case. *See generally,* Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017). The Supreme Court observed in *Jevic Holding Corp., id. at* 979:

****

VI. Administrative and Procedural Features of Subchapter V

B. Elimination of Requirement of Disclosure Statement

******Delete last two sentences of second full paragraph on page 42 and replace with:***

Subchapter V does not require that the plan contain "adequate information," and it does not provide for prior judicial review of the required information before solicitation of acceptances of the plan. Nevertheless, confirmation of a sub V plan requires that a plan comply with the applicable provisions of § 1129(a),[445] among which are the requirements that a plan[446] and its proponent[447] comply with applicable provisions of chapter 11 and that the plan be proposed in good faith.[448] These provisions provide the basis for a court to consider whether a debtor's plan contains the information that New § 1181(a) requires. Material or intentional errors or omissions could provide a basis for denial of confirmation.

> [T]he [Bankruptcy] Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a
>
> > "hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).
>
> Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." Ibid., n. 973.

[445] New § 1191(a), (b). See Section VIII(A).
[446] § 1129(a)(1).
[447] § 1129(a)(2).
[448] § 1129(a)(3).

C. Required Status Conference and Debtor Report

******Add as text of footnote 142 on page 42***

Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

******Insert text page 43 after footnote 143***

Section VI(J) discusses extension of the deadline.

******Insert text on page 43 after footnote 145***

Subchapter V does not specify any consequences if the status conference does not timely occur or for the debtor's failure to file a report. Courts have noted that the deadline for the status conference is a deadline for the court, not the debtor, and that a debtor is not in default until the status conference has been set and the debtor fails to file the report at least 14 days before.[449]

A debtor's unexcused failure to file the report timely or to attend the status conference could be cause for dismissal or conversion of the case under § 1112(b) or denial of confirmation. "Cause" for dismissal includes unexcused failure to satisfy timely any filing or reporting requirement under the Bankruptcy Code, § 1112(b)(4)(F), and the failure to comply with an order of the court, § 1112(b)(4)(E). Confirmation of a subchapter V plan requires compliance by the proponent with applicable provisions of the Bankruptcy Code. § 1129(a)(2). Section VI(D) considers these issues further in the context of a debtor's failure to file a plan within the 90-day deadline of New § 1189(a).

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[449] *In re* Tibbens, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re* Wetter, 620 B.R. 243, 252 (Bankr. W.D. Va. 2020).

D. Time for Filing of Plan

******Insert text on page 45***

Section VI(J) discusses extension of the deadline.

******Add text to footnote 150 on page 45***

Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

****

******Delete last paragraph of Section VI(D) on page 46 and add text***

Subchapter V does not provide any consequences when a debtor does not timely file a plan. Under other provisions of chapter 11, however, a debtor's failure to comply with a plan deadline subjects the debtor to the risks of dismissal of the case, its conversion to chapter 7, or denial of confirmation of a plan.

As in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal under § 1112(b)(4)(J). When cause exists, § 1112(b)(1) states that the court, on request of a party in interest, *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interests of creditors and the estate, unless the court determines that the appointment of a trustee or examiner *under § 1104* is in the best interests of the estate. Because § 1104 does not apply in a subchapter V case,[450] § 1112(b)(1) requires the court to convert or dismiss the case if the debtor does not timely file a plan upon request of the sub V trustee, a creditor, or other party in interest.

Section 1112(b)(2), however, provides an exception to this requirement. It prohibits dismissal or conversion if: (1) the court "finds and specifically identifies unusual circumstances"

[450] New § 1181(a).

establishing that conversion or dismissal is not in the best interests of creditors; and (2) the debtor (or other party in interest) satisfies two other requirements, unless the ground for conversion or dismissal is substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

The first requirement for application of the exception is a reasonable likelihood that a plan will be confirmed within a reasonable time. § 1112(b)(4)(A). The second is that a reasonable justification for the act or omission constituting cause exist and that it be fixed within a reasonable time fixed by the court. § 1112(b)(4)(B).

Under these provisions, a debtor can overcome a motion for dismissal or conversion based on failure to timely file a plan by establishing a reasonable justification for missing the deadline, an ability to cure the omission (preferably by pointing to a plan already filed or a well-founded motion for an extension of the time to do so), and the likelihood of confirmation of a plan within a reasonable time.

Confirmation of a subchapter plan requires compliance with §§ 1129(a)(1) and (a)(2).[451] Paragraph (a)(1) requires that the plan comply with the applicable provisions of the Bankruptcy Code, and paragraph (a)(2) requires that the proponent of the plan comply with the applicable provisions of the Bankruptcy Code.

In *In re Seven Stars on the Hudson Corp.,* 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020), the court concluded that the failure to comply with the § 1189(a) deadline for the filing of a plan would preclude confirmation of a plan under §§ 1129(a)(1) and (2). The debtor had elected application of subchapter V in a case filed before subchapter V's effective date, and the plan

[451] New § 1191(a) (confirmation of a consensual plan); New § 1191(b) (cramdown confirmation). See Section VIII(A).

deadline had already expired. After the court refused to extend the deadline based on the determination that the election to proceed under subchapter V in these circumstances was within the debtor's control, the court dismissed the case because the debtor could not possibly confirm a plan in view of the default.[452]

The court in *In re Tibbens,* 2021 WL 1087260 at *6 (Bankr. M.D.N.C. 2021), reached a contrary conclusion: "Although the failure to timely file a plan constitutes cause for dismissal under § 1112(b)(4)(J), nothing in the Bankruptcy Code suggests that this failure alone is fatal to confirmation."

The *Tibbens* court noted that the provisions of § 1112(b)(2) that prohibit dismissal or conversion under the circumstances just discussed apply, among other things, when the debtor can establish the likelihood of confirmation. Because Congress permitted a debtor to avoid conversion or dismissal by establishing an ability to confirm a plan, the court reasoned, a failure to comply with plan-filing deadlines does not prevent confirmation. *Tibbens,* 2021 WL 1087260 at *6. The court also concluded that legislative history and cases interpreting §§ 1129(a)(1) and (2) focused on contents of the plan and compliance with disclosure and solicitation requirements, not matters such as failure to comply with a deadline. *Id.* at 7.[453]

The *Tibbens* court permitted a debtor to convert a chapter 13 case, filed after enactment of subchapter V but before its effective date, to chapter 11 after the plan-filing deadline had expired but declined to extend the deadline because delays the debtor caused in the chapter 13

[452] Other courts have concluded that the court may extend the deadline for filing a plan (and for the status conference) in these circumstances. See Part XIII.

[453] The *Tibbens* court cited Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988) (§ 1129(a)(1)); *In re* Multiut Corp., 449 B.R. 323 (Bankr. N.D. Ill. 2011) (§ 1129(a)(1)); *In re* Cypresswood Land Partners, I, 409 B.R. 396, 423-24 (Bankr. S.D. Tex. 2009) (§ 1129(a)(2)) ("Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125."); and 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1] (§ 1129(a)(1)) ("[T]he courts have recognized that the complexity of plan confirmation permits notions of 'harmless error,' so that technical noncompliance with a provision that does not significantly affect creditor rights will not block confirmation.");

case and failures to comply with directives of the court were within the debtor's control and were circumstances for which the debtor justly should be held accountable. The issue of dismissal or conversion of the case was not before the court, and the court did not address it.

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I. Bar Date for Filing of Proof of Claim

******Add footnote on page 50 at end of third full paragraph and new Section VI(J)***

. . . the principal amount.[454]

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

New § 1188 requires a status conference within 60 days after entry of the order for relief and the filing by the debtor of a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization at least 14 days before the status conference. New section 1189(b) requires the debtor to file a plan within 90 days after the order for relief.

Both provisions state that the times run from the date of the order for relief *"under this chapter.*" Under this language, if a debtor in a chapter 7 or 13 case seeks to convert the case to chapter 11 and elect sub V status, it is arguable that the time periods begin on the date of conversion.

Section 348(a), however, provides that conversion of a case from one chapter to another "does not effect a change in the date of the . . . order for relief." Courts have therefore ruled that the deadlines are measured from the date of the order for relief in the original case.[455] Part XIII

[454] *But see In re* Baker, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020) (The expiration of the time for governmental claims is important because the amount of the claims will affect the drafting of the plan and consideration of its feasibility; this supports granting the debtor an extension of time to file the plan until the bar date has passed.).
[455] *In re* Tibbens, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re* Trepetin, 617 B.R. 841, 844 (Bankr. D. Md. 2020).

considers extensions of the deadlines in the context of the availability of subchapter V in cases pending before enactment of subchapter V.

The court may extend the deadlines if the need for an extension is "attributable to circumstances for which the debtor should not justly be held accountable." New §§ 1188(b), 1189(b). Courts have noted that the requirement for an extension is more stringent that the "for cause" standard of Bankruptcy Rule 9006(b), which governs extensions generally, and § 1121(d)(1), which permits extension of the exclusivity period for the debtor to file and obtain confirmation of a plan in a non-sub V case.[456]

Sections 1188(b) and 1189(b) use the same language to provide for extension of their deadlines as § 1221, which governs extension of the 90-day period for the debtor to file a plan in a chapter 12 case. Courts have, therefore, looked to chapter 12 cases applying § 1221 for guidance in interpreting the identical language in subchapter V.[457]

The court in *In re Trepetin,* 617 B.R. 841 (Bankr. D. Md. 2020), noted that courts and commentators had interpreted § 1221 to permit an extension if the debtor "clearly demonstrates that the debtor's inability to file a plan is due to circumstances beyond the debtor's control."[458]

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[456] *E.g., In re* Online King, LLC, 2021 Bankr. LEXIS 198 at *21 (Bankr. E.D.N.Y. 2021); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).

[457] *E.g., In re* Tibbens, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re* Baker, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020); *In re* Trepetin, 617 B.R. 841, 847-48 (Bankr. D. Md. 2020).

[458] *In re* Trepetin*,* 617 B.R. 841, 848 (Bankr. D. Md. 2020) (quotations and punctuation omitted), *quoting In re* Gullicksrud*,* 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016) (quoting 7 COLLIER ON BANKRUPTCY ¶ 221.012[2]), *and also citing In re* Marek, 2012 WL 2153648, at *8 (Bankr. D. Idaho 2012), and *In re* Raylyn AG, Inc., 72 B.R. 523, 524 (Bankr. S.D. Iowa 1987).

The court reasoned that it was appropriate to apply a similar standard to requests for extensions under §§ 1188(b) and 1189(b). *Id.* at 848-49. Other courts have done the same.[459]

Courts have taken different approaches to the determination of whether circumstances are "beyond the debtor's control." The *Trepetin* court formulated the inquiry as whether the debtor is "fairly responsible" for the inability to comply with the deadline.[460] In *In re Seven Stars on the Hudson Corp.,* 618 B.R. 333, 345 (Bankr. S.D. Fla. 2020), however, the court concluded that the language asks whether the need for an extension is due to *circumstances* beyond the debtor's control, not whether *the debtor* was responsible for the inability to meet the deadlines.

Trepetin and *Seven Stars* involved a debtor's request to proceed under subchapter V in a case pending prior to its enactment when the deadlines had already expired. The *Trepetin* court concluded that the deadlines could be extended because the debtor was not responsible for the inability to meet the deadlines that had not previously existed. The *Seven Stars* court concluded that the circumstances were entirely within the debtor's control and that no external factors beyond the debtor's control contributed to the inability to meet the deadlines.

In *In re Tibbens,* 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should justly be held accountable. *Id.* at *9.

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[459] *E.g., In re* Tibbens, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re* Baker, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).
[460] *Accord, In re* Wetter, 620 B.R. 243 (Bankr. W.D. Va. 2020).

In re Keffer, 2021 Bankr. LEXIS 1020 (Bankr. S.D. W.Va. 2021), also considered a chapter 13 debtor's request to convert to chapter 11 and elect sub V after the deadlines for the status conference and the filing of a plan had expired. The need for chapter 11 relief arose, the court explained, after the Internal Revenue Service filed a proof of claim for substantially more than the debtor anticipated, increasing his liabilities above the chapter 13 debt limit and making the debtor ineligible for chapter 13.[461]

The propriety of conversion, the court explained, turned on whether to extend the deadlines. Without an extension, the debtor's chapter 11 case would be subject to dismissal or conversion to chapter 7 for cause for failure to file a plan timely. *Id.* at *26-27.

The *Keffer* court concluded that *Trepetin* provided a superior approach to the extension issue and rejected the *Seven Stars* view. *Id.* at 25. Because the debtor had proceeded appropriately in the chapter 13 case, and because the debtor was not aware of the large amount of his tax liability until the IRS filed its proof of claim and therefore did not know that chapter 13 would be unavailable, the court ruled that the debtor was not justly accountable for the circumstances necessitating an extension of the deadlines. *Id.* at *27-28. The court directed that the deadlines run from the date of its order. *Id* at * 29.

The court in *In re Baker,* 625 B.R. 27 (Bankr. S.D. Tex. 2020), identified four factors to consider in determining whether to extend the deadline for the filing of a plan: (1) whether the circumstances raised by the debtor were within the debtor's control; (2) whether the debtor had made progress in drafting a plan; (3) whether the deficiencies preventing that draft from being filed were reasonably related to the identified circumstances; and (4) whether any party-in-

[461] The court did not address whether chapter 13 eligibility should be determined as of the petition date based on the debtor's schedules, which showed that he was eligible. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 12:8 (2020).

interest had moved to dismiss or convert the case or otherwise objected to a deadline extension in any way.

Regardless of the standard for extending the deadlines, the debtor must describe the circumstances beyond its control and explain why they preclude the timely filing of a plan. For example, although circumstances such as the Covid-19 pandemic, inclement weather, and the Jewish holidays may constitute acceptable reasons for an extension, they do not warrant an extension when the debtor does not demonstrate how they affected the debtor's ability to meet the deadline.[462] Circumstances such as the amount of work required to negotiate and propose a plan and competing demands on the debtors – common to any bankruptcy case – are insufficient to justify an extension.[463]

The court may grant an extension even if the deadline has expired at the time the debtor requests it.[464] Nevertheless, the better practice is for the debtor to file a motion for an extension in time to permit the court to schedule a hearing on it before the deadline terminates because the failure to timely file a plan constitutes "cause" for dismissal or conversion of the case under § 1112(b)(4)(J).[465]

Because subchapter V does not contain a deadline for confirmation of a plan and New § 1193 permits preconfirmation modification of a plan at any time, a debtor may consider the

[462] *In re* Online King, LLC, 2021 Bankr. Lexis 198 at *27-30 (Bankr. E.D. Tex. 2021) (pandemic and Jewish holidays); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at *2 (Bankr. M.D. N.C. 2020) (pandemic and inclement weather preventing inspection of business premises for appraisal).
[463] *In re* Online King, LLC, 2021 Bankr. Lexis 198 at *27 (Bankr. E.D. Tex. 2021).
[464] *E.g., In re* Tibbens, 2021 WL 1087260 at * 8 (Bankr. M.D.N.C. 2021); *In re* Online King LLC, 2021 Bankr. Lexis 198 at * 12-16 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03.
[465] *In re* Online King LLC, 2021 Bankr. Lexis 198 at * 12-16 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03. See Section VI(D).

timely filing of a "placeholder" plan with the expectation of a later modification instead of seeking an extension.[466]

The court in *In re Baker*, 625 B.R. 27, 38 (Bankr. S.D. Tex. 2020), criticized the strategy as "a waste of time and resources for all parties-in-interest" that "does not represent Congress's intent" in enacting subchapter V. . . . The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans."

Stating that "filing a placeholder plan merely to satisfy the statutory plan deadline serves no justiciable purpose, contributes to increased costs, and subverts the intent underlying subchapter V, the *Baker* court announced, *id.* at 38*:*

> [T]his Court disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable.

****

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

******Add text to footnote 199 on page 57***

For cases applying the applicable § 1129(a) standards, see *In re* Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020); *In re* Pearl Resources, LLC*,* 622 B.R. 236 (Bankr. S.D. Tex. 2020).

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[466] In *In re Baker,* 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020), the court described a "placeholder plan" as "a skeletal document filed to satisfy a filing deadline, with the intent to file a completed, substantive document later."

B. Cramdown Confirmation Under New § 1191(b)

1. Changes in the cramdown rules and the "fair and equitable" test

******Insert footnote after "requirement" on page 61***

. . . requirement.[467]

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

******Insert text on page 63***

The court in *In re Young,* 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021), ruled that individuals who claimed that they had no disposable income could not obtain confirmation of their sub V plan.[468]

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D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases

******Insert new text after first full paragraph on page 128 in SUPP XIV***

An issue related to classification is that cramdown confirmation of a subchapter V plan requires, among other things, that the plan not "discriminate unfairly." New § 1191(b).

******Insert text at end of page 128 in SUPP XIV***

In re Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020), involved cramdown confirmation of a sub V plan that provided different treatment for two classes of unsecured claims. One class consisted of disputed unsecured claims of a group of creditors that totaled approximately $ 360,000; the other class included all other unsecured claims of approximately $ 50,000.

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[467] See Section VIII(D)(1).

[468] The *Young* court reasoned, "Debtors who elect not to make plan payments should not get the benefit of subchapter V. If making reasonable plan payments while working is unpalatable to the Debtors, they should have filed a chapter 7 case." *In re Young,* 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021).

The plan provided for creditors in each class to receive payments of 59 percent of their claims from disposable income over five years, but the method of payments differed. The undisputed creditors were to receive equal monthly payments. The payments for the disputed creditors, however, were adjusted to reflect the seasonal nature of the debtor's business, which was the sale of retail outdoor sporting goods in South Lake Tahoe, California.[469] Further, the plan provided for the payments on the disputed claims to be made into a reserve account pending determination of the objections to the claims. *Id.* at 6.

The *Fall Line Tree Service* court concluded that the differences in treatment were "rationally related to the rights of the parties and to seasonal cash flow realities of the Lake Tahoe recreation market" and ruled that the plan did not discriminate unfairly. *Id.* at 6.

******Add to footnote 397 on page 128 in SUPP XIV***

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

****

3. Classification and voting issues relating to priority tax claims

******Insert footnote on page 130 in SUPP XIV in first full paragraph***

. . . is not required.[470]

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[469] Payments for the months of April through June and September through November were twice as much as payments for the months off January through March and July, August, and December.

[470] *See In re* Mangia Pizza Investments, LP, 480 B.R. 669 (Bankr. W.D. Tex. 2012); *In re* Gregory Boat Co., 144 B.R. 361, 365 (Bankr. E.D. Mich. 1992); *In re* Perdido Motel Group, Inc., 101 B.R. 289 (Bankr. N.D. Ala. 1989); 7 COLLIER ON BANKRUPTCY ¶ 1129.02[9][c][i] (Class of unsecured tax claims receiving treatment conforming with § 1129(a)(9)(C) "need not be solicited for its vote, and also does not count as an impaired class for section 1129(a)(10)."); 6 NORTON BANKRUPTCY LAW AND PRACTICE 3d § 112:24 ("Under Code § 1123(a)(1), unsecured priority tax claims under § 507(a)(8) do not have to be separately classified. Arguably, despite a plan's classification of such a claim and deferred payment pursuant to Code § 1129(a)(9)(C), such class should not be counted as a class under Code § 1129(a)(8) or (10).").

******Insert new Sections VIII(D)(5), (6), and (7) beginning on page 131 in SUPP XIV***

5. The "best interests" or "liquidation" test of § 1129(a)(7)

Section 1129(a)(7)(A)(ii) requires that a creditor who has not accepted the plan must receive under the plan property with a value that is not less than what the creditor would receive if the debtor were liquidated under chapter 7.

In re Young, 2021 WL 1191621 (Bankr. D. N.M. 2021), determined that a plan did not comply with this requirement based on its finding that the fees of a chapter 7 trustee would be less than the anticipated costs of liquidating property under a plan.

In re Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020), discusses evidentiary issues in connection relating to the liquidation analysis.

The *Fall Line Tree Service* court rejected an objecting creditor's argument that purchased goodwill, arising from the debtor's earlier acquisition of its business from the creditor, should be included in the liquidation analysis under Generally Accepted Accounting Principles. The court concluded, "[P]urchased goodwill in the original sale of the going concern that has since devolved into this chapter 11 case is not an asset for purposes of hypothetical chapter 7 liquidation analysis." *Id.* at 4.

The court also rejected the creditor's assertion that the debtor's monthly operating reports showed that the value of its inventory was understated, ruling that such reports are not probative of inventory value. The admissible evidence, the court continued, showed that the debtor had used book value at actual wholesale cost in its liquidation analysis, which the court thought was actually more than a chapter 7 liquidation would produce. *Id.* at *4.

6. Voting by holder of disputed claim

In re Fall Line Tree Service, Inc., 2020 WL 7082416 at *2 (Bankr. E.D. Cal. 2020), serves as a reminder that only the holder of an *allowed* claim is entitled to vote on a chapter 11 plan under § 1126(a).[471] Bankruptcy Rule 3018(a) permits the court, after notice and a hearing, to allow a claim temporarily in an amount that the court deems proper for the purpose of accepting or rejecting a plan, but the creditor had not sought that relief.[472]

7. Individual must be current on postpetition domestic support obligations

The confirmation requirement of § 1129(a)(14) is that an individual debtor have paid all amounts payable on a domestic support obligation ("DSO") "that first became payable" after the petition date. It makes no exception when a debtor's inability to pay a postpetition DSO is due to circumstances beyond the debtor's control. *In re Sullivan*, 2021 WL 1250805 at *5-6 (Bankr. D. Colo, 2021).[473]

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[471] Section 1126(a) states, "The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan."

[472] The creditor in *Fall Line Tree Service* was the only creditor in the class, rejected the plan, and objected to its confirmation. The fact that the court disregarded its claim for voting purposes, therefore, did not affect the result in the case.

[473] The problem for the debtor in *Sullivan* was that his monthly obligations for alimony and child support were $ 16,835 and his gross monthly income was $ 7,600. The debtor was seeking to modify those obligations in the divorce case and proposed to modify his plan at a later time to accommodate a future ruling by the divorce court. In the meantime, he proposed to pay what he hoped the modified amounts would be. *Sullivan*, 2021 WL 1250805 at *5. In addition to ruling that § 1129(a)(14) prevented confirmation, the court noted, "Nor was the chapter 11 process meant to create a long-term shelter for debtors while they await the outcome of contested divorce litigation." *Id.* at 6.

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

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

******Insert text on page 75***

The court in *In re Spindler,* 623 B.R. 543 (Bankr. W.D. Wis. 2020), permitted a chapter 12 debtor to make direct payments to a mortgage lender under a plan that provided for the re-amortization of the debt in monthly payments over 30 years.

The court reviewed three approaches to direct payments that courts have taken in chapter 12 cases. One view is that the Bankruptcy Code prohibits direct payments on impaired or modified claims,[474] while a second allows debtors to pay secured creditors directly, regardless of their impaired status.[475] *Id.* at 546-47.

Most courts adopt a third approach that permits direct payments depending on the circumstances of the case.[476] *Id.* at 547. In deciding whether to permit direct payments, the *Spindler* court explained, these courts consider some or all of the factors that *In re Pianowski,* 92 B.R. 225 (Bankr. W.D. Mich. 1988) identified: (1) the past history of the debtor; (2) the business acumen of the debtor; (3) the debtor's post-filing compliance with statutory and court-imposed duties; (4) the good faith of the debtor; (5) the ability of the debtor to achieve meaningful reorganization absent direct payments; (6) the plan treatment of each creditor to

[474] The court cited *Fulkrod v. Savage (In re Fulkrod),* 973 F.2d 801 (9th Cir. 1992) and *In re Marriott,* 161 B.R. 816 (Bankr. S.D. Ill. 1993).
[475] The court cited *Wagner v. Armstrong (In re Wagner),* 36 F.3d 723 (8th Cir. 1994) and *In re Crum,* 85 B.R. 878 (Bankr. N.D. Fla. 1988).
[476] The court cited *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Speir*, 2018 WL 3814276 (Bankr. N.D. Miss. Aug. 8, 2018); *Westpfahl v. Clark (In re Westpfahl),* 168 B.R. 337 (Bankr. C.D. Ill. 1994); *In re Golden*, 131 B.R. 201 (Bankr. N.D. Fla. 1991); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); and *In re Pianowski*, 92 B.R. 225 (Bankr. W.D. Mich. 1988).

which a direct payment is proposed to be made; (7) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (8) the legal sophistication, incentive and ability of the affected creditor to monitor compliance; (9) the ability of the trustee and the court to monitor future direct payments; (10) the potential burden on the chapter 12 trustee; (11) the possible effect on the trustee's salary or funding of the U.S. Trustee system; (12) the potential for abuse of the bankruptcy system; and (13) the existence of other unique or special circumstances.

The *Spindler* court noted that *In re Aberegg,* 961 F.2d 1307 (7th Cir. 1992), concluded that chapter 13 debtors could make direct payments in some cases and that *Aberegg* took a pragmatic approach to direct payment of mortgages that extend beyond the term of the plan, finding that it would be counterproductive to require debtors to make payments through the trustee until completion of plan payments and then to arrange for direct payments thereafter. *Spindler,* 623 B.R. at 547.

The *Spindler* court adopted the majority approach and, based on the circumstances of the case, permitted the direct mortgage payments.[477] Among other things, the court noted that the debtor had negotiated payment terms with the lender and that it did not make sense to require the payment method to change at the end of the plan. *Id.* at 548-49.

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X. Discharge

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

******Insert text on page 83***

The court in *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 2021 WL 1096627 (Bankr. D. Md. 2021), ruled that

[477] The court also permitted, without objection, direct payment of a student loan.

the exceptions to discharge in § 523(a) do not apply to a cramdown discharge of an entity in a subchapter V case under § 1191(b). The court noted that it had to give meaning to the reference to § 1192 in the preamble to § 523(a) that the SBRA added in connection with enactment of subchapter V and that "the only reasonable meaning is that Congress intended to continue to limit application of the Section 523(a) exceptions in a Subchapter V case to individuals." *Id.* at *4. Legislative history explaining the intent of Congress in enacting subchapter V, the court noted, supported its interpretation. *Id.* at *4, *6.

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XIII. Effective Date and Retroactive Application of Subchapter V

******Insert text on page 109 after footnote 394***

Another court refused to permit a debtor to proceed under subchapter V in a case filed a month before its effective date. The court determined that the debtor had waited too long to make the sub V election and had amended its petition to do so only after two attempts to confirm a traditional chapter 11 plan had failed.[478]

******Add footnote and additional text at end of text on page 109***

…of subchapter V.[479] Although the CARES Act provided for the increased debt limit to expire on year after its enactment, the Covid-19 Bankruptcy Relief Extension Act of 2021[480] amended the CARES Act to extend the increased debt limit for an additional year.

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[478] *In re* Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. 2020). *Cf. In re* Tibbens, 2021 WL 1087260 at * 9 (Bankr. M.D.N.C. 2021) (After denial of confirmation of two chapter 13 plans, the debtor sought to convert to chapter 11 and elect subchapter V after the deadline for the filing of a plan had expired; the court converted the case to chapter 11 but declined to extend the deadline because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable.).

[479] See In *In re* Peak Serum, 623 B.R. 609 (Bankr. D. Col. 2020) (Debtors in pending chapter 11 cases may not elect application of subchapter V upon becoming eligible for subchapter V under the increase in the debt limit upon enactment of the CARES Act; increased debt limit applies only in cases filed after enactment.)

[480] Covid-19 Bankruptcy Relief Extension Act of 2021§ 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

******Add text to additional text of footnote 352 on page 145 in SUPP XIV***

In *In re Tibbens,* 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable. *Id.* at *9.

******Insert text on page 145 in Supp XIV (in page 109 text)***

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

******Insert text on page 146 in Supp XIV***

In *In re Hunts Point Enterprises, LLC,* 2021 Bankr. LEXIS 771 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss it. The court ruled that the debtor's debts did not exceed the eligibility limit but concluded that allowing the case to proceed under subchapter V would be an

abuse of its provisions because only the debtor could file a plan, and its request for dismissal demonstrated that it no longer wanted to do so. The court concluded that cause existed for its dismissal and prohibited the debtor from filing another bankruptcy petition for a year unless the debtor sought and obtained relief from that prohibition based on changed circumstances or good cause shown.

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

Enacted August 23, 2019, Effective February 19, 2020

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

May 2020

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

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

11 U.S.C.	**Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases**	New Subchapter V Section
§ 105(d)	§ 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it.	New § 1181(a)
§ 327(a)	New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than $ 10,000.	New § 1195(a)
§ 1101(1)	§ 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2).	New § 1181(a)
§ 1102(a) § 1102(b) § 1103	Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees. These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise.	New § 1181(b)
§ 1104 § 1105	Provisions for appointment of trustee (§ 1104) and termination of trustee's appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession)	New § 1181(a)
§ 1106	§ 1106 specification of duties of trustee and examiner is inapplicable. New § 1183(b) states the trustee's duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new § 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).	New § 1181(a)

§ 1107	§ 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties. § 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional's representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than § 10,000 impliedly has the same effect.	New § 1181(a)
§ 1108	§ 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business)	New § 1181(a)
§ 1115	§ 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor.	New § 1181(a)
§ 1116	§ 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties.	New § 1181(a)
§ 1121	Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1123(a)(8)	Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1123(c)	Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1125	Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c).	New § 1181(b)
§ 1127	Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193.	New § 1181(a)

§ 1129(a)(9)(A)	Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b).	New § 1191(e)
§ 1129(a)(15)	Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1129(b)	"Cramdown" provisions are not applicable. New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met. New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is "fair and equitable with respect to" each impaired, nonaccepting class. The "fair and equitable" requirement in subchapter V does not include the absolute priority rule. For a secured creditor, the "fair and equitable" requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1). To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3).	New § 1181(a)
§ 1129(c)	Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1129(e)	Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time) but does not contain a deadline for confirmation.	New § 1181(a)
§ 1141(d)	Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs.	New § 1181(c)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Election to Have Subchapter V Apply

  - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).[4]

  - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor or a debtor as defined under § 1182(1), and if so, whether it elects to have subchapter V apply. Interim Rule 1020(a).[5]

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

[2] United States Bankruptcy Judge, Middle District of North Carolina.

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

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

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

- Status Conference

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

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

- Filing Plan of Reorganization

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

- Confirmation Hearing[6]

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

- Appointment and Termination of Service of Trustee

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

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

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

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

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

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

- Discharge

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

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

- Modification of a Plan

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

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

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

- Plan Term

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

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

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

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

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

- Timing of Payments

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

Subchapter V Deadlines[11]

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

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

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

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

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

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

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

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

TIME PERIODS RELATED TO PLANS

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

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

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

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

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

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

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

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

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

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

DEADLINES THROUGHOUT THE CASE

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

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

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

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

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

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

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

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

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

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

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

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGE	Janet S. Baer	**Case No.**	17 B 02284
DATE	March 30, 2021	**Adversary No.**	17 A 00437
CASE TITLE	Maria Keller v. Emil Esmail (In re Emil Esmail)		
TITLE OF ORDER	Order Granting Maria Keller's Motion to Compel Trial by Zoom (ECF No. 134)		

DOCKET ENTRY TEXT

Plaintiff Maria Keller's Motion to Compel Trial by Zoom is granted. At the next status hearing on April 7, 2021, the Court, in consultation with the parties, will set the date on which the trial will proceed via Zoom and establish corresponding dates for a pretrial technical conference and the submission of pretrial materials.

[For further details see text below.]

STATEMENT

This matter is before the Court on the motion of creditor-plaintiff Maria Keller (the "Plaintiff") to compel trial by Zoom of the above-captioned adversary proceeding. For the reasons stated below, the motion is granted.

On August 22, 2017, the Plaintiff filed her initial adversary complaint, seeking: (1) revocation of the discharge of debtor-defendant Emil Esmail (the "Debtor") pursuant to 11 U.S.C. § 727(d)(1) for failure to disclose an asset of the estate, and (2) a determination that a debt arising from a state court judgment, owed by the Debtor to the Plaintiff, is nondischargeable under 11 U.S.C. § 523 on the basis of fraud. On December 18, 2019, after several matters in the adversary proceeding had been addressed by the Court—including the parties' cross-motions for summary judgment, which were both denied—the adversary was set for trial on April 14, 2020.

On March 18, 2020, due to the state of emergency declared in response to the spread of COVID-19 and because the Centers for Disease Control and Prevention urged reduced contact among people to slow the spread of the disease, the Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court") entered General Order No. 20-03, which provided that all court calls would be heard telephonically and that no personal appearances in court would be "necessary or permitted." The order also provided that "[c]urrently scheduled trials and evidentiary hearings [could] be continued to new dates." As a result, the trial in this adversary proceeding did not take place as scheduled.

Subsequently, on May 13, 2020, the Bankruptcy Court entered General Order No. 20-05. In that order, the Court, referring to Federal Rule of Civil Procedure 43(a) (made applicable by

Fed. R. Bankr. P. 9017), found "that the COVID-19 emergency constitutes good cause in compelling circumstances for taking testimony by contemporaneous transmission other than in open court" and that the order was being issued "to protect public health." Importantly, General Order No. 20-05 provides that, "[e]ffective June 1, 2020, all trials and evidentiary hearings will be held by video using the Zoom for Government platform" and that "[n]o trials and evidentiary hearings will be held in the courthouse." According to the order, the Bankruptcy Court "finds that Zoom for Government together with the Model Pretrial Order provide appropriate safeguards for taking testimony by contemporaneous transmission other than in open court."

Although they have been slightly amended since their issuance, General Order Nos. 20-03 and 20-05 remain effective today, and in-person proceedings continue to be prohibited.

After cancellation of the original trial date, the parties appeared for status hearings before the Court—remotely by electronic means. At each hearing, the Court explained that, due to the continuing COVID-19 pandemic, it was not known when in-person proceedings could resume; as a result, the Court offered to reschedule the trial to be conducted by Zoom. While the Plaintiff agreed to proceed via Zoom, the Debtor refused to consent to a Zoom trial. The Court continued the adversary proceeding several times to see if either the parties could ultimately agree to a Zoom trial or the state of the COVID-19 emergency had improved such that an in-person trial could be safely held.

On February 15, 2021, the Plaintiff filed her motion to compel the trial by Zoom. She argues that the Court has the authority to compel the trial by electronic means pursuant to Rule 43(a) of the Federal Rules of Civil Procedure, which provides, in relevant part, that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43(a). According to the Plaintiff, the COVID-19 health emergency constitutes good cause to compel the trial via Zoom, and appropriate safeguards are in place to do so. She also points out that this adversary has been ready for trial for almost a year, that there are several key facts that are not in dispute, and that, thus, the Court should not have any real difficulties judging the credibility of the witnesses in a Zoom trial.

In response to the motion to compel, the Debtor argues that the Plaintiff has not offered any "compelling circumstances" to justify ordering the trial to proceed by Zoom over his objection. Specifically, the Debtor contends that the length of time that the adversary proceeding has been pending is of little consequence, that there are no pressing issues, that the Clerk of the Court is holding the sales proceeds that are in dispute, that both parties must agree on the method of trial, and that he wants to present live testimony, in a face-to-face setting. As to the latter, the Debtor cites to an advisory note to Rule 43, which states that "[t]he opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition" and that "[c]ontemporaneous transmission of testimony from a different location . . . cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment. Thus, the Debtor argues, the Plaintiff cannot compel the trial by Zoom merely by showing that it is inconvenient for her to attend an in-person hearing.

The COVID-19 pandemic, as discussed in the General Orders, along with Rule 43(a), constitutes good cause in "compelling circumstances" for prohibiting all in-person court proceedings and requiring those proceedings to be conducted electronically. The Court has been operating under these General Orders for more than a year and has been able to function without interruption. Notwithstanding the Debtor's desire to present live testimony and "our tradition" of judging a witness's demeanor in a face-to-face manner, the Court has found that conducting proceedings via Zoom allows for such judging because a witness's position in front of a video screen typically gives the Court a clear view of that witness. At the same time, conducting trials by Zoom provides appropriate safeguards for taking testimony other than in open court.

To date, this Court has conducted two multi-day Zoom trials—one in a complex commercial case and the other in an individual chapter 7 case in which the debtor's discharge was being challenged, not unlike the adversary proceeding at bar. The Court did not encounter any limitations as to its ability to hear the witnesses or assess their credibility and demeanor by conducting those trials by Zoom.

Further, it is unknown at this time when the Court will be able to conduct in-person proceedings again. In the meantime, the Court must manage its docket of more than 3,200 pending cases and continue to conduct its business in the most efficient way it can under the circumstances. If the Court were to stop permitting matters to proceed via Zoom, the backlog would be overwhelming and the resulting delay a terrible injustice for parties attempting to have their matters adjudicated and concluded.

This adversary proceeding has been pending for over three-and-a-half years. It is ready to go to trial. The Zoom platform provides the appropriate safeguards for the Debtor to appear before and address both the Court and the Plaintiff face-to-face. The COVID-19 pandemic provides good cause in compelling circumstances to order that this trial proceed via Zoom.

For the foregoing reasons, the Plaintiff's motion is granted. At the status hearing in this matter on April 7, 2021, the Court, in consultation with the parties, will set the date on which the trial will proceed via Zoom and establish corresponding dates for a pretrial technical conference and the submission of pretrial materials.

DATED: March 30, 2021 **ENTERED**:

_____
Janet S. Baer
United States Bankruptcy Judge

3/10/2021

Judge Baer's Zoom Trial Rules and Tips

General Matters

1. "Listening in" on the proceedings. The trial is a "public proceeding." Thus, any party interested in the case may "listen in" to the Zoom trial. Parties to the case may share the Zoom ID and passcode with interested parties who wish to "listen in." The information will also be posted on the Court Calendar which is located on Judge Baer's website. Parties who "listen in" must have their cameras off and their microphones muted at all times.

2. Participant/Screen Names. In order to protect the security of the proceedings, all parties, whether they are participating in the trial or just listening in, must identify themselves with their actual names. Parties attempting to join who are only identified with a telephone number or "I pad" etc will not be allowed to join the proceedings. If the device you are using does not identify you with your name, you must re-name yourself on the device for this proceeding or orally identify yourself to the courtroom deputy before you will be allowed to participate.

3. Video/audio on. Only parties who are expected to call witnesses or pose objections at the trial and the witnesses who are testifying should have their cameras and microphones turned on during the trial. All others should turn their cameras off and mute their microphones. The video feed will show only the parties who will actually be participating—the Judge, the witness, the lawyer asking the questions, and any parties entitled to object. Other attorneys assisting in the case must have their cameras off and their microphones muted. All parties must be familiar with the mute and unmute button and make sure to unmute before they attempt to talk during the proceeding.

4. Slow down and do not interrupt. It is vital that everyone slow down when speaking and not interrupt each other. This is even more key now than when proceedings are held in the courtroom. Generally, when two people speak at the same time, nothing is heard from either. Thus, anything that is said will have to be repeated, making the trial even longer.

5. Regular breaks. If people want to take breaks during the trial, they should just ask for a break or raise their hand if someone else is speaking. If it is just a simple break, participants should turn off their video and audio during the break and then turn them back on when the trial commences again.

6. Breakout rooms. If any party wants to be placed in a breakout room so that he or she may speak separately to another participant, the party should ask the Court, and, if appropriate, the courtroom deputy will arrange for the breakout and place the parties in the correct breakout room. Breakout rooms will be set up in advance for the plaintiff and the defendant. Court personnel will also have a chambers breakout room.

7. Technical information. The Court must be provided with a list of cell phone numbers of all parties expected to participate in the trial and descriptions of the types of technology (e.g., Mac, PC, I-pad) that each party will be using at trial. Such a list will allow Court personnel to

immediately contact and provide appropriate technical assistance to any party experiencing technical issues during the trial.

8. Courtroom behavior. Although this will be a virtual trial, parties are expected to conduct themselves in the same way that they would if we were in person in the courtroom. This includes appropriate formality and attire. While I love cats and babies, please try to avoid their participation in the trial if at all possible. In addition, if you are having trouble with the video or audio or other technical difficulties, please speak up immediately. Though glitches are expected, they do not always occur on the Court's end, so we will not necessarily know if your Internet goes down until you tell us. A phone call or text to the courtroom deputy is probably the best way to let us know if your internet has gone down or you are having other technical issue. The deputy's cell phone number will be provided to all parties.

9. Photos/recordings. No photographs or recordings of the proceedings are permitted. You may have your cell phones or similar devices with you during the trial, but they must be muted, and you may not use them to take photographs or record any part of the proceedings. A court reporter will be present, and she will be preparing the only official record of the proceedings. While the Zoom bot will be engaged as a backup for the court reporter, you will not be provided access to that recording.

Witnesses

10. Witness protocol. When a party is called to testify, the witness must generally be in a room by himself or herself with no papers in front of the witness other than the filed exhibits. The witness will be sworn in by the courtroom deputy via Zoom video and audio. Then, while under oath, the witness will be asked by the Court to testify as to where the witness is located, who is in the room with the witness, and whether the witness has any papers in front of him or her. The witness will also be asked to tell the Court if, at any time, someone who was not initially there enters the room. If witnesses wish to have counsel with them in person, that fact must be disclosed to the Court, and the parties must maintain social distance in the room.

11. Violation of witness rules. If, during the course of a witness's testimony or otherwise, it is discovered that (a) the witness is being coached or otherwise communicated to, (b) there is an undisclosed person in the room with the witness, or (c) the witness has notes in front of him or her that have not been disclosed, the Court may disqualify the witness from testifying, enter sanctions, or take other appropriate action within the Court's discretion.

12. Excluding witnesses. At the start of the trial, the parties must inform the Court if they wish to have testifying witnesses excluded from the courtroom. If so, the Court will decide whether the request is appropriate pursuant to the applicable federal rules. Either excluded witnesses will be placed in a Zoom waiting room until it is time for them to testify, or they should be directed not to dial in to the Zoom trial until they are expected to testify.

13. Objections. If parties wish to object to questions during examination, they should simply state "objection" orally *and* physically raise their hand. When the word "objection" is stated and/or the hand is raised, all parties must stop talking. At that point, the Court will invite the

objecting party to state the legal basis for his or her objection; may, at its discretion, solicit a response from the other party; and then rule.

14. Sidebar. If a lawyer needs a sidebar with the Court and opposing counsel during a witness's testimony, the lawyer should just ask. We can arrange for the witness to be placed in the waiting room while the sidebar takes place.

Exhibits

15. Filing and sharing exhibits. Exhibits must all be filed on the Court's docket. The courtroom deputy will serve as host for the trial and thus be the only person who has the right to "screen share." If a party wishes to have an exhibit shared on the screen, the deputy will be the one who will retrieve the document from the docket and share the document with the trial participants. Exhibits must be marked with page numbers that will allow the deputy to readily and quickly find the appropriate pages in each exhibit.

16. Hardcopy exhibits. In addition to filing exhibits electronically, the parties may provide hard copies of the exhibits to each other and the witnesses. One full hardcopy set of the exhibits must be delivered to the Judge via the Bankruptcy Court mailroom, 219 S. Dearborn Street, Room 717, on the date required in the Court's pretrial order.

17. Confidential exhibits. If the parties designate as exhibits documents that are marked as confidential, a redacted set of the confidential documents should be filed on the public docket, and a separate, unredacted version of the documents should be filed under seal with the Court pursuant to Local Rule 5005-4. The courtroom deputy will be directed to "screen share" only the redacted version of confidential exhibits. The Court does not need hard copies of the redacted exhibits. In the hardcopy set of exhibits to be delivered to the Court, the confidential documents should be provided in separate sealed envelopes marked as confidential. Whenever witnesses are expected to testify on the record about confidential information, counsel must provide advanced notice so that the Court can determine whether arrangements need to be made to protect that information from anyone listening in during the trial.

18. Impeachment/rebuttal documents. If a lawyer wants to use a document that is not a marked exhibit for impeachment or rebuttal, he or she must send the relevant document via email to the courtroom deputy who will then share the document on the screen as directed by the lawyer.

19. Deposition transcripts. If a lawyer anticipates using a deposition transcript for impeachment, he or she may either designate the transcript as an exhibit and file it with the other exhibits ahead of the trial or have the transcript downloaded and readily available to provide to the courtroom deputy to be shared during the trial.