

TWENTY THIRD ANNUAL BANKRUPTCY LAW SEMINAR

PRESENTED BY:

**THE MIDDLE DISTRICT OF GEORGIA
BANKRUPTCY LAW INSTITUTE, INC.**

AND

MERCER UNIVERSITY SCHOOL OF LAW

**FRIDAY
OCTOBER 29, 2021**

**IDLE HOUR COUNTRY CLUB
251 IDLE HOUR DRIVE
MACON, GA 31210
(478) 477-1724**

**6 TOTAL CONTINUING LEGAL EDUCATION
CREDIT HOURS – INCLUDING**

**2 HOURS TRIAL CREDIT
1 HOUR ETHICS CREDIT
1 HOUR PROFESSIONALISM CREDIT**

**The Middle District of Georgia Bankruptcy Law Institute
&
Mercer University School of Law
present the
ANNUAL BANKRUPTCY SEMINAR
Friday, October 29, 2021
6.0 Total CLE Hours
(Including 2 trial hours, 1 ethics hour, and 1 professionalism hour)**

Schedule

8:00	-	8:55	Registration – Continental Breakfast
8:55	-	9:00	Welcome – MDGBLI, Ward Stone
9:00	-	9:15	Update from the Court Kyle George, Clerk of Court
9:15		9:45	Update from the USTP Elizabeth A. Hardy, Assistant U.S. Trustee Mary Ida Townson, U.S. Trustee, Region 21
9:45		10:45	Practice in Subchapter V Cases Honorable Paul W. Bonapfel, Judge Northern District of Georgia Leon S. Jones, Jones & Walden, L.L.C. Robert M. Matson, Akin, Webster & Matson P.C. David L. Bury, Jr., Stone & Baxter LLP
10:45	-	11:00	BREAK
11:00	-	12:00	Professionalism: Just the Facts Ronald Daniels, Daniels Taylor Law L.L.C.
12:00	-	1:00	LUNCH Sponsored by the State Bar of Georgia Bankruptcy Law Section
1:00	-	2:00	Judges' Forum: Discussion of Hot Topics Questions & Answers
2:00	-	3:00	Ethical Hypotheticals: A Bankruptcy Lawyer's Journey Through Several Common Scenarios Ishaq Kundawala, Professor of Law Mercer University School of Law
3:00	-	4:30	Chapter 13 Case Update Camille Hope, Chapter 13 Trustee Jonathan DeLoach, Chapter 13 Trustee Chapter 7 and Chapter 12 Update Tom Lovett, Kelley, Lovett, Blakey & Sanders, P.C. Thomas Lovett III, Kelley, Lovett, Blakey & Sanders, P.C.

THE SPEAKERS

KYLE GEORGE

Kyle attended North Georgia College and later graduated from the University of Georgia in 1986, where he was commissioned in the United States Army as a Second Lieutenant in the Infantry. Kyle retired from the U.S. Army in 2006, entered law school at Mercer Law School in Macon, Georgia and graduated from Mercer Law School in 2009. Kyle joined the U. S. Courts in 2011 as the Chief Deputy Clerk for the U. S. Bankruptcy Court for the Middle District of Georgia. He was appointed Clerk of Court on April 1, 2014.

HONORABLE PAUL W. BONAPFEL

Paul W. Bonapfel has been a United States Bankruptcy Judge for the Northern District of Georgia since 2002. Prior to his appointment, he practiced law in Atlanta, Georgia, with Lamberth, Bonapfel, Cifelli & Stokes, P.A., now known as Lamberth, Cifelli, Ellis & Nason, P.A. As an attorney, Judge Bonapfel represented all types of parties in bankruptcy cases, including consumer and business debtors in liquidation cases, business debtors in reorganization cases, chapter 7 and 11 bankruptcy trustees, creditors' committees, and creditors in both consumer and business cases.

Judge Bonapfel is a co-author, with Judge W. Homer Drake, Jr., and Adam M. Goodman, of *Chapter 13 Practice and Procedure* (Thomson Reuters). A fellow of the American College of Bankruptcy, he has served as chairperson of the Bankruptcy Sections of the State Bar of Georgia and the Atlanta Bar Association and was a director and president of the Southeastern Bankruptcy Law Institute, which presents an annual seminar on bankruptcy law and procedure. He teaches a course at Mercer Law School in Macon, Georgia, on consumer bankruptcy practice. Judge Bonapfel received his B.A. *cum laude* from Florida State University in 1972 and his J.D. *magna cum laude* from the University of Georgia School of Law in 1975, where he was Notes Editor of the *Georgia Law Review*. He was a judicial law clerk for United States District Judge Wilbur D. Owens, Jr., in Macon, Georgia.

LEON S. JONES

Leon S. Jones is a co-founder of the law firm Jones & Walden, LLC. The firm is located in midtown, Atlanta, Georgia. Mr. Jones graduated from the University of Georgia (A.B., 1985; J.D., 1988). Since graduating from law school, he has concentrated his legal practice in the areas of bankruptcy, debtor- creditor, and commercial litigation. Within the bankruptcy arena, Mr. Jones represents debtors, creditors, and trustees in both consumer and commercial matters. Specifically, Mr. Jones' practice includes representing parties in cases under Chapter 7, 11, 12, and 13 of the Bankruptcy Code, with a particular emphasis on representing individual and small business debtors in Chapter 11. Mr. Jones also serves as Sub-Chapter V Trustee in Chapter 11 cases.

ROBERT M. MATSON

Robert M. Matson is a partner at the law firm of Akin, Webster & Matson, P.C. in Macon, Georgia. He represents debtors, trustees and creditors in chapter 7, 11 and 13 bankruptcy cases. He is a Chapter 7 panel trustee and a Subchapter V trustee in the Middle District of Georgia. He is board certified by the American Board of Certification as a specialist in consumer bankruptcy. He also is a board member of The Middle District of Georgia Bankruptcy Law Institute, Inc. He received his A.A. from Oxford College of Emory University in 1991, his B.A. from Emory University in 1993 and his J.D. from Mercer University School of Law in 1997.

RONALD DANIELS

Daniels is a partner at Daniels Taylor Law LLC in Eastman and Dublin, Georgia. He is a 2012 graduate of the Walter F. George School of Law and recipient of the 15th Annual YLD Award for Ethics and Professionalism. Daniels is the President-Elect of the YLD and has served in leadership roles in various committees and sections for the YLD and State Bar. His practice is focused on representing consumers in consumer protection matters. He also serves as a Special Assistant Attorney General in the Oconee Judicial Circuit for the Department of Corrections and the Division of Child Support Services of the Department of Human Services.

JONATHAN W. DeLOACH

Mr. DeLoach attended Emory University in Atlanta and obtained his law degree from the University of Georgia School of Law in 1991. Mr. DeLoach is the Chapter 13 Trustee for the Columbus, Albany, and Valdosta Divisions of the Middle District of Georgia.

TOM LOVETT

Tom Lovett is the Managing partner for Kelley, Lovett, Blakey & Sanders, P.C. in Valdosta, Georgia. Mr. Lovett received his B.S., M.S. and J.D. from the University of Florida. He has been practicing law for 32 years.

THOMAS LOVETT III

Thomas Lovett is an Associate with Kelley, Lovett, Blakey & Sanders, P.C. in Valdosta, Georgia. Mr. Lovett received his B.A. from Valdosta State University and his J.D. from Barry University School of Law. He has been practicing law for 5 years.

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Mercer University School of Law

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Update from the Court

Kyle George
Clerk of Court
United States Bankruptcy Court
Middle District of Georgia



**Middle District of Georgia
Bankruptcy Law Institute
GAMB Update
October 29, 2021**

GAMB Clerk's Office Update

Hails, Farewells, and Introductions

- **Elaine Kennel – 37-year veteran Case Manager retired in February 2020**
- **Merri Huellemeier – 28-year veteran Case Manager retired in June 2020**
- **Tori Grantham – *Career* Law Clerk for Judge Laney as of May 2021**
- **Don Clough – IT Systems Specialist - moved to District Court as IT Director in August 2021**
- **Cheryl Stratigos – 33-year veteran Case Manager retired September 30, 2021**
- **Michael A. Smith – IT Systems Analyst – Joined the Court on September 13, 2021**

GAMB Clerk's Office Update

The Big Stuff....(1)

- **Coronavirus Pandemic**
 - **Current operational status**
 - **Court is open for business, with restrictions**
 - **Where we are regarding attorney requirements**
 - **Order 141 lays out requirements**
 - **Unvaccinated persons must wear face masks *at all times* while in Court facilities**
 - **Fully vaccinated persons must wear face masks in public areas and each Judge has discretion as to mask wear in the Courtroom**
 - **Order 139 – telephonic hearings in Macon and Columbus**
 - **NOW, the discussion turns to returning to “normal” (whenever and whatever that is...)**

GAMB Clerk's Office Update

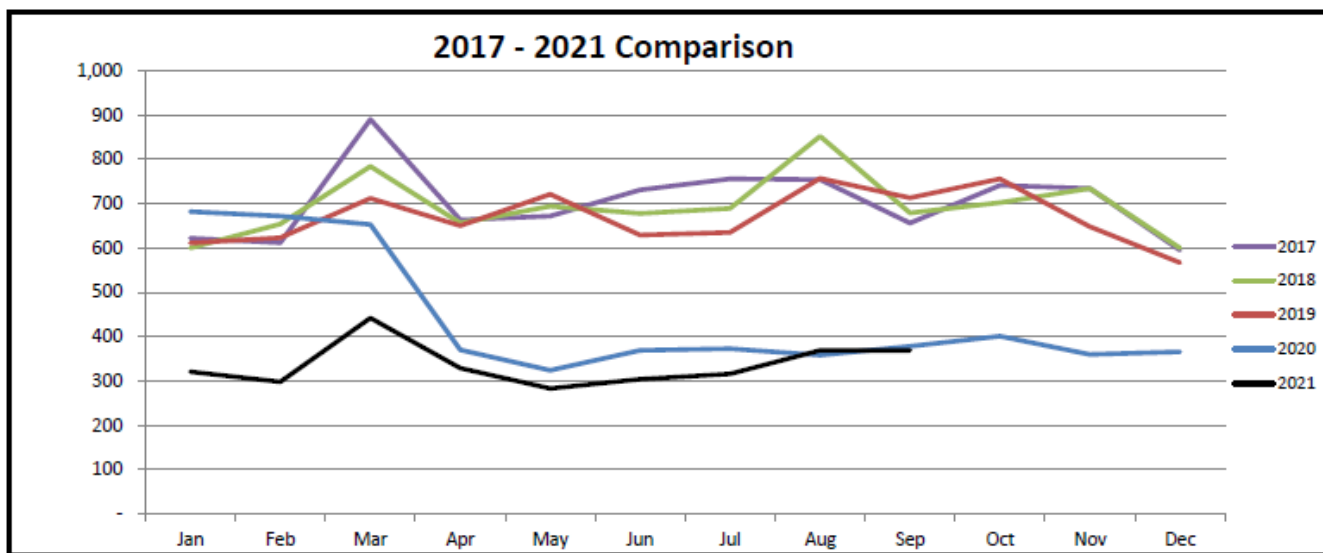
The Big Stuff....(2)

- **NextGen**
 - Fully implemented August 9, with few problems
 - Georgia Northern at the same time
 - Georgia Southern went live on October 12
 - Single Sign-On is now active

GAMB Case Filings 2020 - 2021

Monthly Filings and Closings 2021

DISTRICT	Ch. 7	Ch.11	Ch.12	Ch.13	2021 Total	2020 Total	Trend	Reopens	Closed	AP Filed	AP Closed
Jan	115	1	0	205	321	682	-52.93%	4	581	7	7
Feb	112	1	0	185	298	672	-55.65%	4	609	4	5
Mar	218	4	1	219	442	653	-32.31%	4	466	5	16
Apr	165	3	2	159	329	370	-11.08%	5	555	3	16
May	150	1	0	132	283	324	-12.65%	7	581	7	11
Jun	114	0	0	190	304	369	-17.62%	4	645	6	10
Jul	117	0	1	198	316	373	-15.28%	5	482	7	5
Aug	107	1	1	260	369	358	3.07%	7	736	5	13
Sep	126	2	0	241	369	378	-2.38%	6	524	6	8
Oct	0	0	0	0	0	401		0	0	0	0
Nov	0	0	0	0	0	360		0	0	0	0
Dec	0	0	0	0	0	366		0	0	0	0
YTD	1224	13	5	1789	3031	4179	-27.47%	46	5179	50	91
TOTAL	1224	13	5	1789	3031	5306					



National and 11th Circuit

Case Filings 2020 - 2021

Table F.
U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending
During the 12-Month Periods Ending June 30, 2020 and 2021

Circuit and District	Filed			Terminated			Pending		
	2020	2021	Percent Change ¹	2020	2021	Percent Change ¹	2020 ²	2021	Percent Change ¹
Total	682,363	462,309	-32.2	760,297	609,855	-19.8	954,786	807,243	-15.5
11th	105,252	72,167	-31.4	114,385	96,013	-16.1	175,620	151,769	-13.6
AL,N	12,291	8,024	-34.7	13,018	11,069	-15.0	22,985	19,940	-13.2
AL,M	7,375	4,581	-37.9	7,835	7,364	-6.0	20,731	17,941	-13.5
AL,S	4,496	2,688	-40.2	4,340	4,121	-5.0	11,800	10,373	-12.1
FL,N	2,407	1,642	-31.8	2,539	2,103	-17.2	2,472	2,011	-18.6
FL,M	24,003	18,934	-21.1	26,371	22,836	-13.4	26,434	22,533	-14.8
FL,S	16,242	13,918	-14.3	18,111	15,430	-14.8	25,573	24,061	-5.9
GA,N	25,766	14,992	-41.8	27,685	20,525	-25.9	31,778	26,245	-17.4
GA,M	7,217	4,279	-40.7	8,047	6,878	-14.5	17,674	15,070	-14.7
GA,S	5,455	3,109	-43.0	6,439	5,687	-11.7	16,173	13,595	-15.9

- When will filings go back up?
 - What can we expect?

Federal Rule Changes December 2021 (1)

- **FRBP 2005 Apprehension and Removal of Debtor to Compel Attendance for Examination**
 - **Language changes to bring the Bankruptcy Rule in line with a Criminal Code provision.**
- **FRBP 3007(a)(2(A)(ii) Objection to Claims**
 - **Amended to clarify that the special service method required by FRBP 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in Section 3 of the Federal Deposit Insurance Act, 12 U.S.C. §1813 (“insured depository institutions” are defined as “...any bank or saving association the deposits of which are insured by the Corporation pursuant to this chapter.”)**

Federal Rule Changes December 2021 (2)

- **FRBP 7007.1 Corporate Ownership Statement**
 - Required disclosure now includes nongovernmental corporations that seek to intervene and stylistic changes.
- **FRBP 9036 Notice and Service Generally**
 - Amended to further expand the use of electronic noticing and service, recognizing a court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts.

Local Rule Changes (1)

(Since September 2019)

- **LBR 1017-2 Dismissal or Suspension – Case or Proceedings (December 2019)**
 - Clarifies the language of the rule to ensure that proposed orders of dismissal should not include language regarding the prejudicial effect of the order unless the accompanying motion specifically addresses the prejudicial effect of the relief requested
- **LBR 6007-1 Abandonment (December 2019)**
 - Designates the parties to be served with a Motion to Compel the Trustee to Abandon Property under 11 U.S.C. §554(b), and make clear the date of abandonment.
- **LBR 3001-1 Claims and Equity Security Interests (February 2020)**
 - Updates the bar date for filing proofs of claim in Chapter 11 cases to conform with the requirements of the Small Business Reorganization Act (90 day bar date changed to 70 day bar date)

Local Rule Changes (2) (Since September 2019)

- LBR 3022-1 and new LBR 3022-2 Final Report/Decree (February 2020)
 - Provides for separate requirements in non-Subchapter V Chapter 11 cases and Subchapter V Chapter 11 cases. (Consensual vs. Non-consensual plans)
- LBR 2090-1 Attorneys – Admission to Practice (February 2020)
 - Formalizes a long-standing requirement that attorneys must comply with the Middle District of Georgia District Court Local Rule 83.1.1 for attorney admissions or 83.1.2.C for *pro hac vice* admissions

Local Rule Changes (3) (Since September 2019)

- LBR 2091-1 Attorneys – Withdrawals (April 2021)
 - Allows attorneys to withdraw from a case with appropriate consents to substitute counsel.
- LBR 9072-1 Orders - Proposed and LBR 9073-1 Hearings (April 2021)
 - These local rules clarify the possibility of dismissal for failure to prosecute for motions, applications, objections, or other matters placed on the Final Disposition Calendar where no action has been taken to resolve the matter.
- LBR 9013-1 Certificate of Service – Motions (April 2021)
 - This local rule clarifies that the certificate of service shall include information required by the rule “except for parties served by electronic notice service through the Electronic Case Filing system pursuant to LBR 2002-1(e).” Ensures that the attorney attaches a list of service to all parties served by mail, including addresses.



**Middle District of Georgia
Bankruptcy Law Institute
GAMB Update
October 29, 2021**

Update from the USTP

Elizabeth A. Hardy
Assistant U.S. Trustee

Mary Ida Townson
U.S. Trustee
Region 21



U.S. Trustee Program Annual Report Fiscal Year 2020



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MESSAGE FROM THE DIRECTOR



It is my distinct pleasure to present the Fiscal Year 2020 Annual Report of the United States Trustee Program (USTP or Program).

This year presented perhaps the greatest challenges to management of the USTP since passage of the sweeping 2005 bankruptcy reform amendments, which required a retooling of office operations to carry out expansive new duties. It is only through the extraordinary efforts and resiliency of the Program's staff across the country that we were able to achieve another year of significant accomplishment, despite the hurdles presented by the national pandemic. Notably, the USTP:

- Built a structure for implementing and administering the provisions of the Small Business Reorganization Act that went into effect on February 19, 2020, which, as expanded under the CARES Act, resulted in approximately 1,100 chapter 11 reorganization cases opting to proceed under the new subchapter V through September 30, 2020;
- Took definitive action in the wake of the pandemic by making swift and far-reaching changes in the oversight, administration, and enforcement of consumer and business bankruptcy laws to protect the health and safety of those involved in bankruptcy proceedings while still ensuring the bankruptcy system remained fully functional;
- Implemented a system of regional coordinators and "strike teams" to augment the Program's oversight of chapter 11 cases in response to a continuing increase in larger business reorganization cases, which rose sharply during the pandemic; and
- Continued to carry out the USTP's core duties to oversee the administration of bankruptcy cases and ensure compliance with bankruptcy laws, including by taking nearly 25,000 formal and informal civil enforcement actions with a potential monetary impact of nearly \$1 billion in debts not discharged, fines, penalties, and other relief; making nearly 2,500 criminal referrals to the Program's law enforcement partners, including referrals of fraud in obtaining funds under the CARES Act; taking more than 700 actions in court and over 2,000 out-of-court actions to redress fraud and misconduct by attorneys and non-attorney bankruptcy petition preparers; and participating in 100 new appellate matters to help clarify the law.

The bankruptcy system plays a vital role in our national economy, and the Program's efforts to ensure its effective functioning were more important this year than ever before as the nation faced unprecedented challenges due to the pandemic. I congratulate and thank our nearly 1,000 employees located in 90 offices across the country for their perseverance during these extraordinary times to ensure bankruptcy relief remained available to those who needed it.

I encourage you to review this report to learn more about our accomplishments over this past fiscal year and to visit www.justice.gov/ust regularly for updates on our work.

Sincerely,

A handwritten signature in black ink, appearing to read "Clifford J. White III", with a stylized flourish at the end.

Clifford J. White III

ABOUT THE USTP

MISSION AND RESPONSIBILITIES

The USTP is a litigating component of the Department of Justice (DOJ) whose mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the American public. The Program has standing to participate in every individual and business bankruptcy case in the 88 federal judicial districts under its jurisdiction.¹ In Fiscal Year (FY) 2020, this included oversight of about 1.35 million ongoing bankruptcy cases.² Nearly two-thirds of all cases pending in the federal judicial system are bankruptcy cases.³

In its role as the “watchdog” of the bankruptcy system, the Program carries out a broad range of enforcement, regulatory, and administrative activities (Figure 1).

FIGURE 1: CORE DUTIES OF THE U.S. TRUSTEE PROGRAM



¹ The USTP has jurisdiction in all judicial districts except those in Alabama and North Carolina. In those six districts, bankruptcy court officials called Bankruptcy Administrators perform a similar function.

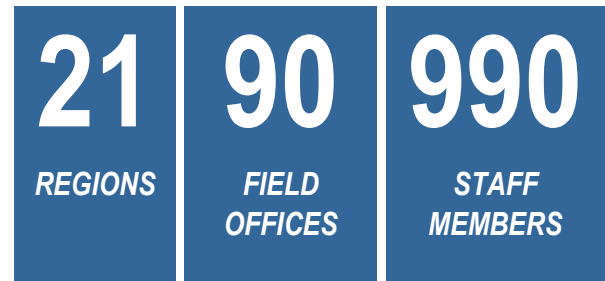
² This figure is calculated using data from both the Executive Office for U.S. Trustees and the Administrative Office of the U.S. Courts.

³ Data from the Administrative Office of the U.S. Courts, available at <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>. For bankruptcy caseload data, see Table F “U.S. Bankruptcy Courts – Bankruptcy Cases Filed, Terminated and Pending” during the 12-month periods ending September 30, 2018, through September 30, 2020. For data on cases pending in district courts and the number of appeals pending in the courts of appeals, see “U.S. District Courts – Federal Court Management Statistics–Profiles” and “U.S. Courts of Appeals – Federal Court Management Statistics–Profiles,” respectively.

ORGANIZATION

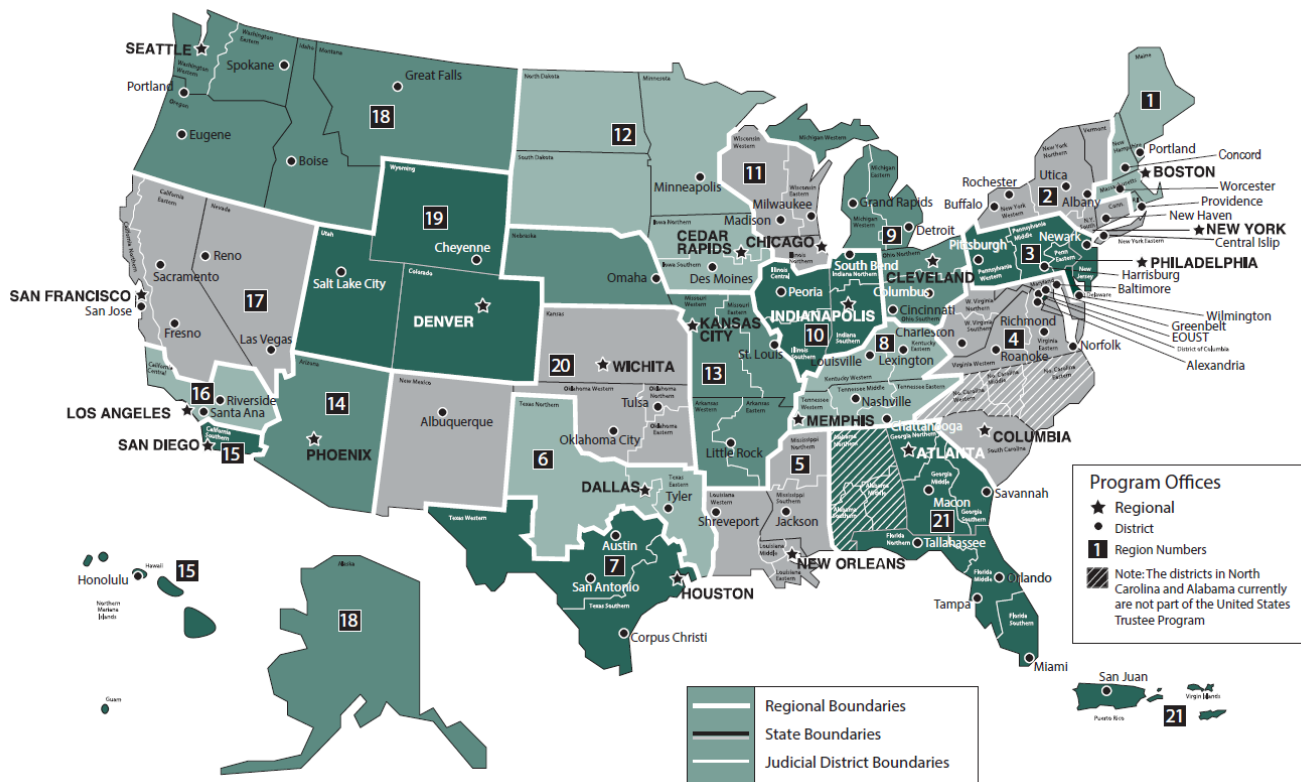
The USTP is led by a Director headquartered in the Executive Office for U.S. Trustees (EOUST) in Washington, D.C. U.S. Trustees manage 21 regions consisting of 90 field offices that are supervised by Assistant U.S. Trustees (Figure 2).

At the conclusion of FY 2020, the Program employed approximately 990 staff members consisting of attorneys, financial analysts, paralegals, and support staff. More than 90 percent of the Program's employees are in its field offices.



The Program's expansive field structure enables it to participate in about 250 bankruptcy courts; preside over statutory meetings of creditors held in 400 locations; detect and address multi-jurisdictional violations through coordinated enforcement efforts; and ensure maximum accessibility to the bankruptcy system by both debtors and creditors.

FIGURE 2: MAP OF USTP REGIONS AND OFFICES



FUNDING

The USTP is funded solely through appropriations made by Congress that are offset by a portion of fees paid by bankruptcy debtors and deposited into the U.S. Trustee System Fund (Fund). In FY 2020, the USTP's appropriation was fully offset by funds on deposit in the Fund.

CASE FILINGS

A bankruptcy case is a proceeding brought under federal law to discharge or reorganize the financial obligations of an individual or an entity. The Bankruptcy Code appears in title 11 of the United States Code. Almost all bankruptcy cases are filed under either chapter 7, 11, or 13.⁴

581,039

BANKRUPTCY FILINGS

- Chapter 7 bankruptcy is a liquidation proceeding available to consumers and businesses (although business cases represent just three percent of chapter 7 cases). In these cases, the private trustee appointed by the U.S. Trustee collects and reduces to money the debtor's non-exempt assets and distributes the proceeds to creditors in accordance with the Bankruptcy Code's priority scheme. A consumer debtor receives a discharge of pre-petition debts, other than certain debts that are exempt from discharge by the Bankruptcy Code.
- Chapter 11 provides a procedure by which a business can reorganize debts while continuing to operate, and generally the company's management retains control during the case. The vast majority of chapter 11 cases are filed by businesses, although individuals also may file under chapter 11. The debtor, often with participation from creditors, proposes a plan of reorganization to repay part or all its debts.
- Chapter 13 is used by individual consumers to reorganize their financial affairs under a repayment plan administered by a private trustee appointed by the United States Trustee that must be completed within three to five years.⁵ To be eligible for chapter 13 relief, a consumer debtor must have regular income and may not have more than a specified amount of debt.

Bankruptcy filings in the judicial districts covered by the Program totaled 581,039 in FY 2020. Chapter 7 cases accounted for about 69 percent of all bankruptcy filings, chapter 11 cases accounted for about one percent, and chapter 13 cases accounted for about 30 percent. During the pandemic, filings were erratic, with consumer filings down by 35 percent—likely a result of federal relief payments and a mortgage moratorium—while overall chapter 11 reorganization filings increased by 30 percent from March 2020 through the end of FY 2020.

⁴ There are three other chapters under which certain debtors may file a bankruptcy case. Family farmers and fishermen may file under chapter 12; municipalities may file under chapter 9; and foreign entities may seek relief under the cross-border insolvency provisions of chapter 15. Cases under these three chapters represent just 0.1 percent of all bankruptcy filings.

⁵ The *Coronavirus Aid, Relief, and Economic Security Act of 2020* (CARES Act) extended the payment period beyond five years in some circumstances.

SELECT ACCOMPLISHMENTS FROM FISCAL YEAR 2020

EFFECTIVE RESPONSE TO THE COVID-19 PANDEMIC

The USTP undertook a massive effort to ensure that bankruptcy operations continued with minimal disruption in the wake of the COVID-19 emergency. The prompt actions taken by the Program were critical to protecting the health and safety of all involved in bankruptcy proceedings while ensuring the system remained functional.

Section 341 Meetings of Creditors

In every bankruptcy case, an administrative proceeding known as a section 341 meeting is held at which debtors testify under oath. These meetings typically are held in person, but with the national pandemic, the USTP had to act quickly to transition them to either telephone or video. This involved, among other things, procuring and distributing 1,200 conference lines and 500 additional digital recording devices so that USTP staff and the private trustees were equipped to conduct remote meetings. It also involved the development of best practices for staff and the trustees to ensure that key procedures were handled properly, such as verifying the debtor's identity, preserving the evidentiary value of the debtor's sworn testimony, and providing debtors with limited English proficiency continued access to tele-interpreters. On balance, telephonic and video meetings have proven efficient and effective, and the USTP's waiver of in-person section 341 meetings will remain in effect until termination of the President's emergency declaration regarding the COVID-19 pandemic.

Debtor Audits

By law, the USTP contracts with independent firms to perform audits of a sample of individual debtors' chapter 7 and chapter 13 cases for purposes of determining the accuracy, veracity, and completeness of filings. Because these audits require debtors to produce additional documentation and often to confer with counsel and financial institutions in responding to auditor requests and reports, the USTP suspended all audits on March 25, 2020, until such time as the public health emergency allows debtors to meet their obligations in a manner that does not compromise their safety or the public health.

Trustee Audits

The USTP also contracts with certified public accounting (CPA) firms to conduct independent audits of the internal controls and cash management practices of private trustees for purposes of ensuring appropriate measures are in place to safeguard bankruptcy estate assets. To be able to continue this important oversight tool, the USTP modified its trustee audit protocols so that the audits could be performed remotely to permit social distancing and to accommodate the telework posture of many private trustees' offices during the public health emergency. Drawing on the expertise of USTP staff and the CPA firms contracted to perform the audits, changes were made to the audit protocol to provide for the use of electronic tools to interview trustees and their staffs, observe procedures, and remotely access trustee case management systems, where possible. In addition, to further reduce the burden on the private trustees, the USTP adjusted the sample size for testing certain information, although the auditors retain discretion to increase testing if warranted.

Other Actions

Among other actions taken by the Program were:

- Issued guidance to the private trustees to address implementation of the CARES Act and ensure debtors' rights were fully recognized, including, in some cases, their right to retain a "recovery rebate."

- Took steps to assist chapter 13 trustees in weathering the decline in case filings during the pandemic so their operations could remain robust and able to handle a return to normal filing levels—or, as some predict, substantially increased filings. These trustees administer in excess of \$5 billion⁶ annually in repayments to creditors, and their operations are funded through collections on a statutory percentage of those disbursements. Efforts to assist these trustees, which included approving budget amendments and suspending the limitation on the amount of operating reserves, provided a greater financial cushion so that they would have necessary funds to cover additional expenses and maintain essential staff and infrastructure under turbulent economic conditions.

Collaboration with Partners

The USTP undertook significant outreach efforts throughout the pandemic, including frequently meeting with, learning from, and consulting with judges, trustees, clerks of court, and other participants in the bankruptcy process on system-wide and discrete issues alike. This collaboration, both at the national level with liaison groups and professional associations as well as locally by the U.S. Trustees, was essential to providing debtors continued access to bankruptcy relief.

SUCCESSFUL IMPLEMENTATION OF THE SMALL BUSINESS REORGANIZATION ACT (SBRA)

The Small Business Reorganization Act of 2019 (SBRA) was enacted on August 23, 2019, with an effective date of February 19, 2020. Under the SBRA, small business debtors—defined as debtors with less than about \$2.7 million⁷ in debts that also meet other criteria—may voluntarily elect to proceed under a new subchapter V of chapter 11 of the Bankruptcy Code. Among other changes, subchapter V imposes shorter deadlines for completing the bankruptcy process, allows for greater flexibility in negotiating restructuring plans with creditors, and provides for a private trustee in every case who will work with the small business debtor and the creditors to facilitate the development of a consensual plan of reorganization.

The creation of this subchapter within chapter 11 dictated an entirely new regimen for the recruitment and oversight of subchapter V trustees, along with policies and procedures to guide their work. With just 180 days to implement the SBRA, the USTP acted swiftly to set up an infrastructure that was both comprehensive and workable. These efforts included developing a nationwide plan to recruit approximately 250 qualified candidates to serve as subchapter V trustees, a comprehensive manual and handbook system to guide USTP staff and subchapter V trustees in carrying out their new duties, and an extensive training and outreach plan. The USTP also coordinated closely with the bankruptcy courts on a myriad of administrative issues and used statistical and time management studies to estimate the staffing and dollar impact of the new systems, including additional resources needed in future years. Further, to ensure it had the benefit of diverse viewpoints, the Program consulted heavily with major stakeholder groups throughout the process, including the National Conference of Bankruptcy Judges, the organization of bankruptcy clerks of court, trustee associations, and the bankruptcy bar. These important initial efforts were critical to the successful implementation of the new law.

From the February 19, 2020, implementation date through the end of the fiscal year on September 30, 2020, approximately 1,100 cases were filed or amended into subchapter V, with more than three-quarters of all small business cases electing subchapter V. Early indications are that subchapter V cases are being confirmed more quickly than small business cases not electing subchapter V treatment, though these results are preliminary.

⁶ Although FY 2020 figures are not available as of the publication of this report, the chapter 13 trustees have distributed an average of \$5.9 billion per year over the prior five years.

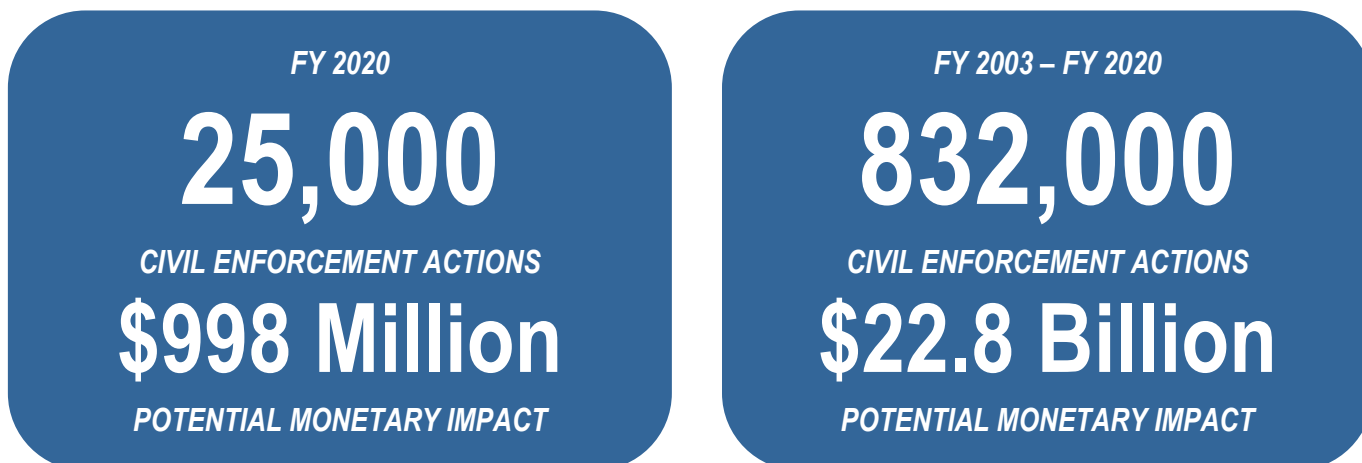
⁷ Later adjusted to \$7.5 million under the CARES Act for cases filed on or after March 27, 2020, in which the debtor elects to proceed under subchapter V.

INVESTIGATED ALLEGED MISCONDUCT IN MAJOR BUSINESS REORGANIZATION CASE

In August 2020, the USTP conducted an investigation and filed a report with the Bankruptcy Court for the Southern District of Texas documenting its findings and preliminary analysis of allegations against the founder and manager of a hedge fund, who was serving as a co-chair of the unsecured creditors' committee in a major chapter 11 bankruptcy case. The allegations included attempted interference with competitive bidding for securities earmarked for certain classes of creditors that the hedge fund sought to acquire. The USTP report concluded that the hedge fund, through the committee co-chair, breached its fiduciary duty to unsecured creditors by coercing an outside third party not to submit a rival bid. The hedge fund stepped down as a member and co-chair of the creditors' committee, and its owner agreed to pay to the estate \$1.4 million in fees and costs and to subordinate his interest to those of other creditors.

In September 2020, based in part on the U.S. Trustee's investigative report, the hedge fund manager was arrested after being charged in a criminal complaint filed in federal district court by the Acting United States Attorney for the Southern District of New York with extortion and bribery in connection with a bankruptcy, securities fraud, wire fraud, and obstruction of justice. The Acting United States Attorney's press release on the arrest thanked the USTP for its cooperation and assistance in the investigation.

CIVIL ENFORCEMENT AND MEANS TESTING



One of the USTP's core functions is to combat bankruptcy fraud and abuse. Although most of the Program's actions address debtor violations, a significant number focus on remedying wrongdoing by attorneys, non-attorney bankruptcy petition preparers, creditors, and others who attempt to exploit debtors and the bankruptcy system.

During FY 2020, the Program took nearly 25,000 civil enforcement actions,¹¹ with a potential monetary impact of nearly \$1 billion in debts not discharged, fines, penalties, and other relief. From FY 2003, when the USTP began tracking results, through the end of FY 2020, the Program took more than 832,000 actions, with a potential monetary impact of approximately \$22.8 billion.

FIGURE 3: CIVIL ENFORCEMENT ACTIVITY IN CONSUMER CASES, FY 2020

Type of Activity	Inquiries ⁸	Actions ⁹	Action Success Rate ¹⁰	Potential Financial Impact (Thousands)
§ 707(a) Dismissal for Cause	792	658	95%	\$55,329
§ 707(b) Dismissal for Abuse	7,729	1,014	98%	\$148,775
§ 727 Denial of Discharge	1,261	693	99%	\$762,609
§ 1307(c) Dismissal or Conversion	43	84	99%	N/A
§ 1328(f) Denial of Discharge	62	59	100%	\$5,642
§ 110 Bankruptcy Petition Preparers	341	88	99%	\$598
§ 329 Attorney Fee Disgorgement	1,321	591	99%	\$6,508
§ 526 Debt Relief Agencies	214	25	100%	\$233
Other Attorney Misconduct	146	40	96%	\$22
Abusive Conduct by Creditors	213	27	100%	\$815

Figure 3 shows the number of inquiries (informal investigations) and court actions initiated by the Program in consumer cases during FY 2020 in key civil enforcement areas, along with the success rate for court actions and their potential financial impact.

MEANS TESTING AND DEBTOR VIOLATIONS

One of the major responsibilities of the USTP is to administer and enforce the “means test,” which is a statutorily prescribed formula used to help determine eligibility for chapter 7 bankruptcy relief by individuals with primarily

⁸ Inquiries (informal investigations) include documented communications by USTP staff with parties or others involved in a bankruptcy case concerning compliance with bankruptcy law and rules.

⁹ Actions include motions, complaints, and objections that Program personnel filed with the bankruptcy court to seek relief.

¹⁰ The success rate is calculated by dividing the number of court actions decided in favor of the USTP in FY 2020 into the total number of court actions decided in FY 2020. Action success rate includes outcomes where the court entered an order granting the relief sought by the USTP, in whole or in part, or the defendant agreed to other relief satisfactory to the USTP.

¹¹ This figure includes all FY 2020 civil enforcement activity, not just the civil enforcement activity in consumer cases reflected in this section of the report.

consumer debt and income above their state median income. The formula determines disposable income by using historical income, which is then partially reduced by allowable expense standards issued by the Internal Revenue Service for its use in tax collection. In FY 2020, a case with disposable income above \$227.50 per month was presumed abusive and subject to dismissal.

The effectiveness of the means test largely depends on the USTP identifying cases that are presumptively abusive under the statutory formula and filing actions to dismiss those cases when appropriate. The USTP is required by law to file with the court either a motion to dismiss a case in which the presumption of abuse arises or a statement explaining the reasons for declining to file such a motion. The USTP moves to dismiss cases where the debtor has an ability to repay creditors or declines to seek dismissal after consideration of special circumstances, such as a recent job loss or continuing medical debt.

The USTP's prudent exercise of its enforcement responsibilities under the means test has allowed it to meet the statutory objective of denying chapter 7 relief to debtors who have an ability to pay without creating unnecessarily harsh results. In FY 2020, the USTP declined to file a motion to dismiss in about 72 percent of presumptively abusive cases. The percentage of declinations has grown from less than 35 percent in FY 2006 to more than 60 percent in recent years. This suggests that the objective criteria of the means test are now well established and that most debtors' attorneys file cases that trigger the presumption of abuse only if they otherwise satisfy statutory exceptions.

Even if a case is not presumptively abusive under the means test, the Bankruptcy Code permits the USTP to seek dismissal based on the debtor's bad faith or the totality of the circumstances of the debtor's financial situation. For example, if a debtor retains luxury items, incurs debt shortly before filing bankruptcy, or fails to disclose information required by the Bankruptcy Code and Rules, then the debtor may be subject to dismissal on the USTP's motion. During FY 2020, over 40 percent of the USTP's actions under § 707(b) related to bad faith or totality of the circumstances.

The USTP also may file a complaint to deny or revoke an individual debtor's bankruptcy discharge if the debtor engaged in improper conduct such as transferring, concealing, or destroying property to hinder or defraud creditors or the bankruptcy estate; knowingly and fraudulently making a false oath; refusing to obey a court order; or failing to keep or preserve financial records. The debtor may voluntarily waive discharge under the same statutory provision.

CONSUMER DEBTOR PROTECTION

Professional Misconduct

Addressing misconduct by consumer debtor attorneys remains a top priority for the USTP, and it has a long history of rigorous enforcement against attorneys who engage in fraudulent conduct or provide inadequate representation to their consumer debtor clients. Some attorneys fail to carry out their basic obligations to their clients by, for example, not meeting with their client, not attending court proceedings, or engaging in other unprofessional behavior. In some of the more egregious cases,

600

**COURT ACTIONS
FILED RELATING TO
PROFESSIONAL
MISCONDUCT**

professionals engaged in fraud by lying to the court, misrepresenting their services to clients, or engaging in other wrongful conduct. This professional misconduct not only harms debtors who receive substandard representation but it also burdens creditors and the courts by causing unnecessary delays in a bankruptcy case.

The USTP also acts against consumer debtor attorneys employing alternative fee arrangements that violate bankruptcy law and harm the attorneys' clients. To circumvent the bankruptcy automatic stay and the discharge that prohibit the collection of pre-filing debts, these arrangements often involve "bifurcated" models under which fees for services performed before and after a bankruptcy case is filed are collected under separate pre- and post-petition fee agreements (allowing the post-petition fees to be paid over time). The USTP has objected to such fee arrangements when they harm debtors by improperly attempting to collect fees after the case is filed for services provided pre-petition in violation of the statute, failing to obtain the client's fully informed consent, or unreasonably inflating the fees solely because they are to be paid over time.

USTP OBJECTION RESULTS IN DENIAL OF POST-PETITION FEES FOR CHAPTER 7 DEBTOR'S ATTORNEY

On motion of the U.S. Trustee, the Bankruptcy Court for the Southern District of Florida denied an attorney's request to receive post-petition payment of attorney's fees for preparing and filing the debtor's bankruptcy petition and schedules and assisting the debtor in complying with other obligations under the Bankruptcy Code. The court held that local rules require an attorney who files a chapter 7 case to assist the client with completing the chapter 7 petition and related pleadings, appear at the section 341 meeting of creditors, and provide legal advice related to the case, and that these requirements cannot be broken into separate pre- and post-petition payment obligations. The court also held that, under the Bankruptcy Code, unpaid attorney's fees owed to counsel as of the petition date are dischargeable and counsel is prohibited from taking action to collect on these payments.

In FY 2020, the Program filed more than 600 court actions against professionals who violated legal standards to the detriment of debtors, creditors, and the bankruptcy system. The USTP's enforcement actions in this area have led to remedies including refunds of attorney's fees already paid, cancellation of retention contracts, civil penalties, injunctions, and other sanctions.

In many instances, attorneys who violate the Bankruptcy Code and Rules during their representation of debtors or other parties also violate the rules of professional conduct governing all lawyers. Where appropriate, the USTP refers these matters to state licensing and disciplinary authorities for investigation and action, which may include suspension from practice or disbarment.

Bankruptcy Petition Preparers

The Program also filed nearly 100 court actions against non-attorney bankruptcy petition preparers during FY 2020. The USTP's enforcement actions in this area included civil actions to obtain orders to disgorge document preparation fees, impose fines, and enjoin prohibited conduct by petition preparers.

Creditor Violations

In many cases with abusive creditor conduct, there are multiple victims, including debtors and other creditors whose distributions are diminished by overpayment to the violating creditor. The USTP's creditor abuse enforcement efforts have sought to address a range of violations committed by both secured and unsecured creditors, including billing debtors for amounts not owed, violating the bankruptcy discharge injunction, non-compliance with the Bankruptcy Rules governing mortgage servicers in chapter 13 bankruptcy cases, failing to protect debtors' personally identifiable

information, and other issues. In FY 2020, the USTP took more than 200 actions and inquiries related to abusive conduct by creditors.

ELDER ABUSE AND FRAUD TARGETED AT SENIORS

Combatting elder abuse and financial fraud targeted at seniors has continued to be a focus of the Program. In this area, the USTP works in concert with private trustees to identify bankruptcy cases that involve the exploitation of an elderly person, sometimes by a person such as a caregiver or family member. This can include cases filed for elderly debtors with or without their informed consent or that involve funds obtained from an elderly person through fraudulent means. The Program also remains vigilant in detecting signs of more sophisticated financial schemes, such as those that target groups that may include elderly persons.

The USTP addresses cases involving elder abuse and fraud civilly and, where appropriate, refers matters to USAOs and other members of law enforcement for further investigation.

MARIJUANA ENFORCEMENT

As more states have legalized medical marijuana, recreational marijuana, or both, the issue of marijuana assets in bankruptcy cases has grown. In FY 2020, the USTP continued its enforcement efforts in this area to ensure that federal bankruptcy law is not used to evade federal drug laws prohibiting the use and sale of marijuana. These actions have protected trustees from having to administer marijuana assets in violation of federal law and prevented proceeds from illegal marijuana activities from entering the bankruptcy system.

WAIVER PREVENTS DISCHARGE OF DEBTOR WHO STOLE FUNDS FROM ELDERLY WOMAN

Following an investigation by the USTP's Cleveland office, the Bankruptcy Court for the Northern District of Ohio entered an agreed order on April 13 waiving the discharge of a chapter 7 debtor. Serving as a caretaker, the debtor used her influence to make unauthorized purchases and automated teller machine (ATM) withdrawals from an elderly woman. She began making the unauthorized withdrawals from the victim's checking account in 2016, gradually increasing the amounts of the withdrawals and purchases. She continued this practice even after the victim's death, eventually transferring tens of thousands of dollars per month from savings and money market accounts to a checking account she could access at ATMs. After the U.S. Trustee filed a complaint to deny discharge, the debtor elected to waive her discharge.

USTP PREVAILS ON MOTION TO DISMISS MARIJUANA-RELATED CHAPTER 11 CASE

The Bankruptcy Court for the District of Oregon granted the U.S. Trustee's motion to dismiss the chapter 11 case of a debtor who leased property to two marijuana-growing tenants in violation of the Controlled Substances Act. The debtor disclosed one of the tenants in its initial bankruptcy documents but revealed the other, an insider, only after the U.S. Trustee filed the motion to dismiss. Following an evidentiary hearing, the court held that the case should be dismissed for cause because of the debtor's "extensive and unrelenting" violations of the Controlled Substances Act, noting that its use of marijuana-related rent was a gross mismanagement of the bankruptcy estate. The court further held that dismissal for bad faith was warranted because the debtor failed to disclose the second marijuana-growing tenant notwithstanding opportunities to do so. The court stressed that "bankruptcy is not a game of hide-and-seek."

CRIMINAL ENFORCEMENT

2,489

CRIMINAL
REFERRALS

The USTP has a statutory duty to refer matters to the United States Attorneys' offices (USAOs) for investigation and prosecution that "relate to the occurrence of any action which may constitute a crime" and to assist the United States Attorney in "carrying out prosecutions based on such action." 28 U.S.C. § 586(a)(3)(F). As bankruptcies cross all industries and levels of American society, the detection of bankruptcy fraud and other criminal activity can lead to the detection and prosecution of other serious crimes.

In FY 2020, the Program made 2,489 bankruptcy and bankruptcy-related criminal referrals, which represented a 9.2 percent increase over the prior fiscal year and the highest number of referrals in the USTP's history. The Program works with its federal and state law enforcement partners and participates in approximately 70 local bankruptcy fraud working groups, mortgage fraud working groups, and other specialized task forces throughout the country. Over 20 Program attorneys are designated as Special Assistant U.S. Attorneys to assist U.S. Attorneys' offices in the prosecution of bankruptcy and bankruptcy-related crimes. In addition, many other staff—including attorneys, bankruptcy analysts, and paralegals—are called upon to assist with investigations and to provide expert or fact testimony at criminal trials. In FY 2020, the Program also responded to more than 250 requests for assistance from USAOs, the FBI, and other law enforcement agencies on matters not originating from a USTP referral.

PANDEMIC-RELATED CRIMES

Among the FY 2020 referrals were 48 matters related to wrongdoing under the CARES Act. The vast majority of these referrals (46) involved loans under the Paycheck Protection Program (PPP). Regulations implementing the law specifically excluded debtors in bankruptcy from eligibility to receive PPP loans; however, these debtor applicants were approved for loans based on the alleged false statements on their loan applications that they were not a debtor in bankruptcy.

FORMER PAYDAY LOAN SERVICER PLEADS GUILTY TO BANKRUPTCY FRAUD, TAX EVASION, AND INTERSTATE TRANSPORTATION OF STOLEN MONEY

A defendant pleaded guilty in the Western District of Missouri to one count each of bankruptcy fraud, tax evasion, and interstate transportation of stolen money. The USTP's Houston office referred the defendant's bankruptcy-related scheme, and investigative assistance was provided by the USTP's Houston and Kansas City offices. The perpetrator obtained personal information on individuals seeking payday loans through his businesses. He used this information to create falsified payday loan debt portfolios that he marketed as legitimate and sold to third-party debt buyers, who then attempted to collect the fake debt from individuals including filing claims in the cases of those who had filed for bankruptcy. He received as much as \$7.3 million from the sale of the false debt portfolios. The bankruptcy claims were the subject of a miscellaneous proceeding before the Bankruptcy Court for the Southern District of Texas. During the proceeding, the defendant provided false information and testimony to the bankruptcy court in order to conceal his scheme.

MORTGAGE RESCUE FRAUD

Combatting mortgage rescue fraud continues to be an area of focus for the Program. The “rescuers” in these matters generally target financially distressed homeowners and falsely promise that they can help save their homes from eviction or foreclosure. They entice the homeowner to pay them a fee to resolve their problems with the mortgage company, or in the most egregious cases, to make mortgage payments to them directly while they allegedly seek resolution. As part of their schemes, rescuers may file bankruptcy cases in the homeowners’ name, oftentimes without their knowledge, to trigger the automatic stay and temporarily stall the foreclosure or eviction action against their victims.

While the forms of this fraud scheme vary, the harm to homeowners can be substantial, ranging from the loss of the fees paid to the loss of their home. USTP staff, in concert with the private trustees, are vigilant in identifying and referring these schemes to law enforcement and providing post-referral assistance as needed.

BANKRUPTCY PETITION PREPARER SENTENCED TO 12 YEARS FOR MORTGAGE RESCUE SCHEME AFTER GUILTY PLEA

Following a guilty plea to wire fraud and bankruptcy fraud, on March 17, the District Court for the Western District of Wisconsin sentenced a former bankruptcy petition preparer to 12 years in prison followed by three years of supervised release for a mortgage rescue scheme that defrauded more than 70 homeowners, some of whom lost their homes as a result of the scheme. The defendant convinced his victims to make their mortgage payments to him under the guise of negotiating with their mortgage lenders, but he used their payments for his own purposes instead. As part of his scheme, he instructed some of his victims to file skeletal bankruptcy cases and sometimes prepared their bankruptcy petitions himself. Acting on a tip, the USTP’s Madison office identified the perpetrator as an undisclosed bankruptcy petition preparer, pursued a successful civil enforcement action against him, referred the potential criminal conduct, and assisted with the investigation.

ANNUAL REPORT TO CONGRESS

Section 1175 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (P.L. 109-162) requires the Director of the EOUST to submit a “report to Congress detailing—(1) the number and types of criminal referrals made by the United States Trustee Program; (2) the outcomes of each criminal referral; (3) for any year in which the number of criminal referrals is less than for the prior year, an explanation of the decrease; and (4) the United States Trustee Program’s efforts to prevent bankruptcy fraud and abuse, particularly with respect to the establishment of uniform internal controls to detect common, higher risk frauds, such as a debtor’s failure to disclose all assets.”

The Program’s most recent report to Congress is available for viewing at <https://www.justice.gov/ust/bankruptcy-data-statistics/reports-studies>.

CHAPTER 11 BUSINESS REORGANIZATIONS

The Program carries out significant responsibilities in chapter 11 business reorganization cases, including:

- appointing official committees of creditors;
- objecting to the employment and compensation of professionals, such as attorneys and financial advisors, whose applications do not meet statutory standards;
- appointing trustees and examiners when warranted, such as when there is suspected financial wrongdoing;
- reviewing and objecting to disclosure statements to ensure adequate information is provided to stakeholders;
- moving to dismiss or convert chapter 11 cases because they are not progressing toward financial rehabilitation; and
- enforcing the statutory limitations on insider and executive compensation under 11 U.S.C. § 503(c).

Although the USTP does not substitute its business judgment for that of management, the Program's role is critical to protecting the interests of all stakeholders by advocating for strict compliance with the law and promoting management and professional accountability.

In FY 2020, the USTP took preemptive measures to augment its current management system for chapter 11 oversight to address an increase in larger business reorganization cases, including designating a "strike team" consisting of experienced chapter 11 lawyers from field offices across the country to assist with drafting pleadings and litigating chapter 11 issues and a chapter 11 coordinator in each region to serve as liaison between field office trial attorneys and the EOUST's Office of the General Counsel.

Figure 4 shows the number of inquiries (informal investigations) and actions (court filings) initiated by the Program during FY 2020 in key areas related to chapter 11 case administration and oversight, along with the success rate for actions.

FIGURE 4: CHAPTER 11 CASE ENFORCEMENT AND ADMINISTRATION, FY 2020

Type of Activity	Inquiries ¹²	Actions ¹³	Action Success Rate ¹⁴
§ 327 Employment of Professionals	1,830	425	87%
§ 330 Professional Fee Requests ¹⁵	1,134	265	91%
§ 503(c) Key Employee Retention Plans	77	55	60%
§ 1103 Employment of Professionals	212	9	89%
§ 1104 Appointment of Trustee or Examiner	15	36	87%
§ 1112(b) Conversion or Dismissal	1,959	1,506	98%
§ 1125 Disclosure Statements	334	355	98%
§ 1129 Plan Confirmation	284	297	90%

¹² Inquiries (informal investigations) include documented communications by USTP staff with parties or others involved in a bankruptcy case concerning compliance with bankruptcy law and rules.

¹³ Actions include motions, complaints, and objections that Program personnel filed with the bankruptcy court to seek relief.

¹⁴ The success rate is calculated by dividing the number of actions decided successfully in FY 2020 into the total number of actions decided in FY 2020. Action success rate includes outcomes where the court entered an order granting the relief sought by the USTP, in whole or in part, or the defendant agreed to other relief satisfactory to the USTP.

¹⁵ Professional fee requests under 11 U.S.C. §§ 327 and 330 arise primarily in chapter 11 cases but also in cases filed under other chapters.

REVIEW OF EXECUTIVE AND OTHER INSIDER BONUSES

The USTP reviews executive bonuses and other compensation requests for compliance with the Bankruptcy Code and is often the only party to challenge excessive management bonuses. Federal law prohibits chapter 11 debtors' executives from awarding themselves bonuses during the bankruptcy case except in narrow circumstances that often require a finding by the court based on evidence in the record. 11 U.S.C. § 503(c). Debtors sometimes disguise prohibited "pay to stay" bonuses for executives and insiders as performance incentives that purportedly will increase the value of the company for the benefit of creditors. In such cases, debtors set so-called milestones to artificially low levels that render performance requirements illusory.

COURT DENIES EXECUTIVE BONUS REQUEST, CALLING IT "OFFENSIVE"

On September 17, the United States Bankruptcy Court for the District of Delaware refused to approve executive bonuses submitted for approval in a chapter 11 bankruptcy case. The court agreed with the USTP's Wilmington office that it was "offensive" that senior executives, who received \$16 million in pre-petition retention bonuses days before the May 22 bankruptcy filing, now sought an additional \$14 million in incentive payments. In issuing an oral ruling, the judge adopted several positions advocated by the U.S. Trustee. On October 7, the debtor company filed a revised incentive plan that reduced total possible payouts to \$8 million, eliminated certain C-suite officers as proposed recipients, and decreased by 20 percent possible payments to senior vice presidents and vice presidents, which the court accepted.

In FY 2020, the USTP filed 55 formal objections to executive bonuses and severance payments in chapter 11 cases. It is important to note that many objections are resolved informally through voluntary modification of the debtor's initial bonus proposal. The kinds of changes sought by the USTP include eliminating top executives from the list of bonus recipients or requiring more stringent performance milestones that must be met prior to payment of the bonus so that they are genuinely incentive, not retention, bonuses.

DISCLOSURE OF CONNECTIONS

The Bankruptcy Code assigns an important responsibility to the Program to review applications to employ law firms and other professional firms that will seek payment from the bankruptcy estate in chapter 11 cases. Due to the multiplicity of interests in a case—from large to small creditors and employees to other stakeholders—the Bankruptcy Code and Rules mandate that professional firms disclose their connections to other parties in the case and satisfy conflict of interest standards.

Although all parties in a case may object to the adequacy of a professional firm's disclosures and to its retention because of potential or actual conflicts, it is usually only the USTP that makes inquiries or files objections.

In recent years, the increasingly complex organizational structure of many professional firms seeking to be retained in bankruptcy cases has made the USTP's review of employment applications more challenging. Some are affiliates of larger businesses that provide a variety of services to clients, both inside and outside of the bankruptcy system. In addition, some professional firms (including their parents and affiliates) sponsor funds that invest in their business clients, in distressed debt that may be at issue in a bankruptcy case, or in industries (including competitors of their business clients) to which they provide services.

2,476

**OBJECTIONS AND
INQUIRIES RELATED TO
THE EMPLOYMENT OF
PROFESSIONALS,
INCLUDING THOSE WITH
CONFLICTS OF
INTEREST**

In response to the increasing challenge of reviewing applications to employ professional firms, the USTP issued guidance to its staff establishing four principles Program personnel should use during this review. These principles, which were publicly posted, put the parties and professional firms on notice of the USTP's enforcement positions and provide a common framework for consistent enforcement of the Bankruptcy Code and Rules related to disclosures and conflicts.

PROFESSIONAL FEES

The Program monitors and, when appropriate, objects to applications for compensation filed by professionals such as attorneys, accountants, turnaround specialists, and others who are paid from bankruptcy estate funds. In FY 2020, the USTP made 1,134 inquiries and took 265 formal actions related to professional fees, resulting in an aggregate of nearly \$16 million in fee requests reduced or withdrawn.

The role the USTP plays in this area is an important one since the USTP frequently is the only party to object to professional fees. Often, there is urgency to a bankruptcy filing due to impending foreclosure, lack of cash to continue operations, or other emergencies that result in a filing. As a result, the client control present in other business litigation may be absent. Moreover, a bankruptcy case generally involves multiple parties with varying interests that are affected by the conduct of the case and varying levels of financial ability to assert their interests. Therefore, non-debtor parties seldom exercise oversight or do so only as a litigation tactic.

USTP OBJECTION RESULTS IN DENIAL OF NEARLY \$32,000 IN COMPENSATION TO LAW FIRM

The Bankruptcy Court for the District of Utah entered an order sustaining the U.S. Trustee's objection to a fee application by counsel to a chapter 11 debtor. The firm sought fees for successfully defending itself against an objection by a creditor to a prior application for compensation. The USTP's Salt Lake City office objected, asserting that the firm was barred by the Supreme Court's decision in *Baker Botts, LLP v. ASARCO, LLC*, because, in defending its fees, the firm had been representing its own interests and not the interests of the debtor. The bankruptcy court agreed with the USTP and denied nearly \$32,000 of the firm's fees.

POST-BANKRUPTCY ASBESTOS TRUSTS

In FY 2020, the Program worked to ensure that asbestos trusts created under confirmed chapter 11 plans operate with greater transparency and with protections against fraud and abuse—protecting the most vulnerable future claimants whose injuries may not be manifested for years. Asbestos trusts operate and pay claims for years, or even decades, after a company with asbestos liability emerges from bankruptcy. In recent years, there has been concern that some trusts may mismanage funds and pay fraudulent claims, including to persons who lack valid medical claims or who were not exposed to the defendant-debtor's products. Mismanagement and fraud may deplete the trusts at the expense of future claimants, who may receive less than what was provided in the plan.

The USTP is addressing these issues by exercising its enforcement authority in two ways. First, the Program scrutinizes candidates nominated by debtors for

COURT ACCEPTS USTP RECOMMENDATION FOR HEIGHTENED LEGAL STANDARD FOR FCR APPOINTMENT

The USTP's Wilmington office objected to a debtor company's proposed candidate for appointment as the future claimants' representative (FCR) in a case involving a trust to compensate those who presently, as well in the future will, suffer from asbestos disease. In its objection, the USTP argued that fiduciaries appointed in the case to represent the interests of those yet to become sick must be independent of the debtor company and the tort lawyers who represent current claimants. The USTP asked the court to adopt an open selection process that allowed consideration of other FCR candidates without conflicts, such as connections to the professionals in the case. After a two-day trial in June 2020, the Bankruptcy Court for the District of Delaware agreed with the USTP, adopting the open process and reaffirming the higher guardian ad litem standard for appointment it had advanced, and appointed the debtor's nominee under that standard.

appointment as a future claimants' representative (FCR) and, where a candidate lacks the required independence, objects and offers an alternative candidate for the court's consideration. Second, the Program objects to disclosure statements that do not adequately explain the terms of the proposed trusts and the risks to future claimants, as well as plans that lack provisions to prevent fraud and abuse or that fail to provide transparency. The USTP's litigation in this area has led to significant rulings that heighten the standard and improve the process for the court's appointment of FCRs, impose new requirements regarding the disclosure of claims history and other relevant information, and provide for the audit of trust claims.

APPELLATE PRACTICE

As the "watchdog" of the bankruptcy system, the USTP has a unique national perspective and a responsibility to promote the coherent and consistent application of bankruptcy law throughout the country. One of the most important roles the USTP plays is to identify and raise issues for review on appeal, thereby ensuring that the law is shaped, interpreted, and applied evenly in all judicial districts. When substantial rights and financial interests are affected, stakeholders large and small benefit from clear legal standards—not only in the case at hand but in the larger marketplace as well. In support of this effort, the USTP handles a large number of appeals annually, many of which have a profound and long-standing effect on the bankruptcy system.

During FY 2020, the USTP participated in 100 new appellate matters—an increase of almost 25 percent over FY 2019—that included:

- Two cases before the Supreme Court at the *certiorari* or merits stage;
- 28 appeals to the United States courts of appeals; and
- 69 appeals that the USTP handled before district courts and bankruptcy appellate panels and one where the USTP assisted the U.S. Attorney's office for the Southern District of New York.

Of the 30 appeals decided in FY 2020, the USTP's position prevailed in 29 of them, a 97 percent success rate. Many appeals arise from enforcement actions prosecuted by the USTP, but the USTP also intervenes as *amicus curiae* (friend of the court)¹⁶ in other cases.

100

NEW
APPELLATE
MATTERS

97%

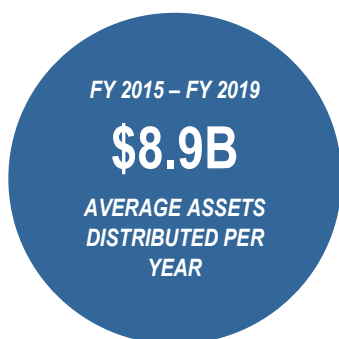
SUCCESS RATE

SUPREME COURT AGREES WITH THE UNITED STATES' POSITION AS *AMICUS CURIAE* AND UPHOLDS THE FINALITY OF BANKRUPTCY ORDERS DENYING RELIEF

In *Ritzen Group, Inc. v. Jackson Masonry, LLC*, the Supreme Court for the second time in successive terms addressed the finality of bankruptcy court orders. The Court unanimously agreed with the position of the United States as *amicus curiae* that a bankruptcy court's order denying a creditor's motion for relief from the automatic stay is a final, appealable order. Guided by its opinion in *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015), the Court reasoned that adjudication of a stay-relief motion "forms a discrete procedural unit" within the bankruptcy case that "yields a final, appealable order when the bankruptcy court unreservedly grants or denies relief." The decision is important for two reasons. First, it underscores that a bankruptcy case may yield more than one final order that is immediately appealable by right. Second, it confirms that orders that deny relief—here a refusal to lift the automatic stay—may be final, so final orders are not restricted to ones that grant affirmative relief. The clarity provided in *Ritzen* will greatly assist the Program in appealing adverse rulings involving significant and novel issues that might not have been subject to review previously. As in *Bullard*, the Program helped the Solicitor General's office in the briefing and arguing of this case by sharing its substantive expertise and participating in meetings with the parties and at the moot courts the Solicitor General's office conducted in preparing for oral argument.

¹⁶ When the USTP acts as *amicus curiae*, it is not a party to the case. Instead, it files a brief as a neutral party that shares its views about the legal issues presented by the appeal and its proposed solutions. Given that the USTP is a neutral party, courts often give weight to its views.

PRIVATE TRUSTEE OVERSIGHT AND ADDITIONAL USTP ACTIVITIES



U.S. Trustees appoint and supervise private trustees, who are not government employees, to serve as fiduciaries in bankruptcy cases with responsibility for administering the bankruptcy estate and distributing payments to creditors in cases filed under chapter 7, 12, and 13. These private trustees support a system that provides a fresh start to debtors and efficiently distributes assets to repay creditors, thereby assisting the national economy. They also conduct the section 341 meeting of creditors, generally the only formal proceeding in which most debtors participate during the bankruptcy process. In addition, with the passage of the SBRA,¹⁷

U.S. Trustees also recruited subchapter V trustees who are appointed on a case-by-case basis to facilitate the development of a consensual plan of reorganization by small business debtors who have elected to proceed under subchapter V of chapter 11.

Chapter 7 trustees often are referred to as “panel trustees” because the U.S. Trustee appoints them to a panel in each judicial district. Once a trustee is appointed to the panel, cases generally are assigned through a blind rotation process. The chapter 7 trustee collects the debtor’s assets that are not exempt from creditors, liquidates the assets, and distributes the proceeds to creditors. Chapter 12 and chapter 13 trustees are called “standing trustees” because, pursuant to statute, they have a standing appointment from the U.S. Trustee to administer cases within a particular geographic area. Standing trustees evaluate the financial affairs of the debtor, make recommendations to the court regarding confirmation of the debtor’s repayment plan, and administer the court-approved plan by collecting payments from the debtor and disbursing the funds to creditors.

The Program has a robust system of oversight for the private trustees that includes regular training, reviews of financial operations, and evaluation of performance to ensure the effective administration of bankruptcy estate assets.

In FY 2020, there were approximately 1,200 private trustees¹⁸ who handled the day-to-day activities of nearly 1.35 million ongoing bankruptcy cases. On average, these trustees distribute about \$8.9 billion¹⁹ annually from the assets of bankruptcy estates. As part of its oversight responsibilities in FY 2020, the USTP:

- Reviewed about 61,000 final reports to ensure that chapter 7 cases were administered in compliance with the Bankruptcy Code and funds were properly distributed to creditors and other third parties.
- Reviewed more than 1,000 interim reports prepared by chapter 7 panel and non-panel trustees to monitor their case administration progress and ongoing accountability for estate funds and other assets.
- Conducted eight field exams of chapter 7 trustees and oversaw 431 audits of chapter 7 and chapter 13 trustees designed to verify that the trustees’ accounting, reporting, and case management practices were adequate for safeguarding bankruptcy estate funds and administering bankruptcy cases.
- Reviewed 357 chapter 12 and chapter 13 FY 2020 amended and FY 2021 proposed annual budgets to ensure requested expenditures were reasonable and necessary for the administration of cases.

¹⁷ Discussed further in the section “Successful Implementation of the Small Business Reorganization Act” earlier in this report.

¹⁸ This figure includes trustees overseeing cases under chapters 7, 12, and 13; it does not include trustees overseeing cases under subchapter V of chapter 11. Currently, the USTP has recruited approximately 250 private individuals who are eligible for appointment as a subchapter V trustee in small business cases in which the debtor has elected treatment under the SBRA.

¹⁹ This figure is the average total trustee distributions per year over the previous five years (FY 2015 – FY 2019).

ASSISTANCE FOR INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY

To help ensure that individuals with limited English proficiency can fully participate in the statutory section 341 meetings of creditors where debtors testify under oath, the Program offers free telephonic interpreter services at these meetings as needed.

In FY 2020, more than 13,000 calls were made for interpreter services in over 70 languages. The top three languages requested were Spanish, Korean, and Vietnamese (Figure 5).

CREDIT COUNSELING AND DEBTOR EDUCATION

To ensure that consumers are aware of alternatives to bankruptcy and to provide tools to avoid future financial problems when they exit bankruptcy, the Bankruptcy Code requires individual debtors to receive credit counseling (including a discussion of options outside of bankruptcy) before filing and to complete a personal financial management education course before receiving a discharge of debts.

The USTP is responsible for the approval of providers who meet statutory qualifications to offer the pre-filing credit counseling and pre-discharge debtor education services to individual debtors. Providers must submit an initial application that is approved for a preliminary six-month period and, thereafter, must re-apply annually for approval. In FY 2020, the Program reviewed 206 new and renewal applications for approval and, as of September 29, 2020, there were 86 approved credit counseling agencies and 141 approved debtor education providers.

Debtors primarily elect to take their credit counseling and debtor education via the Internet, although services also are available by telephone or in-person in many districts (Figure 6). These services are available at an average combined cost of less than \$40. In addition, around 10 percent of services are provided at no or reduced cost.

FIGURE 5: LANGUAGES REQUESTED FOR INTERPRETER SERVICES

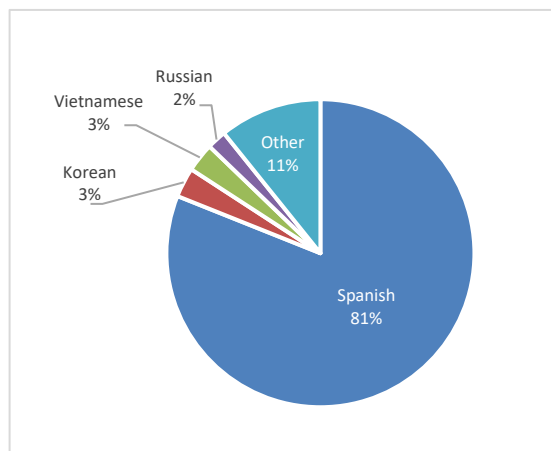


FIGURE 6: DELIVERY METHOD FOR SERVICES RECEIVED, FY 2020

Type of Service	In-Person	Telephone	Internet
Credit Counseling	0.2%	11.1%	88.7%
Debtor Education	1.0%	9.2%	89.8%

U.S. TRUSTEE PROGRAM NATIONWIDE OFFICE LOCATOR

Please visit our Web site at www.justice.gov/ust for office phone numbers and addresses.

EXECUTIVE OFFICE FOR U.S. TRUSTEES

Washington, D.C.

REGIONS, JUDICIAL DISTRICTS, AND FIELD OFFICES

Region 1

District of Massachusetts
Boston
Worcester

District of Maine
Portland

District of New Hampshire
Concord

District of Rhode Island
Providence

Region 2

Southern District of New York
New York

Eastern District of New York
Central Islip

Northern District of New York
Albany
Utica

Western District of New York
Buffalo
Rochester

District of Connecticut
New Haven

District of Vermont
Covered by the Albany
office

Region 3

*Eastern District of
Pennsylvania*
Philadelphia

Middle District of Pennsylvania
Harrisburg

*Western District of
Pennsylvania*
Pittsburgh

District of Delaware
Wilmington

District of New Jersey
Newark

Region 4

District of South Carolina
Columbia

District of Maryland
Baltimore
Greenbelt

Eastern District of Virginia
Alexandria
Norfolk
Richmond

Western District of Virginia
Roanoke

*Southern District of West
Virginia*
Charleston

*Northern District of West
Virginia*
Covered by the Charleston
office

District of Columbia
Covered by the Alexandria
office

Region 5

Eastern District of Louisiana
New Orleans

Middle District of Louisiana
Covered by the New
Orleans office

Western District of Louisiana
Shreveport

Southern District of Mississippi
Jackson

Northern District of Mississippi
Covered by the Jackson
office

Region 6

Northern District of Texas
Dallas

Eastern District of Texas
Tyler

Region 7

Southern District of Texas
Houston
Corpus Christi

Western District of Texas
Austin
San Antonio

Region 8

Western District of Tennessee
Memphis

Middle District of Tennessee
Nashville

Eastern District of Tennessee
Chattanooga

Eastern District of Kentucky
Lexington

Western District of Kentucky
Louisville

Region 9

Northern District of Ohio
Cleveland

Southern District of Ohio
Cincinnati
Columbus

Eastern District of Michigan
Detroit

Western District of Michigan
Grand Rapids

Region 10

Southern District of Indiana
Indianapolis

Northern District of Indiana
South Bend

Central District of Illinois
Peoria

Southern District of Illinois
Covered by the Peoria office

Region 11

Northern District of Illinois
Chicago

Eastern District of Wisconsin
Milwaukee

Western District of Wisconsin
Madison

Region 12

Northern District of Iowa
Cedar Rapids

Southern District of Iowa
Des Moines

District of Minnesota
Minneapolis

District of North Dakota
Covered by the Minneapolis
office

District of South Dakota
Covered by the Des Moines
office

Region 13

Western District of Missouri
Kansas City

Eastern District of Missouri
St. Louis

District of Nebraska
Omaha

Eastern District of Arkansas
Little Rock

Western District of Arkansas
Covered by the Little Rock
office

Region 14

District of Arizona
Phoenix

Region 15

Southern District of California
San Diego

District of Hawaii
Honolulu

District of Guam
Covered by the Honolulu
office

*District of the Northern
Mariana Islands*
Covered by the Honolulu
office

Region 16

Central District of California
Los Angeles
Riverside
Santa Ana

Region 17

Northern District of California
San Francisco
San Jose

Eastern District of California
Fresno
Sacramento

District of Nevada
Las Vegas
Reno

Region 18

Western District of Washington
Seattle

Eastern District of Washington
Spokane

District of Oregon
Portland
Eugene

District of Idaho
Boise

District of Montana
Great Falls

District of Alaska
Covered by the Seattle
office

Region 19

District of Colorado
Denver

District of Utah
Salt Lake City

District of Wyoming
Cheyenne

Region 20

District of Kansas
Wichita

District of New Mexico
Albuquerque

Northern District of Oklahoma
Tulsa

Western District of Oklahoma
Oklahoma City

Eastern District of Oklahoma
Covered by the Tulsa office

Region 21

Northern District of Georgia
Atlanta

Middle District of Georgia
Macon

Southern District of Georgia
Savannah

Northern District of Florida
Tallahassee

Middle District of Florida
Orlando
Tampa

Southern District of Florida
Miami

District of Puerto Rico
San Juan

District of the Virgin Islands
Covered by the Atlanta
office



United States Department of Justice Executive Office for United States Trustees

Report to Congress:

Criminal Referrals by the United States Trustee Program Fiscal Year 2019

*(As required by Section 1175 of the Violence Against Women and
Department of Justice Reauthorization Act of 2005, Public Law 109-162)*

May 2020

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EXECUTIVE SUMMARY

The Director of the Executive Office for United States Trustees (EOUST) is required to submit an annual report to Congress under the provisions of Section 1175 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (P.L. 109-162). Section 1175 states:

The Director of the Executive Office for United States Trustees shall prepare an annual report to the Congress detailing—(1) the number and types of criminal referrals made by the United States Trustee Program; (2) the outcomes of each criminal referral; (3) for any year in which the number of criminal referrals is less than for the prior year, an explanation of the decrease; and (4) the United States Trustee Program's efforts to prevent bankruptcy fraud and abuse, particularly with respect to the establishment of uniform internal controls to detect common, higher risk frauds, such as a debtor's failure to disclose all assets.

The United States Trustee Program (USTP or Program) made 2,280 bankruptcy and bankruptcy-related criminal referrals during Fiscal Year (FY) 2019. This represents a 1.0 percent increase from the 2,257 criminal referrals made during FY 2018. The five most common allegations contained in the FY 2019 criminal referrals involved tax fraud, false oaths or statements, a bankruptcy fraud scheme, identity theft or use of false/multiple Social Security numbers, and the concealment of assets. Of the 2,280 criminal referrals, as of March 20, 2020, formal criminal charges had been filed in connection with 6 of the referrals, 1,526 of the referrals remained under review or investigation, 746 of the referrals were declined for prosecution, and 2 referrals were administratively closed.

In FY 2019, the Program continued its work to strengthen its partnerships with law enforcement through its participation on bankruptcy fraud working groups and other specialized task forces in districts across the country, as well as assisting in the prosecution of bankruptcy and bankruptcy-related crimes by serving as Special Assistant United States Attorneys (SAUSAs) in cases, assisting with investigations, and providing support as expert and fact witnesses. The USTP also employed a variety of strategies to identify fraud, including the

Program’s Internet email “Hotline,” which offers a convenient means for individuals to report suspected bankruptcy crimes.

INTRODUCTION

Section 1175 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (P.L. 109-162) requires the Director of the EOUST to submit a “report to Congress detailing—(1) the number and types of criminal referrals made by the United States Trustee Program; (2) the outcomes of each criminal referral; (3) for any year in which the number of criminal referrals is less than for the prior year, an explanation of the decrease; and (4) the United States Trustee Program’s efforts to prevent bankruptcy fraud and abuse, particularly with respect to the establishment of uniform internal controls to detect common, higher risk frauds, such as a debtor’s failure to disclose all assets.”

The Program is the component of the Department of Justice whose mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public. It consists of 21 regions with 90 field office locations nationwide and an Executive Office in Washington, DC. Each field office is responsible for carrying out numerous administrative, regulatory, and litigation responsibilities under title 11 (the Bankruptcy Code) and title 28 of the United States Code.^{1/}

The USTP has a statutory duty to refer matters to the United States Attorneys’ offices (USAOs) for investigation and prosecution that “relate to the occurrence of any action which may constitute a crime,” and to assist the United States Attorney in “carrying out prosecutions based on such action.” 28 U.S.C. § 586(a)(3)(F). In addition, 18 U.S.C. § 158 requires designation of a prosecutor and a Federal Bureau of Investigation (FBI) agent in each district to address bankruptcy-related crimes, which affirms the importance of the partnership between the USTP and law enforcement in protecting the integrity of the bankruptcy system.

^{1/} The Program has jurisdiction in all federal judicial districts except those in Alabama and North Carolina.

I. NUMBER AND TYPES OF CRIMINAL REFERRALS

The Program tracks criminal referrals using its internal, automated Criminal Enforcement Tracking System (CETS). Program personnel enter information into CETS as each case progresses and review the status of all referrals at least once every six months. The system is designed to provide an accurate measure of criminal enforcement actions, assist in trend identification, and facilitate management improvements.

In FY 2019, the USTP made 2,280 bankruptcy and bankruptcy-related criminal referrals. Each referral may be sent to multiple agencies, but it is counted only once in CETS. Similarly, each referral may contain multiple allegations. The breadth of allegations involved in criminal referrals is evident in Table 1, with referral allegations in 43 separate categories. The five most common allegations contained in the FY 2019 criminal referrals involved tax fraud (60.0%), false oaths or statements (23.7%), a bankruptcy fraud scheme (19.8%), identity theft or use of false/multiple Social Security numbers (19.2%), and concealment (18.6%).

Table 1: Criminal Referrals by Type of Allegation		
Type of Allegation	Referrals	
	Count	Percent
Tax Fraud [26 U.S.C. § 7201, <i>et seq.</i>]	1,368	60.0%
False Oath/Statement [18 U.S.C. § 152(2) and (3)]	540	23.7%
Bankruptcy Fraud Scheme [18 U.S.C. § 157]	452	19.8%
Identity Theft or Use of False/Multiple Social Security Numbers	438	19.2%
Concealment [18 U.S.C. § 152(1) and (7)]	423	18.6%
Mail/Wire Fraud [18 U.S.C. §§ 1341 and 1343]	188	8.2%
Perjury/False Statement	176	7.7%
Concealment/Destruction/Withholding of Documents [18 U.S.C. § 152(8) and (9)]	141	6.2%
Forged Document	105	4.6%
Serial Filer	99	4.3%
Mortgage/Real Estate Fraud	81	3.6%
Disregard of Bankruptcy Law/Rule by Bankruptcy Petition Preparer [18 U.S.C. § 156]	63	2.8%
Bank Fraud [18 U.S.C. § 1344]	60	2.6%
Conspiracy [18 U.S.C. § 371]	57	2.5%
Destruction, Alteration, or Falsification of Documents in Federal Investigations and Bankruptcy [18 U.S.C. § 1519]	52	2.3%

Type of Allegation	Count	Percent
Professional Fraud	39	1.7%
Embezzlement [18 U.S.C. § 153]	18	0.8%
Post-Petition Receipt of Property [18 U.S.C. § 152(5)]	16	0.7%
Federal Program Fraud	15	0.7%
Money Laundering [18 U.S.C. §§ 1956 and 1957]	13	0.6%
State Law Violation	13	0.6%
Corporate Fraud	10	0.4%
Obstruction of Justice	10	0.4%
Corporate Bust-Out/Bleed-Out	9	0.4%
Investor Fraud	8	0.4%
Threat of Violence	8	0.4%
Misuse of Seals of Courts; Seals of Departments or Agencies [18 U.S.C. §§ 505–506]	7	0.3%
False Claim [18 U.S.C. § 152(4)]	5	0.2%
Insurance Fraud	5	0.2%
Bribery [18 U.S.C. § 152(6)]	4	0.2%
Criminal Contempt [18 U.S.C. § 402]	3	0.1%
Drug Offense	3	0.1%
Credit Card Fraud/Bust-Out	2	0.1%
Extortion	2	0.1%
Health Care Fraud [18 U.S.C. § 1347]	2	0.1%
Immigration Offense	2	0.1%
Internet Fraud	2	0.1%
Adverse Interest/Officer Conduct [18 U.S.C. § 154]	1	<0.1%
Counterfeiting of Certification Marks (19 U.S.C. § 1337)	1	<0.1%
Failure to Remit Passenger Facility Charges (49 U.S.C. §§ 40117 and 46316)	1	<0.1%
Prohibited Exportation, Re-exportation, Sale, or Supply of Goods, Technology, or Services to Iran (31 C.F.R. § 560.204)	1	<0.1%
Structuring	1	<0.1%
Firearms-Unlawful Acts (18 U.S.C. § 922)	1	<0.1%
<p>1) Allegation information can change over time. Table 1 reflects information contained within CETS as of March 20, 2020.</p> <p>2) Percent based on 2,280 referrals. One referral often contains more than one allegation, so the sum of the percentages for referrals will exceed 100 percent.</p>		

II. OUTCOMES OF CRIMINAL REFERRALS

Table 2 shows the collective outcome/disposition of the 2,280 criminal referrals the Program made during FY 2019 as of March 20, 2020.^{2/} Of the 2,280 referrals, 1,526 of the referrals are under review by the USAOs (36.4%) or with an investigative agency (30.6%), 6 referrals (0.2%) resulted in formal charges, 746 referrals (32.7%) were declined for prosecution, and 2 referrals (0.1%) were administratively closed.^{3/}

Table 2: Outcome/Disposition of FY 2019 Referrals		
Outcome/Disposition	Referrals	
	Number	Percent
Under Review in United States Attorney's Office	829	36.4%
With Investigative Agency	697	30.6%
Formal Charges Filed (Case Active)	3	0.1%
Formal Charges Filed (Case Closed)	3	0.1%
– At least One Conviction or Guilty Plea	3	
– At least One Pre-trial Diversion	0	
– At least One Dismissal	0	
– At least One Acquittal	0	
Prosecution Declined by United States Attorney	746	32.7%
Administratively Closed	2	0.1%
1) Outcome and disposition information will change over time. The information contained within Table 2 reflects information contained within CETS as of March 20, 2020.		
2) Rounded percent based on 2,280 referrals.		

^{2/} The Program is not the source of official disposition information. CETS is designed primarily to track referrals made by the Program to United States Attorneys. While Program staff work with local USAOs to update disposition information semi-annually, delays in reporting, as well as differences in tracking systems, may result in reporting variances between the agencies.

^{3/} Administratively closed referrals may still be under review/investigation by agencies (other than USAOs) that historically have not provided updates to the USTP on referrals. After a referral has been open for a period of time and if the Program is not able to verify the outcome/disposition, the referral is administratively closed in CETS. Referrals that are administratively closed may be reopened at a later date.

The six cases referenced in Table 2 in which formal charges were filed between October 1, 2018, and March 20, 2020, are prosecutions that originated from an FY 2019 referral as derived from CETS.^{4/} It is important to note that white-collar criminal referrals like those made by the Program often require significant time and resources to investigate. As a result, it generally takes more than two years before there is a reportable action in CETS. Therefore, it is reasonable that a high percentage of cases referred in FY 2019 are still under investigation or review.

III. COMPARISON WITH CRIMINAL REFERRALS MADE IN PREVIOUS YEAR

As shown in Table 3, the number of criminal referrals made during FY 2019 represents a 1.0 percent increase from the number of referrals made in FY 2018.

Table 3: Comparison Between Criminal Referrals in FY 2018 and FY 2019		
FY 2018	FY 2019	Percent Change
2,257	2,280	1.0%

The USTP has experienced near continuous growth in the number of bankruptcy and bankruptcy-related criminal referrals over the past 10 years, with the exception of a slight decline in FY 2013. The Program's sustained efforts to detect and refer suspected criminal activity, including an increase in referrals despite continued resource challenges in FY 2019, demonstrate the Program's commitment to this important statutory duty.

IV. USTP EFFORTS TO PREVENT BANKRUPTCY FRAUD AND ABUSE

The USTP is committed to identifying and referring for investigation and prosecution bankruptcy fraud and bankruptcy-related crimes. The EOUST's Office of Criminal Enforcement

^{4/} Table 2 reflects only disposition information related to referrals the Program made in FY 2019. It does not reflect the entirety of prosecutions with bankruptcy charges brought by the Department of Justice in FY 2019. A reporting of all prosecutions would include those that originated from Program referrals in prior fiscal years, as well as prosecutions related to referrals not made by the Program.

oversees and coordinates these enforcement efforts, and has strengthened the Program's ability to detect, refer, and assist in the prosecution of criminal violations. Through issuing guidance and resource materials, participating in working groups and task forces, collaborating with its law enforcement partners, and providing extensive training, the USTP has established the necessary systems to detect fraud schemes and to combat fraud and abuse that threaten the integrity of the bankruptcy system.

Following are some highlights of the Program's criminal enforcement efforts in FY 2019.

Bankruptcy Fraud Working Groups and Other Specialized Task Forces. The Program participates in approximately 70 local bankruptcy fraud working groups and other specialized task forces throughout the country. Members of these working groups and task forces include representatives from the USAOs; FBI; United States Postal Inspection Service; Internal Revenue Service-Criminal Investigation; and offices of the Inspector General for the Social Security Administration, the Department of Housing and Urban Development, the United States Secret Service, and Immigration and Customs Enforcement.

Working groups and task forces provide an effective forum for consultation between the USTP and its law enforcement partners and allow the Program to draw on the collective expertise of the group to investigate and effectively address fraud and abuse in the bankruptcy system. One example of the success that can be achieved based on these collaborations comes from the Central District of Illinois Bankruptcy Fraud Working Group, which is coordinated by the United States Trustee for Region 10. After filing bankruptcy, a debtor improperly transferred property of the bankruptcy estate and concealed it from the private trustee and the court. The USTP obtained a denial of the debtor's bankruptcy discharge and referred the matter to the United States Attorney. In cooperation with the working group, the referral was investigated by the FBI. Ultimately, the defendant pled guilty to the concealment of assets and was sentenced to serve weekends in jail for six months of a three-year term of supervised release and ordered to pay a fine and restitution of nearly \$11,000. The United States Attorney's press release on sentencing recognized the investigative support and assistance of the working group.

Special Assistant United States Attorneys. More than 25 Program attorneys in field offices across the country are designated as SAUSAs to assist USAOs in the investigation and prosecution of bankruptcy and bankruptcy-related crimes. For example, in the Eastern District of Michigan, a Program Trial Attorney served as a SAUSA in a matter that resulted in the conviction of multiple defendants for their roles in a scheme to defraud the Farm Service Agency. The scheme involved the sale and transfer of secured collateral and the concealment of assets in connection with the lead defendant's bankruptcy case. After a trial, the lead defendant was convicted on multiple counts, including false oath and declaration, concealment of assets in contemplation of bankruptcy, conspiracy to commit bankruptcy fraud, wire fraud, mail fraud, and conversion of a property pledge. He was sentenced to 70 months incarceration followed by two years of supervised release. In addition, the defendant's parents were convicted of conspiracy to commit bankruptcy fraud and wire fraud. The father and mother were sentenced to 12 and 6 months of incarceration, respectively, followed by two years of supervised release.

Other Staff Support. Nationally, the EOUST's Office of Criminal Enforcement regularly coordinates with USAOs and other members of law enforcement on cases referred by the Program. Staff at the office level also are frequently relied on to provide post-referral assistance. One example of this local assistance involved a matter in the Northern District of New York that came to conclusion in FY 2019 after a multi-year investigation. In this matter, the USTP's office provided documents and financial records relating to the defendant's bankruptcy case and consulted with the USAO and law enforcement on bankruptcy law issues. The defendant, a certified public accountant (CPA), admitted that during his personal chapter 11 bankruptcy case he used the bank accounts of his CPA practice to conceal between \$3.5 and \$9.5 million in assets, laundered money by depositing funds unrelated to his CPA practice into the accounts, and then used the funds for his own benefit, including writing checks to himself totaling tens of thousands of dollars. He also admitted to defrauding an elderly client in a \$4.6 million mail fraud scheme. The defendant pleaded guilty to concealment in bankruptcy, mail fraud, and money laundering, and was sentenced to 87 months of incarceration followed by 36 months of supervised release.

In FY 2019, the USTP also responded to nearly 300 requests for assistance from USAOs, the FBI, and other law enforcement agencies on matters not originating from a Program referral.

In one such matter, two Trial Attorneys, one from the Program’s Minneapolis office and another from the Kansas City office, supported the USAO for the Western District of Missouri in its prosecution of a defendant who was convicted after trial of mail fraud, wire fraud, and money laundering. The defendant solicited investments for his business, falsely claiming that his expertise in stock trading would generate significant returns to investors. Instead, he used nearly all of the investors’ funds on personal expenditures, including the purchase of a luxury car. The defendant was indicted and the USAO sought assistance on matters relating to his 2012 chapter 7 bankruptcy in the District of Minnesota, in which the United States Trustee’s office had obtained a revocation of his discharge. The Trial Attorneys worked in tandem to provide law enforcement with information and documents and the Minneapolis Trial Attorney testified at the criminal trial. The defendant was sentenced to 15 years in federal prison without parole and was ordered to pay nearly \$500,000 in restitution to his victims.

Training. During FY 2019, the Program sponsored more than 65 bankruptcy and bankruptcy-related fraud training programs that reached a combination of approximately 3,300 federal, state, and local law enforcement personnel; private bankruptcy trustees; USTP staff; and members of the bar and other professional associations throughout the country. Each program is customized to maximize impact and a variety of educational formats are utilized, including in-person presentations, online meeting technology, and video teleconferences. Notable for FY 2019 were presentations made by Program personnel at two national FBI conferences sponsored by the Economic Crimes Unit of FBI headquarters that reached approximately 600 FBI managers, agents, and analysts.

Bankruptcy Fraud Internet “Hotline.” In FY 2019, the USTP documented 385 email submissions via its National Bankruptcy Fraud Hotline (USTP.Bankruptcy.Fraud@usdoj.gov). The Hotline offers a convenient means for individuals to report suspected bankruptcy fraud and provide supporting documentation and specific factual information that may be useful in pursuing allegations. In FY 2019, more than 130 referrals resulted from a Hotline submission made in either FY 2019 or a prior fiscal year. While not all submissions rise to the level of a criminal referral, they may lead to a civil enforcement action.

SUMMARY

The United States Trustee Program's criminal enforcement program continued to flourish in FY 2019 through the actions described in this report. By detecting and referring fraud schemes, collaborating with its law enforcement partners, and providing specialized training, the USTP continues to prioritize its enforcement efforts to combat fraud and abuse and to protect the integrity of the bankruptcy system.



UNITED STATES TRUSTEE PROGRAM INFORMATIONAL NOTICE

EMERGENCY RENTAL ASSISTANCE PROGRAMS

If you are a renter having trouble paying your rent or a landlord who has lost rental income due to challenges presented by the COVID-19 pandemic, help may be available. Through funding from the U.S. Department of the Treasury's Emergency Rental Assistance (ERA) program, there are a wide variety of state and local programs that offer assistance—including financial assistance—to those who are struggling to make ends meet.

Provided below are links to learn more about ERA programs in your local area, including how they work and who is eligible, as well as other important information to help you navigate these difficult times. ERA programs can vary based on locale since flexibility is given to states to develop programs that best suit the needs of their communities.

For more general information on assistance programs, visit:

<https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/>

For ERA program links in your local area, visit:

<https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/find-help-with-rent-and-utilities/>

To get answers to frequently asked questions, visit:

For Renters: <https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/emergency-rental-assistance-for-renters/>

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Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, March 10, 2021

National Consumer Bankruptcy Law Firm Agrees to Pay More than \$300,000 in Relief to Consumers and to a Six-Year Practice Ban in Settlement with U.S. Trustee Program

The Department of Justice's U.S. Trustee Program (USTP) has entered into a settlement with national consumer bankruptcy law firm Deighan Law LLC, previously known as Law Solutions Chicago and doing business as UpRight Law (UpRight). The settlement is set forth in a consent order entered by the Bankruptcy Court for the District of Montana on March 9 and resolves enforcement actions filed by the USTP over allegations of misconduct relating to UpRight's representation of Montana consumers as debtors or prospective debtors in bankruptcy cases. As stipulated in the settlement, UpRight has paid or will pay more than \$300,000 in monetary relief and will be barred from representing bankruptcy clients in Montana for six years.

As a result of dozens of USTP actions filed since 2016, UpRight has paid or been ordered to pay almost \$900,000 in monetary relief, including returning fees to over 500 impacted consumers and paying court-ordered sanctions, attorney's fees, and costs. Additionally, bankruptcy courts have imposed practice bans against UpRight in at least four jurisdictions.

"Lawyers who misrepresent their services to vulnerable clients and fail to perform as promised harm debtors, creditors, and the integrity of the bankruptcy system," said USTP Director Cliff White. "This settlement shows that the USTP will continue to hold accountable attorneys who fail to adequately and honestly represent their clients."

In the current matter, the USTP alleged that UpRight engaged in misconduct and misrepresentations impacting hundreds of Montana consumers, which came to light due to investigations by the USTP in two bankruptcy cases. In one case, UpRight substantially delayed filing its client's bankruptcy case for almost a year after it misrepresented that it had a local attorney who was licensed in Montana available to file the case. UpRight's delay resulted in a creditor garnishing more than \$6,000 of the debtor's wages. In the other case, UpRight obtained payment of its attorney's fees by advising the debtors to participate in an improper scheme whereby they surrendered their vehicle to an out-of-state towing company. Another bankruptcy court previously sanctioned UpRight for implementing the towing program—which it used in more than 200 cases across the country—describing it as a "scam from the start," and the towing company's owners were indicted for their role in the scheme. UpRight's advice resulted in the debtors being sued by their automobile lender for conversion of its collateral.

In the settlement, UpRight does not contest the USTP's allegations that it engaged in misconduct in the course of its dealings with Montana consumers, including misrepresenting that it had a sufficient number of local Montana-licensed attorneys available to provide adequate bankruptcy representation, misrepresenting

to clients the scope of legal services to be provided and the cost of those services, failing to timely provide its clients with written retainer agreements that clearly and conspicuously explained the legal services to be provided and the cost of those services, failing to discuss non-bankruptcy alternatives, failing to adequately supervise the firm's non-attorney staff (some of whom engaged in the unauthorized practice of law), providing erroneous legal advice, and failing to adequately supervise its Montana "partner" attorneys. This misconduct contributed to UpRight's substantial delay in filing bankruptcy cases for Montana consumers. In addition, UpRight filed bankruptcy cases for only 109 of the 473 Montana clients from whom the firm collected at least a partial fee.

To resolve the USTP's allegations of misconduct, UpRight has refunded or will refund more than \$300,000 in fees paid by Montana consumers for whom UpRight never filed a bankruptcy case. UpRight also agreed to pay a civil penalty of \$10,309 and to return all fees, totaling \$3,770, to the debtors in the two cases in which the USTP brought its enforcement actions. Additionally, UpRight will be barred from accepting bankruptcy clients or providing bankruptcy services to consumers in Montana, effective July 2, 2018, through July 2, 2024.

While the agreement resolves disputes with the USTP in the two underlying bankruptcy cases, it does not impact the rights of the debtors in those cases or any other parties or government agencies not participating in the settlement, including other Montana consumers, nor does it impact the USTP's rights to litigate enforcement actions against UpRight in other jurisdictions or to seek redress in other Montana cases. The two underlying cases are captioned *In re Dailey*, Case No. 15-61088-7 (Bankr. D. Mont.), and *In re Emerson*, Case No. 16-60056-7 (Bankr. D. Mont.).

The U.S. Trustee Program is the component of the Justice Department that protects the integrity of the bankruptcy system by overseeing case administration and litigating to enforce the bankruptcy laws. The Program has 21 regions and 90 field office locations. Learn more information on the Program at: <https://www.justice.gov/ust>.

Attachment(s):

[Download Order Approving UpRight Settlement Agreement In re Dailey](#)

[Download Order Approving UpRight Settlement Agreement In re Emerson](#)

Topic(s):

Bankruptcy

Consumer Protection

Component(s):

[U.S. Trustee Program](#)

Press Release Number:

214

Updated March 10, 2021

SUBSCRIPTION FEATURE FOR MOR/PCR WORKING GROUP EMAIL UPDATES

Professionals in non-small business chapter 11 cases are encouraged to sign up for the subscription to the USTP's MOR/PCR Working Group Email Updates which will alert professionals when changes to the new forms that took effect on June 21, 2021, or the Instructions have been made, as well as provide other valuable information.

Step 1: Navigate to: [Chapter 11 Operating Reports | UST | Department of Justice](#).

Step 2: Click "Subscribe to Chapter 11 Operating Reports Email Update."

Step 3: Follow prompts to input email address and submit.

The screenshot displays the 'CHAPTER 11 OPERATING REPORTS' section. It includes a paragraph explaining the 'Final Rule' effective June 21, 2021, regarding the filing of pre-confirmation monthly operating reports (MORs) and quarterly post-confirmation reports (PCRs). Below this text is a yellow banner with an envelope icon and the text 'Subscribe to Chapter 11 Operating Reports Email Updates'. At the bottom, there are two side-by-side boxes. The left box, titled 'Forms (Effective June 21, 2021)', contains a dark button that says 'CLICK HERE TO DOWNLOAD THE GUIDE FOR OPENING THE MOR/PCR FORMS'. The right box, titled 'TROUBLESHOOTING', contains the text: 'Having technical problems? Please review our Troubleshooting Tips page, which includes:'.

Practice in Subchapter V Cases

Honorable Paul W. Bonapfel
Bankruptcy Judge
Northern District of GA

Leon S. Jones
Jones & Walden, LLC

A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

Revised July 2021

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

Earlier versions of this paper were distributed in February 2020, May 2020, and July 2020. Supplements were added (effectively as “pocket parts”) as Chapter XIV (November 2020) and Chapter XV (April 2021).

This revision merges the material in the “pocket parts” into the body of the text and includes other editorial revisions that do not materially change the substance of the paper as supplemented in April 2021.

This revision also contains revised or new material dealing with the following subjects:

Eligibility requirements regarding “engaged in commercial or business activities” and debts arising from commercial or business activities – §§ III(C), (D), (E)

Eligibility of reporting company or affiliate of issuer – § III(G)

Removal of debtor in possession – § VI(C)

Temporary amendments to § 365(d) dealing with postpetition lease obligations – §§ VI(K), VII(C), VIII(D)(4).

Relationship of good faith requirement of § 1129(a)(3) and disposable income in consensual plan – § VIII(D)(8)

Property of the estate in subchapter V case of individual – § XI(B)(2)

The original version of the paper was published at 93 AMER. BANKR. L. J. 571 (2019).

The American Bankruptcy Institute has published an ebook version:

<https://store.abi.org/sbra-a-guide-to-subchapter-v-of-the-u-s-bankruptcy-code.html>

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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 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 on August 23, 2019.

New subchapter V applies in cases in which a qualifying debtor elects its application. In the absence of an election, the pre-SBRA provisions of chapter 11 that govern a small business debtor apply with one change. SBRA amended § 1102(a)(3) to provide that no committee of

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).

unsecured creditors is appointed in any case of a small business debtor unless the court orders otherwise.⁴

Under the SBRA, a debtor could not elect subchapter V if its debts (with some exceptions) exceeded \$ 2,725,625. The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”),⁵ enacted and effective March 27, 2020, amended the SBRA to increase the debt limit to \$ 7.5 million for purposes of subchapter V for one year and made certain technical corrections. The Covid-19 Bankruptcy Relief Extension Act of 2021⁶ amended the CARES Act to extend the increased debt limit for an additional year. The later legislation did not increase the debt limits in a small business case.

The Consolidated Appropriations Act, 2021 (the “CAA”) temporarily amended § 365(d) to permit the court to extend the time for a debtor in a sub V case in certain circumstances to comply with its postpetition obligations under a lease of nonresidential real property and to permit deferred payment of such obligations under a nonconsensual, “cramdown” plan.⁷ Section VI(K) discusses this amendment.

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.”⁸ A sponsor of the legislation stated that it

⁴ SBRA, § 4(a)(11), 133 Stat. 1079, 1086.

⁵ Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

⁶ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

⁷ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat. 1182, 3219 (December 27, 2020).

⁸ 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.

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.”⁹ Courts have taken the legislative purpose of SBRA into account in their application of the new law.¹⁰

SBRA has had a significant impact. A preliminary estimate was that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would have qualified as a subchapter V debtor and that about 25 percent of individuals in chapter 11 cases

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., Amer. Bankr. Inst. Comm’n to Study the Reform of Chapter 11: 2012-14 Final Report & Recommendations*, 23 AMER. 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.⁹ 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).

¹⁰ *E.g., 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).

would qualify.¹¹ The economic circumstances arising from the Covid-19 pandemic and the temporary increase of the debt limit under the CARES Act most likely increased the number of subchapter V cases.¹²

Subchapter V resembles chapter 12 in some aspects.¹³ 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 to take effect on SBRA’s effective date. Changes to the Bankruptcy Rules,

¹¹ Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, 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. The estimate does not take into account the increase in the debt limit that the CARES Act temporarily made.

¹² 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 AMER. BANKR. INST. L. REV. 251 (2020).

¹³ 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.¹⁴ The changes to the Official Forms became effective as of the effective date of SBRA. The Rules Committee 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.¹⁵ Appendix B summarizes the changes that the Interim Rules made.

If a small business debtor does not elect subchapter V, the provisions that govern small business cases apply.¹⁶ The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee refers to “small business cases” and to “cases under subchapter V of chapter 11.”

¹⁴ 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.

¹⁵ 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.

¹⁶ For a summary of key features of a non-sub V small business case governed by the provisions for small business cases, see *supra* footnote 8.

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. Moreover, under the temporary extension of the debt limits under the CARES Act, a debtor can be a subchapter V debtor, but not a small business debtor, if its debts are less than \$ 7.5 million but more than the limit for a small business debtor.

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.¹⁷

Three types of cases are now possible under chapter 11: (1) a non-small business case under traditional chapter 11 for a debtor who is not a small business debtor and either (a) has debts in excess of the sub V debt limit or (b) has debts below the limit but does not elect subchapter V; (2) a small business case for a small business debtor that does not elect subchapter

¹⁷ 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).

V; and (3) a subchapter V case for a qualifying debtor who elects it. This paper generally uses “traditional” to describe a chapter 11 case (including a small business case) that is not a subchapter V case.

II. Overview of Subchapter V

For electing debtors who qualify, 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 traditional chapter 11, chapter 12, and chapter 13 cases.

A. Changes in Confirmation Requirements

The court may confirm a sub V 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 sub V 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 traditional chapter 11 cases or in chapter 12 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 small business 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 requirements in a non-sub V 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).¹⁸ One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

¹⁸ § 1141(d)(2).

2. Discharge – cramdown plan

When cramdown confirmation occurs in a sub V case, § 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 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.¹⁹ 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.²⁰ (Section XI(B)).

¹⁹ New § 1181(a).

²⁰ New § 1186(a).

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 an eligible debtor elects them.²¹ If a small business debtor does not make the election, the 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.²²

As originally enacted by SBRA, new § 1182(1) defined “debtor” as meaning a “small business debtor,”²³ a term defined in § 101(51D). As the next Section discusses, SBRA also revised the § 101(51D) definition of “small business debtor,” but did not change the debt limit of \$ 2,725,625.

The CARES Act increased the debt limit to \$ 7.5 million through amendments to these sections. 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

²¹ 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. Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 264 (2020). 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.

²² 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:

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.

²³ SBRA § 2(a).

technical correction that it also made,²⁴ except that the debt limit in § 1182(1) is \$ 7.5 million.²⁵ The debt limit in revised § 101(51D) is unchanged. The CARES Act made a conforming change in § 103(i) to replace “small business debtor” with “debtor (as defined in section 1182).”

The CARES Act provided for the increased debt limit to be effective for only one year after its enactment on March 27, 2020.²⁶ The Covid-19 Bankruptcy Relief Extension Act of 2021²⁷ amended the CARES Act to extend the amended provision for an additional year. On March 27, 2022, §§ 1182(1) and 103(i) will return to their original language in the SBRA. Thus, § 1182(a) will define “debtor” as “a small business debtor,” and § 103(i) will limit application of subchapter V to a small business debtor who has elected it.

The effect of the CARES Act is that until March 27, 2022, new (and amended) § 1182(1) states the definition of a debtor eligible to be a sub V debtor. After that, revised § 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.)

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.²⁸ In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order

²⁴ The technical correction involves the exclusion of public companies. See text accompanying note 45 *infra*.

²⁵ CARES Act § 1113(a)(1).

²⁶ CARES Act § 113(a)(5).

²⁷ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

²⁸ FED. R. BANK. P. 1020(a).

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.²⁹ 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.³⁰ Revised Official Forms also provide for creditors to receive notice of the debtor's statement of its status and the election that it makes.³¹

Parties in interest may object to a debtor's statement of whether it is a small business debtor. Bankruptcy Rule 1020(b) requires an objection to a debtor's statement of its small business status within 30 days after the later of the conclusion of the § 341(a) meeting or

²⁹ INTERIM RULE 1020.

³⁰ OFFICIAL FORM B101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); OFFICIAL FORM B102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

³¹ 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) were 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.

amendment of the statement. Interim Rule 1020(b) makes the same requirement applicable to the statement regarding the sub V election. Courts have concluded that the debtor has the burden of proving eligibility for subchapter V relief.³²

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 sub V election should be allowed and, if so, under what circumstances.³³ Part XIII discusses whether a debtor who does not make the subchapter V election in the original petition (such as in a case pending before enactment of SBRA) may later 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 conference³⁴ and for filing a plan³⁵ 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

³² *E.g., In re Port Arthur Steam Energy, L.P.*, 2021 WL 2777993 at *2 (Bankr. S.D. Tex. 2021); *In re Blue*, 2021 WL 1964085 at *4 (Bankr. M.D.N.C. 2021); *In re Offer Space, LLC*, 2021 WL 1582625 at *2 (Bankr. D. Utah 2021); *In re Ikalowych*, 2021 WL 1433241 at *7 (Bankr. D. Colo. 2021); *In re Johnson*, 2021 WL 825156 at *4 (Bankr. N.D. Tex. 2021); *In re Thurmon*, 625 B.R. 417, 419 n. 4 (Bankr. W.D. Mo. 2020); *In re Blanchard*, 2020 WL 4032411 at *1-2 (Bankr. E.D. La. 2020). *But see In re Body Transit, Inc.*, 613 B.R. 400, 409 n. 15 (Bankr. E.D. Pa. 2020) (“It is appropriate to place the burden of proof on [the objecting party], as it is the *de facto* moving party.”).

The issue seems academic in most cases dealing with eligibility. For the most part, the outcomes do not appear to turn on the resolution of factual disputes but on the legal conclusions to be drawn from the facts.

³³ 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.”

³⁴ See Section VI(C).

³⁵ See Section VI(D).

make a delayed election would be the time restriction imposed by subchapter V. . . .”³⁶ Section VI(J) and Part XIII discuss extension of the time limits and their effect on the ability of a debtor to amend the petition to make an election after their expiration.

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

In general, a debtor is eligible to elect subchapter V if the debtor: (1) is a “person;” (2) is engaged in “commercial or business activities;” (3) does not have aggregate debts in excess of the debt limit; and (4) at least 50 percent of the debts arise from the debtor’s commercial or business activities,³⁷ subject to certain exceptions. (“Person” under § 101(41) includes an individual, corporation, or partnership but does not generally include a governmental unit. A limited liability company is a “person.”³⁸)

A debtor is ineligible for sub V if: (1) its primary activity is the business of owning single asset real estate; (2) it is a member of a group of affiliated debtors that has aggregate debts in excess of the debt limit; (3) it is a corporation subject to reporting requirements under the Securities Exchange Act of 1934; or (4) it is an affiliate of an issuer as defined in section 3 of the Securities Exchange Act of 1934.

Until March 27, 2022, the statutory basis for the definition is new § 1182(1), and the debt limit is \$ 7.5 million. On March 28, 2022, the debt limit reverts to \$ 2,725,625, and an eligible debtor must be a “small business debtor” as defined in § 101(51D).

³⁶ Advisory Committee on Bankruptcy Rules, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), at 3,

https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf.

³⁷ See generally, e.g., *In re Blue*, 2021 WL 1964085 at * 5 (Bankr. M.D.N.C. 2021); *In re Offer Space*, 2021 WL 1582624 (Bankr. D. Utah 2021).

³⁸ E.g., *In re QDN, LLC*, 363 Fed. Appx. 873, 876 n. 4 (3d Cir. 2010); *In re CWNevada, LLC*, 602 B.R. 717 (Bankr. D. Nev. 2019); *In re 4 Whip, LLC*, 332 B.R. 670, 672 (Bankr. D. Conn. 2005); *In re ICLNDS Acquisition, LLC*, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio (2001); see *In re Asociación de Titulares de Condominio Castillo*, 581 B.R. 346, 358-60 (B.A.P. 1st Cir. 2018) (collecting cases).

This Section explains how SBRA revised the definition of “small business debtor” in connection with its enactment of subchapter V that a small business debtor could elect and how the CARES Act temporarily increased the debt limit of eligibility for subchapter V.

Later sections discuss: the requirement that the debtor be “engaged in commercial or business activities” (Section III(C)); what debts “arose from” such activities (Section III(D)); whether the commercial or business debts must be connected to the debtor’s current commercial or business activities (Section III(E)); what debts are included in determination of the debt limit (Section III(F)); and the exclusion of reporting companies and affiliates of an issuer (Section III(G)).

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 debts³⁹ as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$ 2,725,625,⁴⁰ (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 had aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

³⁹ § 101(51D)(A). Debts owed to one or more affiliates or insiders are excluded from the debt limit. *Id.* See Section III(F).

⁴⁰ The amount is revised every three years. § 104. The current amount became effective to cases filed on or after April 1, 2019.

As the previous Section discusses, SBRA amended the § 101(51D) definition of “small business debtor,” and the CARES Act temporarily increased the debt limit for a sub V debtor to \$ 7.5 million. Section III(F) discusses what is included in the debt limit.

The CARES Act effected the debt limit change through an amendment to new § 1182(1) that lasted only one year. The Covid-19 Bankruptcy Relief Extension Act of 2021⁴¹ amended the CARES Act to extend the increased debt limit for an additional year. The language of revised § 1182(1) is identical to the language of § 101(51D). 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.

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. § 101(51D)(B)(i). The temporary CARES Act amendment to § 1182(1) retains the exclusion in the same language. Section III(F) discusses this issue.

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. The same requirements are temporarily in § 1182(1). Section III(C) discusses eligibility issues that have arisen 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. Section III(E) addresses whether the debts arising from the debtor’s commercial or business activities must arise from the debtor’s current commercial or business activities.

⁴¹ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

SBRA made three other definitional changes in § 101(51D). The Cares Act made a technical correction to one of them and temporarily enacted the revised provisions in § 1182(1) to govern subchapter V eligibility. Both contain identical paragraphs (A) and (B).

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.⁴² Pre-SBRA § 101(51D) excluded a debtor whose principal activity was the business of owning or operating real property.

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 a non-sub V small business case unless the court orders otherwise.)

Finally, SBRA added subparagraphs (B)(ii) and (B)(iii) to exclude two additional types of debtors to those that paragraph (B) excludes from being a small business debtor.

The first new exclusion, in (B)(ii), is for a corporate debtor subject to reporting requirements under § 13 or § 15(d) of the Securities Exchange Act of 1934.⁴³ The second new exclusion, in (B)(iii), was for a corporate debtor subject to the reporting requirements of those sections that is an affiliate of a debtor.⁴⁴

The CARES Act made a technical correction⁴⁵ to (B)(iii). The revised (B)(iii) excludes “any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act

⁴² 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). For a discussion of case law relating to the definition of “single asset real estate” in the sub V context, see *In re NKOGS1, LLC*, 626 B.R. 860 (Bankr. M.D. Fla. 2021) (Debtor is qualified for subchapter V because the hotel that it owns and operates is not a “single asset real estate” project.).

⁴³ § 101(51D)(B)(ii).

⁴⁴ SBRA § 4(a)(1)(B)(i)(III), amending § 101(51D)(B)(iii).

⁴⁵ For a discussion of the issues relating to this provision, see Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 7. .

of 1934 (15 U.S.C. 78c)).”⁴⁶ The temporary § 1182(1)(B) that the CARES Act enacted contains identical exclusions in its (B)(ii) and (iii). Section III(G) discusses these exclusions.

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,⁴⁷ 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.⁴⁸

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).⁴⁹

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 if the sub V debtor 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.”

A bankruptcy court’s determination of a debtor’s eligibility to proceed under subchapter V may be the proper subject of an interlocutory appeal under 28 U.S.C. § 158(a)(3).⁵⁰

⁴⁶ CARES Act § 1113(a)(4)(A).

⁴⁷ 11 U.S.C. § 109(e).

⁴⁸ 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).

⁴⁹ *In re Johnson*, 2021 WL 825156 (Bankr. N.D. Tex. 2021).

⁵⁰ *In re Parkinson*, 2021 WL 1554068 at * 2 (D. Idaho 2021). (“[R]eviewing and resolving any questions concerning Subchapter V will not waste litigation resources, but will conserve them. In like manner, taking up Appellants’ appeal at the current juncture will advance the ultimate termination of the underlying bankruptcy litigation.”).

C. Debtor Must Be “Engaged in Commercial or Business Activities”

An individual who is the principal of an entity such as a corporation or limited liability company may want to file a subchapter V case to deal with personal liabilities arising out of guarantees or other obligations when the entity fails and is no longer operating. The entity that is out of business may itself want to deal with its assets and debts under subchapter V.

Courts have dealt with two eligibility issues when the business is no longer operating. The first is whether eligibility depends on the debtor being engaged in commercial or business activities at the time of the filing of the petition. If so, the second question is what types of activities satisfy the requirement that the debtor be engaged in commercial or business activities.

1. Whether debtor must be engaged in commercial or business activities on the petition date

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 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 must be currently engaged in business to be eligible for subchapter V. Thus, in *In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. 2020), 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.”⁵¹ *Accord*, *e.g.*, *In re Blue*, 2021 WL 1964085 at * 6 (Bankr. M.D.N.C.

⁵¹ *In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020), 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. *Id.* at 423-24.

2021) (collecting and discussing cases); *In re Offer Space*, 2021 WL 1582625 at * 4 (Bankr. D. Utah 2021); *In re Ikalowych*, 2021 WL 1433241 at * 12-14 (Bankr. D. Colo. 2021), *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021).

In *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021), the debtor and the debtor’s spouse had filed a chapter 7 petition, before enactment of subchapter V, to deal with business debts arising from the debtor’s ownership of several limited liability companies.

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

The only party objecting to the plan was the U.S. Trustee, who contended that the court could not confirm the plan of a debtor ineligible for subchapter V because it was not accompanied by a disclosure statement. The 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.” *Id.* at 424.

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,⁵² 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.⁵³

In *In re Two Wheels Properties, LLC*, 625 B.R. 869 (Bankr. S.D. Tex. 2020),⁵⁴ a corporation’s charter had been forfeited under state law for tax reasons, state law did not permit

⁵² *Hileman v. Pittsburgh & Lake Erie Props., Inc. (In re Pittsburgh & Lake Erie Props., Inc.)*, 290 F.3d 516, 519 (3rd Cir. 2002).

⁵³ *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).

⁵⁴ *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).

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.

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

When an entity has gone out of business at the time of the filing of the bankruptcy case, courts concluding that sub V eligibility requires current commercial or business activities have considered whether the principal of the entity or the entity itself is nevertheless eligible based on current activities other than operating it, such as winding down its affairs or dealing with assets or creditors.

In *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021), just discussed, the individual debtor and the debtor’s spouse sought to proceed under subchapter V to deal with the debtor’s personal liabilities arising out of his ownership and operation of defunct limited liability companies.

After the court concluded that that eligibility required that the debtor be engaged in commercial or business activities at the time of the filing of the petition, the court considered the debtor’s argument that he was currently engaged in commercial or business activities because, as an employee, he 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.

The *Johnson* court rejected the debtor’s argument. 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 WL 1433241 (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 *12-14.⁵⁵ 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 *15-16.

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 *8-11, the *Ikalowych* court reasoned that the phrase “commercial or business activities” is “exceptionally broad.” *Id.* at *8.

Thus, the *Ikalowych* court interpreted “commercial or business activities” to mean, *id.* at *8:

⁵⁵ The *Ikalowych* court qualified its ruling, *id.* at *14:

[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.

[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).

In determining whether a debtor is engaged in “commercial or business activity,” the court employed a “totality of the circumstances” test, which includes consideration of the circumstances immediately before and after the date of the sub V filing as well as the debtor’s conduct and intent. *Id.* at *14.⁵⁶

The *Ikalowych* court acknowledged that the facts in *Thurmon* (discussed in the previous section) and *Johnson* were similar to, but not the same as, the facts in the case before it. *Id.* at *15, *16. 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 *15. The court reasoned, “Each category of Wind Down Work itself constitutes ‘commercial or business activities’ in the broad sense.” *Id.* at *16.

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

⁵⁶ The court cited *Watford v. Fed. Lank Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1528 (11th Cir. 1990), which adopted a “totality of the circumstances” test to decide whether the debtor in a chapter 12 case was “engaged in a farming operation.”

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 *14.

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 products, which had begun shortly before filing, qualified as “commercial or business activities.” Under the broad scope of the definition, the court ruled, *id.* at *16 (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 *17. 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 *17. Section III(E) discusses this aspect of the court’s ruling.

The court in *In re Offer Space*, 2021 WL 1582625 (Bankr. D. Utah), likewise concluded that a debtor no longer operating its business was nevertheless “engaged in commercial or business activities” in the circumstances of the case.

About three months before the subchapter V filing, after several months of difficulties due to legal claims and chargebacks, the debtor began informing its customers that it would be unable to continue to provide vendor marketing services, which included customer relations

management, merchant account management, and marketing campaign management using proprietary software. One of its customers purchased the software in exchange for shares of its publicly traded stock. *Id.* at *1.

At the time of filing, the debtor was no longer conducting business, had no employees, and did not intend to reorganize. It had been marshaling its assets and taking steps to realize value from its assets and pay its creditors. Its assets consisted of a bank account, accounts receivable, counterclaims in a lawsuit, and the stock. *Id.* at * 1.

The U.S. Trustee objected to eligibility because the debtor was not an operational business on the petition date. *Id.* at *2.

Like the *Ikalowych* court, the *Offer Space* court looked to the dictionary definitions of relevant terms (“engaged,” “commercial,” “business,” and “activity”), *Offer Space*, 2021 WL 1582625 at *3, and noted that Congress had chosen “very broad language.” *Id.* at *4. The court observed that, in contrast to the definition of a family farmer in § 101(18A), which refers to a debtor engaged in a farming *operation*, the subchapter V definition uses the broader and more inclusive term, *activities*. *Id.* at *5.

Considering the “totality of the circumstances,” the *Offer Space* court concluded that the debtor was “engaged in commercial or business activities” because it had active bank accounts, had accounts receivable, was analyzing and exploring counterclaims in a lawsuit, was managing the publicly traded stock in acquired from the earlier sale of its main operational asset, and was winding down its business, including steps to pay creditors and realize value from its assets. *Offer Space*, 2021 WL 1582625 at *4.

The *Offer Space* court rejected the U.S. Trustee’s contention that the legislative history of SBRA demonstrated that subchapter V is not available for a debtor seeking to liquidate its shutdown operations.

After concluding that the plain language of the statute made it unnecessary to consider legislative history, the court concluded that, although successful reorganizations might be the primary purpose of SBRA, noting indicated that it did not have other purposes, including “relief for small business debtors who intend to liquidate their businesses without the cumbersome structure that otherwise exists in Chapter 11.” *Id.* at *5. Moreover, the court observed, chapter 11 permits confirmation of liquidation plans under § 1129(a)(11),⁵⁷ and Congress did not include this section in the list of those that it made inapplicable in subchapter V cases. *Id.*

The debtor in *in re Port Arthur Steam Energy, L.P.*, 2021 WL 2777993 (Bankr. S.D. Tex. 2021), similarly had terminated its historical business operations before it filed its subchapter V case but was engaged in other activities that the court concluded were sufficient for it to be “engaged in commercial and business activities.”

Two principals of the debtor’s limited partner and an independent contractor managed the debtor and maintained its facility and vehicles to preserve the value of the assets, including running technical parts of the facilities, maintaining utilities like power and water, making repairs after severe storms, and filing reports and tax returns that state and federal agencies required. The managers worked on a plan to sell assets and pay creditors in the chapter 11 case

⁵⁷ Section 1129(a)(11) conditions confirmation of a plan on a determination that confirmation “is not likely to be followed by the liquidation . . . of the debtor or any successor to the debtor, unless such liquidation . . . is proposed in the plan.”

The court in *In re Port Arthur Steam Energy, L.P.*, 2021 WL 2777993 at *3 (Bankr. S.D. Tex. 2021), also noted that a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. The court observed that § 1123(b)(4) permits a chapter 11 plan to provide for the sale of all or substantially all of its assets and that it is not one of the sections that is inapplicable in a subchapter V case.

and sold one asset in the months preceding the bankruptcy filing. The debtor was also litigating a multi-million dollar lawsuit and pursuing collection remedies on an account receivable, both arising out of its prepetition transactions with a party who claimed to be a creditor in the case and objected to the subchapter V election. *Id.* at *3.

The court concluded that, because all of these activities were “commercial or business activities,” the debtor was eligible for subchapter V relief. *Id.* at *3.

The *Port Arthur Steam Energy* court addressed the argument that eligibility for subchapter V required current operation of a business because SBRA’s legislative history demonstrated that the Congressional purpose of subchapter V was to promote reorganizations. The court rejected the argument, concluding that, because the eligibility statute is not ambiguous, consideration of legislative history was not properly a part of the analysis. In any event, the court continued, a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. *Id.* at *3.

The court in *In re Blue*, 2021 WL 1964085 (Bankr. M.D.N.C. 2021), held that a salaried employee who received a material contribution to her income from part-time consulting work as an independent contractor was “engaged in commercial or business activities.” Agreeing with the *Offer Space* reasoning that “activities” is a much broader term than “operations,” the court concluded, “[N]othing in the Bankruptcy Code or legislative history of subchapter V mandates that commercial or business activities must be full-time to qualify, and Debtor’s activities in this case are substantial and material.” *Id.* at *7.

The *Blue* court also concluded that the debtor’s rental of her former residence to tenants was within the broad scope of commercial or business activities. *Id.* at 10.

The *Blue* court ruled that more than 50 percent of the debtor’s debts arose from commercial or business activities and that such debts did not have to arise from the debtor’s current commercial or business activities for purposes of sub V eligibility. Sections III(D) and (III(E)), respectively, discuss these aspects of the court’s decision.

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 arise from the commercial or business activities of the debtor.⁵⁸ Chapter 12 similarly conditions eligibility on a specified percentage of debt arising from a farming or fishing operation.⁵⁹ The court in *In re Ikalowych*, 2021 WL 1433241 at *18 (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.”⁶⁰

The *Ikalowych* court determined that the individual debtor’s liability on guarantees of certain debts of a limited liability company that he managed and was winding down and of his wholly-owned operating company that provided his services and that owned 30 percent of the limited liability company met this standard.⁶¹ Because these debts were 86 percent of his total

⁵⁸ 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).

⁵⁹ 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).

⁶⁰ 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.”

⁶¹ Section (III)(C)(2) discusses the *Ikalowch* court’s ruling that the debtor was “engaged in commercial or business activities.” The court also determined that the debtor was engaged in commercial or business activities as a salaried employee, but the court concluded that those activities did not make the debtor eligible for subchapter V because none of the debts arose from that activity.

debts, the court concluded he was eligible for subchapter V. *Ikalowych*, 2021 WL 1433241 at *18.

In *In re Blue*, 2021 WL 1964085 (Bankr. M.D. N.C. 2021), the debtor had retained her former residence when she bought a new one and rented it until she evicted a tenant approximately three years before filing. Because the tenant had substantially damaged the property, the debtor owed \$ 38,271.31 for partial repairs but had not been able to complete them and had not rented it in the meantime.

After determining that her rental of the property fell within the “broad scope of commercial or business activities,” *id.* at 10, the court considered the question of whether the mortgage debt on the property and the repair debts arose from such activities.

The court concluded that the debtor had originally incurred mortgage debt when she purchased it for her residence and that she did not intend to lease it at that time. The court ruled, therefore, that the mortgage debt did not arise from commercial or business activities. *Id.* at *9-10.

The court found that the debtor had continuously rented the property until the damage to the property occurred and that she had not rented it since then because of her inability to finance and complete necessary repairs. Because the damage occurred when she was actively renting the property, the court concluded, the debts arose from commercial or business activities. *Id.* at 11.

In re Sullivan, 626 B.R. 326 (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.⁶²

⁶² The definition in effect under the CARES Act is in § 1182(a)(1). See Section III(B). 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.

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. *Sullivan*, 626 B.R. at 333.⁶³

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 debt,⁶⁴ reasoning that a debt incurred with a "profit motive" or an "eye toward profit" is not a

⁶³ 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.

⁶⁴ The court cited *In re Garcia*, 606 B.R. 9, 106 (Bankr. D. N.M. 2019).

consumer debt. *Id.* at 330-31.⁶⁵ The court noted rulings that student loans,⁶⁶ alimony obligations,⁶⁷ and divorce-related debts are consumer debts.⁶⁸

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*, 626 B.R. at 331.

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 331-32.

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 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.

⁶⁵ 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).

⁶⁶ The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 807 (10th Cir. 1999).

⁶⁷ The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 807 (10th Cir. 1999).

⁶⁸ 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).

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*, 626 B.R. at 332.

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 332-33.

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 Supreme 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*, 626 B.R. at 333, 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, 626 B.R. at 333 (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.

E. Whether Debts Must Arise From Current Commercial or Business Activities

Eligibility for subchapter V requires that the debtor be “engaged in commercial or business activities” and that not less than 50 percent of the debtor’s debts arise from “the commercial or business activities of the debtor.” § 101(51D)(A); New § 1182(1)(A).

In *In re Ikalowych*, 2021 WL 1433241 (Bankr. D. Colo. 2021), the court concluded that an individual working as a salaried employee was engaged in commercial or business activities. *Id.* at 16. The court observed that, although this ruling suggested “that virtually all private sector wage earners may be considered as ‘engaged in commercial or business activities,’” *id.* at 16,

this did not mean that every private sector wage earner is eligible for subchapter V relief because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at 17. Thus, the court concluded that debtor’s employment did not make him eligible for subchapter V because none of the debts arose from that activity. *Id.* at *17.

The court’s conclusion was not necessary for the decision; the court determined that most of the debtor’s debts arose from other commercial or business activities. Nevertheless, the implication may be that eligibility requires that more than 50 percent of the debtor’s debts must be connected to current commercial or business activities.

The court in *In re Blue*, 2021 WL 1964085 (Bankr. M.D. N.C. 2021), addressed this issue and ruled that no connection is necessary. There, the debtor filed a subchapter V case to deal with debts arising from her ownership and operation of a corporation that had discontinued its operations about 21 months earlier, as well as other debts. At the time of filing, the debtor was a salaried, full-time, W-2 employee. In addition to her income, the debtor worked part-time for two different companies as an independent contractor.

As section III(C)(2) discusses, the *Blue* court determined that the debtor’s work as an independent contractor constituted “commercial or business activities.” The Bankruptcy Administrator, however, argued that the debtor was not eligible for subchapter V because no nexus existed between the debtor’s current activities as an independent contractor and the debts arising from her previous activities. *Id.* at *7.

The premise of the argument is based on the language of the eligibility requirement, which states that not less than 50 percent of the debtor’s debt must arise from “*the* commercial or business activities of the debtor.” § 101(51D)(A); § 1182(1)(A) (emphasis added). Use of the word “the” at the end of paragraph (A), the argument continues, implies a reference to the same

“commercial or business activities” in which the debtor must be engaged under the language at the beginning of paragraph (A).

The *Blue* court rejected the argument, concluding, “Such an implication is not required by the language of the statute, and would be far too limiting for the remedial purposes of subchapter V.” *Id.* at 7. The court reasoned that courts have interpreted and applied the eligibility statute broadly, citing cases noting that the purposes of SBRA include providing relief for debtors that intend to liquidate their businesses without the cumbersome structure that otherwise exists in chapter 11⁶⁹ and that debtors may proceed under subchapter V even though their debts stem from both currently operating and non-operating businesses.⁷⁰ *Id.* at 8.

The *Blue* court concluded, *id.* at 8:

[D]ebtor intends to use subchapter V to address both defunct and non-defunct commercial and business activities, and the more straightforward interpretation of § 1182(1)(A) does not require a connection of debts to current business activities.

Nothing in the statute requires that there be a nexus between the qualifying debts and the Debtor's current business or commercial activities. Moreover, such an interpretation could, for example, disqualify meritorious small businesses from the remedial purposes of subchapter V simply by having significant debts from former operations. The Court will not interpret subchapter V as narrowly as suggested by the BA.

F. What Debts Are Included in Determination of Debt Limit

A debtor is not eligible for subchapter V if the “aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for

⁶⁹ The court cited *In re Offer Space, LLC*, 2021 WL 1582625 at *2 (Bankr. D. Utah 2021).

⁷⁰ The court cited *In re Blanchard*, 2020 WL 4032411 at *2 (Bankr. E.D. La. 2020).

relief” exceed the applicable debt limit. Debts owed to affiliates or insiders are excluded from the calculation. § 101(51D)(A); New § 1182(1)(A).

But a debtor is ineligible if the debtor is a member of a group of affiliated debtors when the aggregate of all such debts of all of the affiliates exceeds the debt limit. § 101(51D)(B)(i); New § 1182(1)(B)(ii).

The requirement that debts be “liquidated” and “noncontingent” for inclusion in the debt limit also appears in the eligibility requirements for relief under chapters 12⁷¹ and 13.⁷²

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.

In re 305 Petroleum, Inc., 622 B.R. 209 (Bankr. S.D. Miss. 2020), considered the exclusion of debts of debtors in an affiliated group. Four affiliated debtors filed chapter 11 cases. Each of them had elected subchapter V, but one was a single asset real estate debtor that

⁷¹ Chapter 12 is available only to a “family farmer” or “family fisherman” under § 109(f). Definitions of the terms include the debt limit requirement. §§ 101(18)(A); 101(19A)(A)(i).

⁷² § 109(e). For a discussion of what debts are “liquidated” and “noncontingent” for purposes of the debt limitation 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.

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 section III(A) 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 it is part of 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.

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

The SBRA added two exclusions from the definition of “small business debtor” that did not previously exist. The CARES Act made a technical correction to the SBRA language.⁷³

As amended by SBRA and the CARES Act, the definition of “small business debtor” does not include a debtor that “is a corporation subject to the reporting requirements under

⁷³ See Section III(B).

section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)).”

§ 101(51D)(B)(ii). Under § 1182(1), which governs sub V eligibility until March 27, 2022,⁷⁴ identical language makes such a debtor ineligible for subchapter V. § 1182(1)(B)(ii). In general, the provisions of the Securities Exchange Act require reporting by any public company.

Subparagraph (B)(iii) of both § 101(51D) and § 1182(1) also exclude “an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).” Section 3(8) of the Securities Exchange Act defines “issuer” as “any person who issues or proposes to issue any security.” 15 U.S.C. § 78(c)(8). Section 3(10) broadly defines “security” as including, among other things, any “stock,” “certificate of interest or participation in any profit-sharing agreement,” or “investment contract.” 15 U.S.C. § 78(c)(10).

Read broadly, the (B)(iii) exclusion for the affiliate of an issuer would render ineligible any debtor that is an affiliate of any corporation or other limited liability entity. By definition, stock in a corporation or an interest in a limited liability entity is a “security.” Thus, for example, if an individual has a sufficient equity interest in two or more such entities to qualify as an “affiliate” under § 101(2), all of the affiliates would be disqualified. Similarly, if one entity is an affiliate of another, neither could be a small business or sub V debtor.

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

In re Serendipity Labs, Inc., 620 B.R. 679 (Bankr. N.D. Ga. 2020), considered whether the corporate debtor was an affiliate of a publicly traded company. The public company owned more than 27 percent of the voting shares of the debtor but only 6.51 percent of the voting shares

⁷⁴ See Section III(A).

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 shares held by the public company 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.

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases.⁷⁵ 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 and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.⁷⁶

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.⁷⁷ 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.”⁷⁸

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

⁷⁵ § 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.

⁷⁶ New § 1181(a). Section 1104, which governs the appointment of a trustee in a traditional chapter 11 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).

⁷⁷ 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).

⁷⁸ *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.

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.⁷⁹

New § 1183 enumerates the trustee’s duties. Section 1106, which specifies the duties of the trustee in a traditional chapter 11 case, does not apply in sub V cases.⁸⁰ 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.⁸¹

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.⁸² This role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

⁷⁹ 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 Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 260-62, 267-71 (2020).

⁸⁰ New § 1181(a).

⁸¹ New § 1183(b)(5).

⁸² The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, 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.

First, the sub V trustee has the duty to “facilitate the development of a consensual plan of reorganization.”⁸³ 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.”⁸⁴ 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 that comprise a plan,” and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.⁸⁵ The United States Trustee Program expects sub V trustees to be proactive in the plan process.⁸⁶

Second, the trustee must appear and be heard at the status conference that new § 1188(a) requires.⁸⁷ 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.

⁸³ New § 1183(b)(7).

⁸⁴ § 1302(b)(4).

⁸⁵ Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 AMER. BANKR. INST. J. 8 (Nov. 2019). See also Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 261 (2020) (“Trustees seem likely to play the role of mediator.”).

⁸⁶ The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, 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.*

⁸⁷ New § 1183(b)(3). See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, 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.”).

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.⁸⁸

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. Like a chapter 12 trustee, however, a sub V trustee does not have the duty to investigate the financial affairs of the debtor. Section 704(a)(4) imposes such a duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a traditional chapter 11 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 for a chapter 11 trustee in a traditional case 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

⁸⁸ 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).

summary of it to entities that the court directs (§ 1106(a)(4)⁸⁹); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).⁹⁰ The same procedures apply to a chapter 12 trustee's duty to investigate under § 1202(b)(2).

2. Other duties of the trustee

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),⁹¹ 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)).⁹² 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)).⁹³

⁸⁹ 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.

⁹⁰ 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.

⁹¹ 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.

⁹² New § 1183(b)(1).

⁹³ New § 1183(b)(4).

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees.⁹⁴ 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.⁹⁵

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 § 1106.⁹⁶ 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.⁹⁷

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

⁹⁴ 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.

⁹⁵ SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, 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).

⁹⁶ 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.

⁹⁷ 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).

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)).⁹⁸

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.

The trustee's duties do not, however, include the filing of a plan, which only the debtor can do under new § 1189(a). Section V(C) discusses issues arising from the trustee's lack of authority to file a plan.

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.⁹⁹ Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph's direction for their disbursement

⁹⁸ § 1106(a)(1).

⁹⁹ New § 1194(a).

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.¹⁰⁰

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.¹⁰¹ 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.

¹⁰⁰ 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. 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.

¹⁰¹ § 1326(a).

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.¹⁰² 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.

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.¹⁰³ 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.¹⁰⁴ Part IX discusses payments under the plan.

¹⁰² New § 1194(c).

¹⁰³ New § 1194(b).

¹⁰⁴ New § 1191(a).

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,¹⁰⁵ which ordinarily occurs when distribution commences.¹⁰⁶ 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.

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.¹⁰⁷

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.¹⁰⁸ The reason for this provision is unclear.

¹⁰⁵ Section IX(A) discusses substantial consummation in the context of payments under a consensual plan.

¹⁰⁶ New § 1183(c).

¹⁰⁷ 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.

¹⁰⁸ New § 1183(c)(1).

Cramdown confirmation does not terminate the service of the sub V trustee. Therefore, if a debtor seeks modification after cramdown confirmation, the trustee is in place, 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."¹⁰⁹ 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 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

¹⁰⁹ New § 1185(a).

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.¹¹⁰ Some of them, however, have indicated that it is unlikely that this will occur in the foreseeable future.

1. Compensation of standing subchapter V trustee

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586.¹¹¹ 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),¹¹² 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.¹¹³ Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12 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)].”¹¹⁴ The limits require reference to the standing trustee's

¹¹⁰ The observers are bankruptcy judges, lawyers, and professors who have followed and supported enactment of SBRA with whom the author has discussed the issue.

¹¹¹ SBRA § 4(a)(4).

¹¹² SBRA § 4(b)(1)(D).

¹¹³ 28 U.S.C. § 586(e).

¹¹⁴ 28 U.S.C. § 586(e)(5).

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.

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.

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error.¹¹⁵ 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

¹¹⁵ See *supra* note 110.

trustee.¹¹⁶ Observers close to the legislative process expected a technical amendment to resolve this issue by making the five percent limitation also applicable to sub V trustees.¹¹⁷ Technical corrections in the CARES Act, however, did not address this issue.¹¹⁸ 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

¹¹⁶ 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.

¹¹⁷ 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 79, at 3-21.

¹¹⁸ 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).

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 a 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 traditional 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 reverts 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.

In *In re Hunts Point Enterprises, LLC*, 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss the case. 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.

In traditional 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.

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.”¹¹⁹ 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 to the court’s approval of the trustee’s compensation under § 330. The debtor must include the interim compensation in any cash collateral budget.

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.¹²⁰ This requirement applies in subchapter V cases to confirmation of a consensual plan under new § 1191(a).¹²¹

¹¹⁹ E.g., *In re Nostalgia Family Medicine P.A.*, Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Mar. 26, 2021).

¹²⁰ § 1129(a)(9)(A).

¹²¹ New § 1191(a).

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).¹²² 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 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.¹²³ In this regard, a person serving as a sub

¹²² New § 1191(e).

¹²³ 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 79, at 3-17 to 3-18, states:

V trustee should have a sufficient understanding of applicable legal principles to perform the 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.¹²⁴

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.¹²⁵

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.¹²⁶ Because a bankruptcy trustee acts as the representative of the estate¹²⁷ and creditors have an interest in the estate, the

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.

¹²⁴ 28 U.S.C. § 1654.

¹²⁵ *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.").

¹²⁶ *E.g.*, *J. J. Rissell, Allentown, P.A. Trust v. Marchelos*, 976 F.3d 1233 (11th Cir. 2020) (trust); *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).

¹²⁷ § 323(a).

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.

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 professionals¹²⁸ and routine objections to claims.¹²⁹ *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

¹²⁸ 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).

¹²⁹ 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.

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 courts¹³⁰ when the availability of bankruptcy relief was either nonexistent or short-lived.¹³¹ 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,¹³² and to appear and be heard on confirmation and other significant issues that relate to confirmation.¹³³ 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.

¹³⁰ 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.”

¹³¹ *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AMER. BANKR. INST. L. REV. 5, 12-23 (1995). *See also* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 1:2.

¹³² New § 1183(b)(7).

¹³³ New § 1183(b)(3).

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 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 traditional chapter 11 case,¹³⁴ or an expert witness that a court appoints.¹³⁵ 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.¹³⁶

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

¹³⁴ § 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 NORTON BANKRUPTCY LAW AND PRACTICE § 99:29. *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)).

¹³⁵ FED. R. EVID. 706.

¹³⁶ 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.¹³⁷ 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.¹³⁸ A sub V debtor in possession has the rights, powers, and duties of a trustee that a traditional chapter 11 debtor in possession has, including the operation of the debtor's business.¹³⁹ The court may

¹³⁷ 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.

¹³⁸ New § 1186(b).

¹³⁹ 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.¹⁴⁰

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 in a non-sub V case under §§ 1116(1)(A) and (B).¹⁴¹ In a sub V case, §1116 is inapplicable, but new § 1187(a) requires the sub V debtor to comply with §§ 1116(1)(A) and (B) upon making the election.¹⁴²

The timing of the election does not change the time for a debtor who qualifies as a small business debtor to file the required documents. In a voluntary case, it is the date of the filing of the petition. If a small business 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.¹⁴³

The timing requirements operate differently in the case of a debtor who is not a small business debtor because its debts exceed \$ 2,725,625. In this situation, § 1116 does not apply

¹⁴⁰ New § 1185(b).

¹⁴¹ New. § 1187(a).

¹⁴² 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 SBRA made § 1116 inapplicable in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee. This statutory scheme is important in the case of a debtor who is not a small business debtor because its debts exceed \$2,725,625 but qualifies for subchapter V because its debts are less than \$ 7.5 million. Because § 1116 applies only in a small business case, it would not apply to such a debtor, but new § 1187 requires such a debtor to comply with its requirements.

¹⁴³ 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.

because the case is not a small business case. In a voluntary or involuntary case, new § 1187(a) requires the debtor to comply with § 1116 upon making the sub V election, which could occur after the filing of a voluntary petition or entry of an order for relief in an involuntary case.

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.¹⁴⁴

SBRA also requires a sub V debtor to file periodic reports under § 308, which continues to apply in a non-sub V small business case.¹⁴⁵ Section 308(b) requires periodic reports that 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.¹⁴⁶

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7).¹⁴⁷ 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

¹⁴⁴ § 1116(1).

¹⁴⁵ New § 1187(b). Although § 308 applies only in a small business case, new § 1187(b) requires all sub V debtors to comply with it.

¹⁴⁶ § 308.

¹⁴⁷ New § 1187(b).

and compelling circumstances¹⁴⁸); (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;¹⁴⁹ (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other 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.¹⁵⁰

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).¹⁵¹

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).¹⁵² 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.

¹⁴⁸ As in non-sub V small business 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 79, at 3-3, 3-5. The U.S. Trustee expects the sub V trustee to participate in both. *Id.*

¹⁴⁹ That is not a typo. The statute specifies local rule of the district court.

¹⁵⁰ § 1118.

¹⁵¹ New § 1184.

¹⁵² § 1106(a)(1).

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;¹⁵³ to file tax returns for any year for which the 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.¹⁵⁴

Subchapter V does not expressly impose on a sub V debtor the duties to communicate and cooperate with the sub V trustee and to negotiate with creditors in an effort to obtain consensual confirmation, but at least one court has noted the debtor's failure to do so, despite encouragement from the court, in connection with dismissal of the case and denial of confirmation.¹⁵⁵

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.¹⁵⁶ "Cause" includes "fraud, dishonesty,

¹⁵³ 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.
¹⁵⁴ § 1106(a)(5-8).

¹⁵⁵ *In re* U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile U.S.A. Limited Partnership, 2021 WL 1679062 at *2 n. 4, *5 (Bankr. N.D. W. Va. 2021). The court concluded its Memorandum Opinion dismissing the debtor's case, in which it also determined that the debtor's plan was not feasible, as follows, *id.* at * 5:

The Debtor had ample opportunities as it meandered through this case to negotiate with interested parties and propose a confirmable plan of reorganization. Specifically, the court encouraged the Debtor to engage with the Subchapter V Trustee and negotiate with the Creditors. By all accounts, however, the Debtor lacked motivation in those regards while evading certain of its responsibilities to the bankruptcy estate. Cause undoubtedly exists to dismiss this case, and the Debtor has been in bankruptcy for over a year without putting forth a feasible, confirmable plan. The court will therefore enter a separate order dismissing the Debtor's case.

¹⁵⁶ 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.

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),¹⁵⁷ which governs appointment of a trustee in a traditional chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case. 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.¹⁵⁸

In *In re Neosho Concrete Products Co.*, 2021 WL 1821444 at * 8 (Bankr. W.D. Mo. 2021), the court found guidance for the standards a court should consider in determining whether to remove a sub V debtor from possession under § 1185(a) in case law construing the provisions of § 1104(a) for appointment of a trustee in a traditional chapter 11 case.

Applying rulings in § 1104(a) cases, the court concluded that it had discretion to determine whether “cause” exists to remove a sub V debtor in possession. The court determined that the party seeking removal of the sub V debtor bears the burden of establishing cause by a preponderance of the evidence. The court noted, “Because removal of a debtor in possession is an “extraordinary remedy,’ the movant’s burden is high.” *Id.* at *8.¹⁵⁹

The court adopted a “flexible” approach to determining whether cause exists for removal of a sub V debtor from possession and identified the following factors that a court may consider, among others: (1) the materiality of any misconduct; (2) the debtor’s evenhandedness or lack thereof in dealing with insiders and affiliated entities in relation to other creditors; (3) the

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).

¹⁵⁷ Section 1104 does not apply in a sub V case. New § 1181(a).

¹⁵⁸ *In re Young*, 2021 WL 1191621 at * 6-7 (Bankr. D. N.M. 2021).

¹⁵⁹ The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership)*, 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

existence of prepetition avoidable transfers; (4) whether any conflicts of interest on the part of the debtor are interfering with its ability to fulfill its fiduciary duties; and (5) whether any self-dealing or squandering of estate assets had occurred. *Id.* at 8.¹⁶⁰

The court concluded that cause did not exist to remove the debtor from possession because its principal had “competently managed the estate and adapted to challenges as it encountered them,” had agreed to reimburse the estate for the value of preferential transfers he had received, had retained separate counsel, and had prioritized the interests of the debtor above his own. *Id.* at 9.¹⁶¹

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 in traditional chapter 11 cases and in chapter 12 cases.¹⁶²

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.¹⁶³ 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.

Like §§ 1104(a) and 1204(a), new § 1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists.¹⁶⁴ 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

¹⁶⁰ The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership)*, 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

¹⁶¹ The court also denied a motion to convert the case to chapter 7.

¹⁶² New § 1185(a).

¹⁶³ New § 1185(b).

¹⁶⁴ New § 1185(a).

debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

If the court removes the debtor in possession, the trustee has the duty to operate the business of the debtor¹⁶⁵ and other duties that Section IV(B)(3) discusses.

The removal of a sub V debtor from possession has one significant legal difference from appointment of a trustee in a traditional chapter 11 case.

In a traditional case, § 1121(c)(1) provides that appointment of a trustee terminates the debtor's exclusivity period to file a plan under § 1121(b) and permits the trustee to file a plan. One of the duties of a trustee in a chapter 11 case under § 1106(a)(5) is to file a plan, to file a report of why the trustee will not file a plan, or to recommend conversion or dismissal of the case.

In a subchapter V case, however, § 1121 does not apply, new § 1181(a), and the debtor thus remains the only party who can file a plan under new § 1189(a). Moreover, the duties of a sub V trustee upon removal of the debtor in possession do not include the duty to file a plan or report or to recommend conversion or dismissal. New § 1183(b)(5)

When a sub V trustee after removal of the debtor's possession thinks that confirmation of a reorganization plan is possible, therefore, the trustee will have to convince the debtor to file a satisfactory plan or to amend the petition to eliminate the sub V election so that the case becomes a traditional chapter 11 case in which the trustee may file a plan.

Unless the debtor files a plan that the court confirms or amends the election, or unless the court reinstates the debtor's possession, the case must conclude through either dismissal or

¹⁶⁵ § 1183(b)(5).

conversion. One possibility is for the trustee to liquidate the debtor's assets and then seek their distribution through conversion to chapter 7 or a structured dismissal of the case.¹⁶⁶

In re Young, 2021 WL 1191621 at *7 (Bankr. D. N.M. 2021), suggested such an alternative. There, the court 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.

If the debtor is removed from possession, a question arises whether the debtor's attorney (or any other professional 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

¹⁶⁶ A so-called "structured dismissal" involves 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:

[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.

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 and may not be able to participate effectively in the case.

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. This Part discusses: the elimination of the committee of unsecured creditors (Section VI(A)) and the § 1125(b) disclosure statement (Section VI(B)), unless the court orders otherwise; the mandatory status conference (Section VI(C)); the 90-day deadline for the debtor to file a plan (Section VI(D)), unless the court extends it (Section VI(J)); elimination of U.S. Trustee fees (Section VI(E)); and the modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a) (Section VI(F)).

This Part also discusses: procedures relating to a creditor's § 1111(b) election (Section VI(G)); voting on the plan and confirmation procedures (Section VI(H)); the filing of claims and the fixing of a bar date for the filing of proofs of claim (Section VI(I)); and the debtor's performance of postpetition obligations as lessee under an unexpired lease under § 365(d). (Section VI(K)).

A. Elimination of Committee of Unsecured Creditors

SBRA amended § 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.¹⁶⁷ Prior to the amendment, § 1102(a)(3) provided for the U.S. Trustee to appoint a committee in a small business case unless the court, for cause, ordered that a committee not be appointed.

The same rule applies in a subchapter V case. The provisions of § 1102,¹⁶⁸ which require the appointment of a committee of unsecured creditors and permit the appointment of other committees, and of § 1103, which states the powers and duties of committees, do not apply in a sub V case unless the court orders otherwise. New § 1181(b).

Although SBRA eliminates the appointment of a committee of unsecured creditors in both sub V and non-sub V small business cases unless the court orders otherwise, the Interim Rules did not 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 V¹⁶⁹ 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).

¹⁶⁷ SBRA § 4(a)(11).

¹⁶⁸ The provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).

¹⁶⁹ See Section III(A).

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”¹⁷⁰ about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.¹⁷¹ 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.¹⁷²

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing,¹⁷³ so that solicitation may occur without prior notice and hearing on the disclosure statement.¹⁷⁴ The hearing on approval of the disclosure statement may be combined with the hearing on confirmation.¹⁷⁵ In addition, the court in a small business case may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary,¹⁷⁶ and may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B.¹⁷⁷

In a sub V case, § 1125 is inapplicable unless the court orders otherwise.¹⁷⁸ 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.

¹⁷⁰ 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).

¹⁷¹ § 1125(b).

¹⁷² FED. R. BANKR. P. 3017(a).

¹⁷³ § 1125(f)(3)(A).

¹⁷⁴ § 1125(f)(3)(B).

¹⁷⁵ § 1125(f)(3)(C).

¹⁷⁶ § 1125(f)(1).

¹⁷⁷ § 1125(f)(2).

¹⁷⁸ New § 1181(b).

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).

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),¹⁷⁹ among which are the requirements that a plan¹⁸⁰ and its proponent¹⁸¹ comply with applicable provisions of chapter 11 and that the plan be proposed in good faith.¹⁸² 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.¹⁸³

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.¹⁸⁴ Section 105(d) does not apply in a sub V case.¹⁸⁵ 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.¹⁸⁶ The court may extend the time for holding the status conference if the need for an

¹⁷⁹ New § 1191(a), (b). See Section VIII(A).

¹⁸⁰ § 1129(a)(1).

¹⁸¹ § 1129(a)(2).

¹⁸² § 1129(a)(3).

¹⁸³ See generally Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 10.

¹⁸⁴ § 105(d).

¹⁸⁵ New § 1181(a).

¹⁸⁶ Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

extension is “attributable to circumstances for which the debtor should not justly be held accountable.”¹⁸⁷ Section VI(J) discusses extension of the deadline. 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.”¹⁸⁸ The trustee has the duty to appear and be heard at the status conference.¹⁸⁹

Subchapter V does not specify any consequences if the status conference does not timely occur or if the debtor fails 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 that date.¹⁹⁰

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).

¹⁸⁷ New § 1188(b).

¹⁸⁸ New § 1188(c).

¹⁸⁹ New § 1183(b)(3).

¹⁹⁰ *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).

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.¹⁹¹

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 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

¹⁹¹ 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.

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.¹⁹²

¹⁹² See Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 256, 272-72, 281 (2020).

D. Time for Filing of Plan

Only the debtor may file a plan.¹⁹³ The debtor has a duty to do so.¹⁹⁴

The deadline for the sub V debtor to file the plan is 90 days after the order for relief.¹⁹⁵ 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,¹⁹⁶ the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221.¹⁹⁷ New § 1193(a) permits preconfirmation modification of a plan.¹⁹⁸ Section VI(J) discusses extension of the deadline.

Section 1121(e) requires that a debtor in a small business case file a plan within 300 days of the filing date,¹⁹⁹ and § 1129(e) requires that confirmation occur within 45 days of the filing of the plan.²⁰⁰ These requirements do not apply in a subchapter V case.²⁰¹ 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 small business 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 300.²⁰² Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

¹⁹³ New § 1189(a).

¹⁹⁴ New § 1184. The debtor has the duty to file a plan. See *supra* note 153.

¹⁹⁵ New § 1189(b). Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

¹⁹⁶ *Id.*

¹⁹⁷ 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).

¹⁹⁸ New § 1193(a).

¹⁹⁹ § 1121(e).

²⁰⁰ § 1129(e).

²⁰¹ New § 1181(a).

²⁰² 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.

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,²⁰³ § 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” 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 (1) substantial or (2) 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).

²⁰³ New § 1181(a).

Under these provisions, a debtor can overcome a motion for dismissal or conversion based on failure to timely file a plan by establishing (1) that conversion or dismissal is not in the best interest of creditors; (2) a reasonable justification for missing the deadline; (3) 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 (4) 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).²⁰⁴ 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 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.²⁰⁵

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

²⁰⁴ New § 1191(a) (confirmation of a consensual plan); New § 1191(b) (cramdown confirmation). See Section VIII(A).

²⁰⁵ 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.

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 7.²⁰⁶

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 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.

²⁰⁶ 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.”);

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 amended this subparagraph to except cases under subchapter V from this requirement.²⁰⁷

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).²⁰⁸ A disinterested person cannot not have an interest “materially adverse to the interest of the estate.”²⁰⁹

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 § 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 \$ 10,000.²¹⁰

²⁰⁷ SBRA § 4(b)(3).

²⁰⁸ § 327(a).

²⁰⁹ § 101(14)(C).

²¹⁰ New § 1195.

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.

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.²¹¹ 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.²¹² 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.²¹³

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.²¹⁴

²¹¹ § 1111(b). For a discussion of strategic considerations for creditors regarding the § 1111(b) election, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 25, 275-76 (2020). Section VIII(E) discusses the operation and effect of the § 1111(b) election and how courts have applied it in subchapter V cases.

²¹² FED. R. BANKR. P. 3014.

²¹³ FED. R. BANKR. P. 3017.1.

²¹⁴ INTERIM RULE 3017.

Courts have taken varied approaches to scheduling the date for the § 1111(b) election. Many do not address it unless a party requests it. Others fix 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.

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.

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.²¹⁵

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.²¹⁶

I. Filing of Proof of Claim; Bar Date

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 in any chapter 11 case. 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 a sub V case. Some include 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. Lawyers representing creditors in subchapter V cases who are 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 they know 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

²¹⁵ FED. R. BANKR. P. 3017.1.

²¹⁶ INTERIM RULE 3017.2.

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.²¹⁷

In *In re Wildwood Villages, LLC*, 2021 WL 1784408 (Bankr. M.D. Fla. 2021), plaintiffs in a state court class action sought to file a proof of claim on behalf of the class under Rule 7023 of the Federal Rules of Civil Procedure in the sub V case. The court explained that most courts conclude that class proofs of claim are permissible and that the determination of whether to allow and certify a class claim is within the court’s discretion. *Id.* at *2 & n. 8 (collecting cases). The court rejected the debtor’s argument that class claims should not be permitted in subchapter V cases because it would circumvent Congress’ intent that creditors’ committees should not exist in them. Instead, the court addressed the issue under the traditional analysis of the exercise of the court’s discretion. *Id.* at *4.

²¹⁷ *But see In re Baker*, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020) (The court noted that 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 supported granting the debtor an extension of time to file the plan until the bar date had passed.).

Under those principles, the court declined to allow a class claim. *Id.* at *4-7. The court directed the debtor to send a proof of claim form to all of the class members identified in the motion for allowance of a class claim, with notice of the bar date. *Id.* at *7.

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 § 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.²¹⁸ Part XIII 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 than the “for

²¹⁸ *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).

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 traditional chapter 11 case.²¹⁹

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.²²⁰

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.”²²¹ 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.²²²

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.²²³ In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 345 (Bankr. S.D. Fla. 2020), however, the court concluded that

²¹⁹ *E.g.*, *In re Online King, LLC*, 2021 WL 1536415 at *6 (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).

²²⁰ *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).

²²¹ *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).

²²² *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).

²²³ *Accord, In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020).

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.

In re Keffer, 2021 WL 1523167 (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 13.²²⁴

²²⁴ 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.

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 *9.

The *Keffner* court concluded that *Trepetin* provided a superior approach to the extension issue and rejected the *Seven Stars* view. *Id.* at *9. 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 *9. The court directed that the deadlines run from the date of its order. *Id.* at *10.

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-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.²²⁵ 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.²²⁶

The court may grant an extension even if the deadline has expired at the time the debtor requests it.²²⁷ 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).²²⁸

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 timely filing of a “placeholder” plan with the expectation of a later modification instead of seeking an extension.²²⁹

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.”

²²⁵ *In re Online King, LLC*, 2021 WL 1536415 at *8 (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).

²²⁶ *In re Online King, LLC*, 2021 WL 1536415 at *9 (Bankr. E.D. Tex. 2021).

²²⁷ *E.g.*, *In re Tibbens*, 2021 WL 1087260 at * 8 (Bankr. M.D.N.C. 2021); *In re Online King LLC*, 2021 WL 1536415 at *4-5 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03.

²²⁸ *In re Online King LLC*, 2021 WL 1536415 at *4-5 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03. See Section VI(D).

²²⁹ 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.”

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.

K. Debtor’s postpetition performance of obligations under lease of nonresidential real property-- § 365(d)

Section 365(d)(3) requires the timely performance of all obligations of a debtor that is the lessee under an unexpired lease of nonresidential real property, unless the court for cause extends the time for performance. SBRA did not change § 365(d)(3), but the Consolidated Appropriations Act, 2021 (the “CAA”) enacted a temporary amendment that permits the court to extend the time for performance in subchapter V cases that is effective until December 28, 2022.²³⁰

Pre-CAA § 365(d)(3), which remains in effect, redesignated as § 365(d)(3)(A),²³¹ permits the court to extend the time for performance of postpetition obligations arising within 60 days after the order for relief, but not beyond such 60-day period.

The CAA temporarily adds subparagraph (B) to § 365(d)(3) to permit an extension of the time for performance in a subchapter V case if the debtor “is experiencing or has experienced a

²³⁰ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020). The CAA also temporarily amended § 365(d)(4). Pre-CAA § 365(d)(4) provided that, if assumption of a lease of nonresidential real property under which the debtor is the lessee did not occur by the earlier of confirmation of a plan or 120 days after the order for relief, the lease was deemed rejected and the trustee (or debtor in possession) must surrender the property to the lessor. The court for cause could extend the time by 90 days, for a maximum time of 210 days. The CAA extended the 120-day period to 210 days and permits extension to a maximum of 300 days. CAA § 1010(f)(1)(B). The extended period sunsets two years after enactment of CAA, or December 28, 2022. CAA § 1001(f)(2)(A)(ii).

²³¹ CAA § 1001(f)(1)(A)(i).

material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”²³² Subparagraph (B) permits extension of the time for performance to the earlier of 60 days after the order for relief or the date of assumption or rejection of the lease.²³³ In addition, subparagraph (B) permits the court to extend the time for an additional 60 days if the debtor is continuing to experience a material financial hardship due to the COVID-19 pandemic.

CAA also temporarily added subparagraph (C) to § 365(d)(3). It provides that, if the court extends the time for performance of an obligation under subparagraph (B), the obligation will be treated “as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).”²³⁴ Section VII(C) considers this provision in its discussion of new § 1191(e), which permits deferral of administrative expenses under a cramdown plan.

The amended provisions expire on December 28, 2022.²³⁵ They continue to apply, however, in any subchapter V case filed before the sunset date.²³⁶

It is unclear whether a sub V debtor who has not experienced financial hardship due to COVID-19 may seek relief under subparagraph (A). Although subparagraph (B) arguably states the rule for all sub V cases, its apparent purpose is to relax the rule in a subchapter V case for a debtor whose problems arise from the COVID-19 pandemic. A sub V debtor who cannot establish that it has experienced Covid-related financial distress, therefore, should be able to proceed under subparagraph (A).

²³² CAA § 1001(f)(1)(A)(iii).

²³³ This provision in subparagraph (B) differs from subparagraph (A) (the pre-CAA rule in § 365(d)(3)). Subparagraph (A) permits extension of the time for performance for 60 days without regard to whether the lease is assumed or rejected. Subparagraph (B) does not permit extension of time beyond the date of assumption or rejection. Arguably, the purpose of subparagraph (B) is to relax the rules for postpetition performance in a subchapter V case so that a sub V debtor could still seek an extension of time for 60 days to perform postpetition obligations notwithstanding the earlier rejection of a lease.

²³⁴ CAA § 101(f)(1)(A)(iii).

²³⁵ CAA § 101(f)(2)(A)(i).

²³⁶ CAA § 101(f)(2)(B).

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.²³⁷

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.²³⁸ A subchapter V plan must comply with the other requirements of §§ 1122 and 1123.

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 plans²³⁹ or make the use of Official Form 425A mandatory and provide guidance on its preparation.²⁴⁰

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.²⁴¹ Section 1123(c) prohibits a plan filed by an entity

²³⁷ New § 1190(3).

²³⁸ New § 1181(a).

²³⁹ 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>.

²⁴⁰ E.g., *SBRA Plan Instructions*, available at <http://www.canb.uscourts.gov/forms/district>.

²⁴¹ § 1123(a)(8).

other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.²⁴²

SBRA replaced § 1123(a)(8) with a disposable income 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.²⁴³

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

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

First, new § 1190(1)²⁴⁴ 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.

²⁴² § 1123(c).

²⁴³ New § 1189(a).

²⁴⁴ No apparent reason exists for using numbers for the subsections of this section instead of the customary lower-case letters.

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 things²⁴⁵) “commencement of distribution under the plan.”²⁴⁶ 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.²⁴⁷

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.”²⁴⁸ (Query whether an individual

²⁴⁵ 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).

²⁴⁶ § 1101(2)(C).

²⁴⁷ See Section IX(A).

²⁴⁸ 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 Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 282-83 (2020). 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.*

whose debts exceed the limits for qualification as a “small business debtor” under § 101(51D)(A) but who qualifies for subchapter V under the temporary \$ 7.5 million debt limit under the CARES Act meets the requirement in (B) for use of loan proceeds for the debtor’s “small business.”)

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.²⁴⁹ 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 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.²⁵⁰

The court in *In re Ventura*²⁵¹ 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

²⁴⁹ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:42.

²⁵⁰ *Id.*

²⁵¹ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).

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,²⁵² 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.²⁵³

The *Ventura* 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 § 1190(3)(B)).²⁵⁴

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.²⁵⁵

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.”²⁵⁶ 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

²⁵² *Id.* at 7-14. Part XIII discusses the court's ruling on the availability of subchapter V in the case.

²⁵³ 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.

²⁵⁴ *In re Ventura*, 615 B.R. 1, 23 (Bankr. E.D.N.Y. 2020).

²⁵⁵ *Id.* at 24.

²⁵⁶ *Id.*

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.”²⁵⁷

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

The *Ventura* 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.”²⁵⁸

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 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.”²⁵⁹

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.²⁶⁰

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

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 25.

²⁶⁰ *Id.*

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.²⁶¹ 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).

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.²⁶²

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 *Seven Stars* court agreed that § 1191(e) permits deferred payment of administrative expense claims allowed under § 503(b). It concluded, however, that § 365(d)(3), not § 503(b), governs postpetition rent obligations. The court ruled, “As such, even though new Section

²⁶¹ New § 1191(e).

²⁶² 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 Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 15-16.

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.

The Consolidated Appropriations Act, 2021 (the “CAA”)²⁶³ made temporary changes to § 365(d) dealing with the timely performance of the debtor’s postpetition obligations as lessee under an unexpired lease of nonresidential real property. As Section VI(K) discusses, the temporary amendment added subparagraph (B) to § 365(d)(3) to permit the court to extend the time for the performance of such obligations for up to 120 days in a sub V case if it determines that the debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”²⁶⁴

Importantly, CAA also added subparagraph (C) to § 365(d)(3) to provide that, if the court grants such an extension, the obligation “shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).”²⁶⁵

The provisions expire on December 28, 2022²⁶⁶ but continue to apply in any subchapter V case filed before then.²⁶⁷

Because temporary § 365(d)(3)(C) requires treatment of a deferred postpetition lease obligation as an administrative expense for purposes of new § 1191(e), it seems that, notwithstanding the *Seven Stars* analysis, a cramdown plan may provide for the deferral of

²⁶³ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020).

²⁶⁴ § 365(d)(3)(B), as enacted by CAA § 1001(f)(1)(A)(iii).

²⁶⁵ § 365(d)(3)(C), as enacted by CAA § 1001(f)(1)(A)(iii).

²⁶⁶ CAA § 1001(f)(2)(A).

²⁶⁷ CAA § 1001(f)(2)(B).

payment of obligations that the court extends. The difficulty with the conclusion is that subparagraph (B) still requires that the court order performance of postpetition obligations within no more than 120 days after the order for relief.

Arguably, a debtor who has not complied with the mandatory requirement of § 365(d)(3)(B) has not satisfied the confirmation requirement of § 1129(a)(2) that the plan proponent comply with all applicable provisions of the Bankruptcy Code. Courts will have to determine whether temporary § 365(d)(3)(C) grants permission to defer payments that the debtor had the obligation to make within the time that § 365(d)(3)(B) requires.

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.²⁶⁸ 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)).²⁶⁹ The effects of confirmation are not different depending on whether cramdown confirmation under § 1129(b) occurs.

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

²⁶⁸ § 1129(b)(1).

²⁶⁹ § 1129(b)(2).

income requirement in the case of an individual if an unsecured creditor invokes it.²⁷⁰ Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.²⁷¹

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.²⁷² 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.²⁷³ 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.²⁷⁴

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) discuss confirmation issues that have arisen in subchapter V cases under provisions that SBRA did not change.

²⁷⁰ New § 1181(a). 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).

²⁷¹ INTERIM RULE 1007(b).

²⁷² New § 1191.

²⁷³ § 1181(a).

²⁷⁴ New § 1191(c)(1).

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 disposable income requirement, which a single creditor can do in a traditional case even if all impaired classes accept the plan.²⁷⁵ Section VIII(D)(8) discusses application of the good faith requirement of § 1129(a)(3) in the context of confirmation of a consensual plan when an unsecured creditor objects because the debtor is not paying enough disposable income to creditors.

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).²⁷⁶

²⁷⁵ § 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.

²⁷⁶ Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (Part IX); compensation of the trustee (Section IV(E)); deferral of administrative expenses (Section VII(C)); postconfirmation modification of the plan (Section VIII(C)); discharge (Part X); contents of property of the estate (Part XI); and postconfirmation default and remedies (Part XII).

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.²⁷⁷ Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.²⁷⁸

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 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).²⁷⁹ 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.²⁸⁰

²⁷⁷ § 1129(a)(8).

²⁷⁸ § 1129(a)(10).

²⁷⁹ § 1129(b)(2)(B).

²⁸⁰ See 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d]. For competing views of whether the absolute priority rule should apply in a traditional case of an individual, see Brett Weiss, *Absolute-Priority Rule Should Not Apply in Individual Cases*, 40 AMER. BANKR. INST. J. 20 (May 2021), and Emily C. Eggmann and Robert E. Eggmann, *Absolute-Priority Rule Should Apply in Individual Chapter 11 Cases*, 40 AMER. BANKR. INST. J. 21 (May 2021),

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.²⁸¹ 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.²⁸² New § 1191(c) states a new “rule of construction” for the requirement that a plan be “fair and equitable.”²⁸³ 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.²⁸⁴

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 cramdown confirmation under § 1129(b).

It does not appear that the new statute effects any change in the unfair discrimination requirement.²⁸⁵ New § 1191(c) does, however, provide a new “rule of construction” in

²⁸¹ New § 1181(a).

²⁸² New § 1191(b).

²⁸³ New § 1191(c).

²⁸⁴ New § 1191(d).

²⁸⁵ See Section VIII(D)(1).

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 complies with the standards 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. In a traditional chapter 11 case, 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 traditional case because of the absence of an accepting impaired class of claims, which § 1129(a)(10) requires.²⁸⁶ This requirement is inapplicable for cramdown confirmation in a sub V case under new § 1191(b).

In addition, the creditor in a sub V case cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

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

²⁸⁶ § 1129(a)(10).

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.

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.²⁸⁷

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

The projected disposable income (or “best efforts”) requirement is in new § 1191(c)(2).²⁸⁸

²⁸⁷ 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 275.

²⁸⁸ 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).

Cramdown confirmation under new § 1191(b) requires that the plan 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.²⁸⁹ Alternatively, the plan may provide that the value of property to be distributed under the plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.²⁹⁰ 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.²⁹¹

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.²⁹² Like the chapter 12 requirement (and unlike the requirement in traditional chapter 11 cases), it applies to entities as well as individuals.

²⁸⁹ 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, CHAPTER 13 PRACTICE AND PROCEDURE §§ 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.

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.

²⁹⁰ The projected disposable income tests in chapters 11 and 12 also contain this alternative, but the chapter 13 one does not.

²⁹¹ 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).

²⁹² *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, Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, 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.

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 12²⁹³ and 13.²⁹⁴ In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.²⁹⁵

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;²⁹⁶ or
- a domestic support obligation that first becomes payable after the date of the filing of the petition;²⁹⁷ or
- payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.²⁹⁸

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) defines the income component as “current monthly income” (defined in § 101(10A)) and permits a deduction for charitable contributions. The chapter 11 provision incorporates the chapter 13 definition.²⁹⁹

²⁹³ § 1225(b)(2).

²⁹⁴ § 1325(b)(2).

²⁹⁵ § 1129(a)(15).

²⁹⁶ New § 1191(d)(1)(A).

²⁹⁷ New § 1191(d)(1)(B).

²⁹⁸ § 1191(d)(2).

²⁹⁹ § 1129(a)(15).

Although the definition of disposable income in all cases is substantially the same, 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”³⁰⁰ debtor may take in calculating disposable income.³⁰¹ 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.³⁰²

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

³⁰⁰ 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, CHAPTER 13 PRACTICE AND PROCEDURE § 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 id.* §§ 4:9, 8:12.

³⁰¹ § 1325(b)(3).

³⁰² 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 § 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.

cases prior to the introduction of the means test standards in BAPCPA.³⁰³ 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.³⁰⁴ 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.

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.³⁰⁵ As later text discusses, an extension of the period that the debtor must make

³⁰³ 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, CHAPTER 13 PRACTICE AND PROCEDURE § 8:28.

³⁰⁴ New § 1191(d)(2).

³⁰⁵ 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).

payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or for expenditures 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 income³⁰⁶ 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.

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.

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

³⁰⁶ 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.

amount at one or more specified times.³⁰⁷ 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.

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.

³⁰⁷ 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.

In *Patel*, 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.

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 12³⁰⁸ and 13³⁰⁹ and in traditional chapter 11 cases of individuals.³¹⁰ 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

³⁰⁸ § 1225(b).

³⁰⁹ § 1325(b).

³¹⁰ § 1129(a)(15). The requirement applies only if an unsecured creditor invokes it.

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.³¹¹

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.³¹² 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.³¹³

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.

In chapters 12 and 13 and in traditional 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

³¹¹ § 1125(b)(4).

³¹² New § 1191(c)(2).

³¹³ 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).

wants.³¹⁴ 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.³¹⁵

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

³¹⁴ 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.

³¹⁵ 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 traditional chapter 11 case of an individual, § 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, CHAPTER 13 PRACTICE AND PROCEDURE § 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* CHAPTER 13 PRACTICE AND PROCEDURE § 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 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.

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.³¹⁶

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.³¹⁷ 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*.

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,³¹⁸ or that there is a reasonable likelihood that the debtor will be able to make all

³¹⁶ See 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

³¹⁷ 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 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.

³¹⁸ New § 1191(c)(3)(A)(i).

payments under the plan.³¹⁹ 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.³²⁰

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.³²¹ Section XII(B) discusses remedies for default in the plan.

Courts in sub V cases 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

³¹⁹ § 1191(c)(3)(A)(ii).

³²⁰ § 1129(a)(11).

³²¹ New § 1191(c)(3)(B). 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.

objection of a creditor that it was not feasible because its funding depended on a proposed assessment of owners that the owners 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 followed 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.

In *In re Gabbidon Builders, LLC*, 2021 WL 1964544 (Bankr. W.D. N.C. 2021), the court denied confirmation of the debtor's plan and converted the case to chapter 7. The debtor planned to sell a parcel of real property, to use the proceeds to make some payments to creditors and to purchase a new lot, to construct a house on the new lot and sell it, and to use those proceeds to pay creditors. The plan also proposed monthly payments to creditors from operating income.

The court found that the principal's testimony in support of confirmation was unreliable and conflicting. The court concluded that the evidence did not establish that sale of the property was imminent, that the proposed construction of a new house could occur as proposed, or what the debtor would receive upon its sale. *Id.* at *2-3. Similarly, the court concluded that no evidence supported the debtor's predictions of future income. *Id.* at *4.

Testimony from a debtor's principal was likewise insufficient to establish feasibility in *In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership*, 2021 WL 1679062 (Bankr. N.D. W. Va. 2021). The court questioned the debtor's revenue projections, noting the absence of testimony as to how it would achieve a 50 percent increase over declining historical results. *Id.* at *4.³²²

³²² The court addressed the feasibility issue after it had decided to dismiss the case for cause, including the failure to explain ambiguities in monthly reports, postpetition payment of unsecured creditors without court approval, failure to file postpetition sales tax returns and pay the taxes, and receipt of a postpetition loan from a company owned by the principal's spouse without court approval. 2021 WL 1679062 at *3.

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.³²³

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).³²⁴ 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.³²⁵ These are the same rules that govern postconfirmation modification in traditional chapter 11 cases under § 1127(b).

³²³ New § 1181(a).

³²⁴ § 1193(b).

³²⁵ § 1193(d).

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.³²⁶ The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of new § 1191(b).³²⁷

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; the modified plan must meet confirmation requirements.³²⁸ Unlike the provisions in the other chapters, new § 1193(c) does not permit modification at the request of creditors or the trustee.³²⁹

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 have arisen in subchapter V cases.³³⁰ Section VIII(E) discusses confirmation and related issues involving secured claims that have arisen in subchapter V cases.

³²⁶ § 1193(c).

³²⁷ 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.

³²⁸ §§ 1229, 1329.

³²⁹ New § 1193(c).

³³⁰ 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). See also *In re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020).

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).³³¹ The classification rule in § 1122(a) is that the claims or interests in a class must be “substantially similar.” 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).

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.”

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

³³¹ 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.

totaled approximately \$ 360,000; the other class included all other unsecured claims of approximately \$ 50,000.

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.³³² 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.

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

³³² 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.

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.³³³

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 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. 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

³³³ 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 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 lease 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 the time it specifies. 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).

The Consolidated Appropriations Act, 2021 (the “CAA”) temporarily amended § 365(d) to change the deadline for assumption from 120 days to 210 days after the order for relief and to permit an extension of the time for an additional 90 days.³³⁴ On December 28, 2022, the deadline reverts to 120 days, which may be extended for up to 90 days.³³⁵

In *In re Motif Designs, Inc.*, 2020 WL 7212713 (Bankr. S.D. Mich., 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.

³³⁴ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f)(1)(B), 134 Stat. 1182, 3219 (December 27, 2020).

³³⁵ *Id.* § 1001(f)(2)(A).

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).³³⁶ 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.³³⁷

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*, 626 B.R. 326, 334 (Bankr. D. Colo, 2021).³³⁸

8. Application of § 1129(a)(3) good faith requirement in context of consensual plan when creditor objects because debtor is not paying enough disposable income

In a traditional chapter 11 case of an individual, § 1129(a)(15) requires a plan to provide for the debtor to pay projected disposable income, or its value, for the longer of five years or for the term of the plan, if an unsecured creditor objects. The requirement applies even if the class of unsecured creditors has accepted the plan.

³³⁶ 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.”

³³⁷ 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.

³³⁸ 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*, 626 B.R. 326, 334. 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.

This rule does not apply in a sub V case. Section 1129(a)(15) is inapplicable, new § 1181(a), and neither consensual confirmation under new § 1191(a) nor cramdown confirmation under new § 1191(b) requires that the plan comply with § 1129(a)(15).

Consensual confirmation under new § 1191(a) requires compliance only with the applicable provisions of § 1129(a). Accordingly, consensual confirmation requirements do not include a projected disposable income test.

Cramdown confirmation in a sub V case similarly does not require compliance with § 1129(a)(15), but new § 1191(c)(2) does require payment of projected disposable income for a minimum of three, and a maximum of five, years, as the court determines.³³⁹

The issue is how the good faith requirement of § 1129(a)(3) applies to an objection to confirmation of a consensual plan when the debtor could pay more than the plan provides. A similar issue arises in chapter 13 cases when the debtor could pay more than the projected disposable income test of § 1325(b) requires.

Objections based on good faith arise in chapter 13 cases, for example, when the debtor proposes to retain an expensive home, car, or other luxury item (and use income to pay the debts they secure instead of paying unsecured creditors) or if the debtor receives social security benefits.³⁴⁰ The chapter 13 projected disposable income rules permit a deduction for payments on secured claims³⁴¹ and exclude social security benefits. The argument is that good faith requires a debtor to surrender expensive luxury items rather than pay for them or that the debtor's social security benefits permit the debtor to pay more, even though the proposed

³³⁹ See Section VIII(B)(4).

³⁴⁰ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:34, 8:59.

³⁴¹ See *id.* §§ 8:29, 8:56, 8:59.

payments comply with the projected disposable income test.³⁴² The same “good faith” objection exists in the context of a consensual plan in a sub V case, when the projected income test similarly does not apply.

Courts have taken various approaches in chapter 13 cases.³⁴³ Appellate courts have rejected a “best efforts” approach to good faith (under which good faith requires that a debtor use “best efforts” to pay creditors).³⁴⁴ Instead, courts use a “totality of the circumstances” test in which ability to pay is one of many factors.³⁴⁵

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), examined the issue in a subchapter V case. There, the debtor’s plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan,³⁴⁶ but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate.

The debtor, with estimated pre-tax annual income over the three-year period ranging from \$ 360,000 to \$ 525,000, projected monthly expenses of \$ 16,000, including \$ 9,000 to pay the mortgage on his residence (in which he alone would reside), and related taxes, maintenance, and utilities. The plan provided for payments of \$ 488,061.82 over three years, of which \$ 159,500 would be available for distribution to unsecured creditors after payment of administrative expenses, priority tax claims, a priority domestic support obligation claim, and prepetition mortgage arrearages.

³⁴² See *id.* § 4:34.

³⁴³ See *id.* § 8:26.

³⁴⁴ See *id.* § 4:31.

³⁴⁵ See *id.* § 4:32.

³⁴⁶ Six creditors, holding claims totaling \$ 1,871,481.51 (84.6%), accepted the plan. Two creditors, holding claims totaling \$ 340,035.15 (15.4%) rejected it.

The creditor asserted that good faith in an individual chapter 11 case required the debtor's "best effort" to repay creditors. In view of the debtor's luxurious lifestyle, the creditor argued that the debtor should be required to add two years of payments from income for the benefit of unsecured creditors, which would add \$ 144,000 to the amount unsecured creditors would receive.

The court noted that courts analyze the good faith requirement of § 1129(a)(3) based on the "totality of the circumstances." In addition, the court observed, the good faith requirement "should be construed narrowly, particularly when raised by a dissenting creditor whose class has voted to accept the plan." *Walker*, 628 B.R. 9, 16.

The court expressed its concerns that "a robust application of the good faith doctrine creates a risk that the court's analysis will lapse into an inquiry that 'may clothe subjective moral judgments with the force of law'"³⁴⁷ and that "a broad application of the good faith requirement also would 'create an undue risk of judicial usurpation of the legislative power to determine the scope of and eligibility for [bankruptcy] relief.'"³⁴⁸

The *Walker* court thus rejected the suggestion that good faith under § 1129(a)(3) inflexibly requires a debtor's "best effort" to make every possible resource available to repay creditors. The court reasoned that the rejection of such a rule in a sub V case involving consensual confirmation under new § 1191(a) is especially relevant because § 1129(a)(15) is not applicable. The court stated, 629 B.R. at 17-18 (citation omitted):

³⁴⁷ *In re Walker*, 628 B.R. 9, 17 (Bankr. E.D. Pa. 2021), *quoting In re Glunk*, 342 B.R. 717, 731 (Bankr. E.D. Pa. 2006) (*quoting Sarasota, Inc. v. Weaver*, 2004 WL 2514290, at *3 (E.D. Pa. Nov. 5, 2004) (*quoting In re Woodman*, 287 B.R. 589, 592 (Bankr. D. Me. 2003), *aff'd* 2003 WL 23709465 (D. Me. Sept. 19, 2003), *aff'd* 379 F.3d 1 (1st Cir. 2004)).

³⁴⁸ *Id.* at 17, *quoting In re Glunk*, 342 B.R. 717, 732 (Bankr. E.D. Pa. 2006).

The omission of § 1129(a)(15) from the confirmation requirements under § 1191(a) sends a clear legislative message that decision whether a plan’s funding justifies confirmation should be resolved by the creditor voting process and chapter 11’s fundamental policy of “creditor democracy.” When the affected creditors support confirmation of a plan, the court generally should be circumspect about overriding the expressed will of the voting creditors based on the good faith requirement of 11 U.S.C. § 1129(a)(3). This narrow application of 11 U.S.C. § 1129(a)(3) is especially apt in a case under subchapter V.

The court agreed that the debtor could pay more to creditors and noted, “Any court should have serious concerns about approving an individual’s reorganization plan in which the debtor proposed to live alone in a large residence, while paying arguably unnecessary carrying costs – roughly \$ 9,000 per month – thereby reducing the available distribution to creditors.”

Walker, 628 B.R. 9, 18.

If it were a creditor, the court continued, it might reject the plan “absent more evidence that the Debtor is making some tangible sacrifices in order to repay his debts.” *Id.* at 18. But the court emphasized, “[T]he subjective reaction of a bankruptcy judge to a debtor’s proposed plan is not the test by which good faith is measured under 11 U.S.C. § 1129(a)(3).” *Id.* at 18.

Instead, the court explained, “[T]he good faith determination requires objective consideration of the totality of the circumstances. In the end, the critical issue is whether a plan adheres sufficiently to Bankruptcy Code policy and is sufficiently fair to warrant a finding that it was proposed in good faith.” *Id.* at 18.

The court found it “extremely significant” that the unsecured class of creditors had voted overwhelmingly in support of the plan. The court reasoned, “Presumably, these creditors made a business judgment that any misgivings they may have regarding the Debtor’s lifestyle and the

likely accompanying reduction in their potential distribution under the Plan were outweighed by the benefits conferred by the Plan.” *Id.* at 18.

The *Walker* court also took into account the fact that the debtor had voluntarily put additional money into the plan that the projected disposable income test applicable to cramdown confirmation would not necessarily require. The additional funding arose from the fact that the debtor’s payments included the commitment of preconfirmation earnings and that disposable income as predicted did not account for the full postpetition income tax liability on anticipated future earnings. 629 B.R. at 15.

In effect, these two adjustments resulted in \$ 170,000 more in projected disposable income than the amount than the statute required. Accordingly, the debtor argued, the plan provided for more money to be paid to unsecured creditors than they would receive if the debtor paid adjusted disposable income for five years.

The court agreed that reference to the amount that a debtor would have to pay under the projected disposable income test of § 1191(c)(2) in the cramdown situation was helpful in evaluating good faith in connection with confirmation of a consensual plan, even though the test does not apply. *Id.* at 15. The court concluded that the debtor’s voluntary commitment of additional money, which the strict statutory requirements would not require, supported a finding of good faith. *Id.* at 18.

The court overruled the good faith objection, *id.* at 19:

[W]hile it may be true that the Debtor could provide a greater distribution to creditors . . . the plan is neither so unfair or offensive to basic notions of justice nor so inconsistent with bankruptcy policy as to warrant court intervention to overrule the will of voting creditors.

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 the cramdown standards in § 1129(b)(2)(A) that apply to secured claims in subchapter V cases and other sections of the Bankruptcy Code 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.³⁴⁹ If the secured obligation is “nonrecourse” – *i.e.*, the debtor is not personally liable and the creditor can

³⁴⁹ See generally *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:5.

collect its debt only from the encumbered property – the creditor does not have an unsecured claim in the case.

Assume, for example,³⁵⁰ 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.

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).³⁵¹

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

³⁵⁰ 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).

³⁵¹ See Section VIII(B)(2).

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 \$ 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.

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, \$ 100,000.³⁵²

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.

Payment Schedules Providing for Payments Totaling \$ 100,000 With a Value of \$ 30,000						
Amortization Period	Payment On \$30,000	Interest Paid at 6%	Total of Payments (\$ 30,000 + Interest payments)	Remaining Balance (\$ 100,000 – (d))	Monthly Payment on Remaining Balance ((e)/months)	Total Monthly Payment (b) + (f)
(a)	(b)	(c)	(d)	(e)	(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.

³⁵² 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].

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).

In a traditional chapter 11 case, a secured creditor for strategic purposes may want to retain a large unsecured deficiency claim so that it controls the vote of the unsecured class. This may give the secured creditor a "blocking position" to prevent confirmation because, unless other classes exist, a debtor cannot meet the requirement of § 1129(a)(10) that at least one impaired class of claims accept the plan.

Because subchapter V permits confirmation even if no class accepts, a secured creditor does not have a blocking position regardless of whether it makes the § 1111(b) election. Especially if a nominal distribution to unsecured creditors is likely, a secured creditor in a sub V case may conclude that making the § 1111(b) election will enhance its recovery and negotiating position.

Two courts have considered a creditor's § 1111(b) election in a subchapter V case. In both, the issue was whether the creditor could not invoke the election because its interest was "inconsequential." The cases are required reading for judges and practitioners dealing with § 1111(b) elections in subchapter V cases.³⁵³

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

³⁵³ See generally Thomas C. Scherer and Whitney L. Mosby, *The Applicability of the § 1111(b) Election in a Small Business Case*, 40 AMER. BANKR. INST. J. 12 (May 2021).

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 *4.³⁵⁴ 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.³⁵⁵ 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

³⁵⁴ The court cited *McGarey v. MidFirst Bank (In re McGarey)*, 529 B.R. 777 (D. Ariz. 2015).

³⁵⁵ The court cited *In re Wandler*, 77 B.R. 728, 733 (Bankr. N.D. 1987).

as a practical matter be amortized fully under the cramdown confirmation standards in § 1129(b)(2)(A)(i), discussed above.³⁵⁶ 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,

³⁵⁶ 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 must “compare the value of the collateral to something else, and the statutory text offers no guidance there.” *Id.*

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] (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 *Body Transit* 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." 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." *Id.* at 836.

These circumstances, the *Body Transit* 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 266-67.³⁵⁷ 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):³⁵⁸

³⁵⁷ 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.

³⁵⁸ 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.

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 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.³⁵⁹ 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.³⁶⁰ 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.³⁶¹ 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.³⁶²

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

³⁵⁹ 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).

³⁶⁰ The court cited *In re May*, 174 B.R. 832, 838–839 (Bankr. S.D. Ga. 1994).

³⁶¹ The court cited *In re SCC Kyle Partners, Ltd.*, 2013 WL 2903453 (Bankr. W.D. Tex.2013).

³⁶² The court cited 4 COLLIER ON BANKRUPTCY ¶ 506.03.

circumstances, concluding that § 1123(a)(5)(E) permits a plan to modify any lien as long as it complies with § 1129(b)(2)(A).³⁶³

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),³⁶⁴ the court must confirm the plan.³⁶⁵ 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."³⁶⁶ 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.³⁶⁷

³⁶³ 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.

³⁶⁴ Section 1129(a)(15) states chapter 11's projected disposable income requirement, which applies only in the case of an individual. See Section VIII(B)(4).

³⁶⁵ New § 1191(a).

³⁶⁶ § 1183(c)(1).

³⁶⁷ § 1183(c)(2).

Under § 1101(2), “substantial consummation” generally occurs upon “commencement of distribution under the plan.”³⁶⁸ 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.

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.³⁶⁹ Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.³⁷⁰

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

³⁶⁸ § 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).

³⁶⁹ 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).

³⁷⁰ § 1226(c), 1326(c).

request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.³⁷¹

New § 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.³⁷² 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.³⁷³ 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

³⁷¹ See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, 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.”).

³⁷² New § 1194.

³⁷³ W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 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.³⁷⁴

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.³⁷⁵ 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.

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,³⁷⁶ while a second allows debtors to pay secured creditors directly, regardless of their impaired status.³⁷⁷ *Id.* at 546-47.

Most courts adopt a third approach that permits direct payments depending on the circumstances of the case.³⁷⁸ *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

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ 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).

³⁷⁷ 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).

³⁷⁸ 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).

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 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.³⁷⁹ 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.

³⁷⁹ The court also permitted, without objection, direct payment of a student loan.

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.³⁸⁰

Section 1141(d)(5) does not apply in a sub V case.³⁸¹ 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.³⁸²

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.³⁸³

³⁸⁰ New § 1181(c).

³⁸¹ New § 1181(a).

³⁸² 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 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.

³⁸³ § 1141(d)(5)(A).

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.³⁸⁴

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).³⁸⁵ 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 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.³⁸⁶

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.³⁸⁷ Only an individual is entitled to a discharge in a

³⁸⁴ § 1141(d)(5)(B).

³⁸⁵ The individual debtor also does not have to deal with the § 522(q) issues discussed in footnote 258, although they rarely arise.

³⁸⁶ § 1141(d)(1)(A).

³⁸⁷ § 1141(d)(3).

chapter 7 case.³⁸⁸ An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.³⁸⁹

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).³⁹⁰ 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.³⁹¹

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 § 1192.³⁹² 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.”³⁹³ Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with

³⁸⁸ § 727(a)(1).

³⁸⁹ § 727(a).

³⁹⁰ § 1141(d)(1)(A).

³⁹¹ § 1141(d)(6).

³⁹² New § 1181(c).

³⁹³ 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.

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.”³⁹⁴ Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;³⁹⁵ compensation of the trustee and professionals employed by the trustee and the debtor;³⁹⁶ and claims for goods the debtor received within 20 days of the filing.³⁹⁷ The discharge provision recognizes that a plan confirmed under new § 1191(b) may provide for the payment of administrative expenses through the plan.³⁹⁸

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.³⁹⁹ 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)].”⁴⁰⁰ The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual under § 1141(d)(2).

³⁹⁴ New § 1192.

³⁹⁵ § 503(b)(1).

³⁹⁶ § 503(b)(2).

³⁹⁷ § 503(b)(9).

³⁹⁸ 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* 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).

³⁹⁹ New § 1192(1).

⁴⁰⁰ New § 1192(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.⁴⁰¹

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)].⁴⁰²

(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.

⁴⁰¹ Some commentators have concluded that the exceptions in § 523(a) apply to the discharge of an entity in a sub V case. 5 NORTON BANKRUPTCY LAW AND PRACTICE § 107:19; James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, NORTON BANKR. L. ADVISER, Oct. 2019, Part IX.

⁴⁰² § 523(a) (language inserted by amendment in *italics*).

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.”⁴⁰³ The use of the words “otherwise nondischargeable” logically refers to § 523(a), which applies only to individuals.

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.⁴⁰⁴ 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),⁴⁰⁵ 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

⁴⁰³ H.R. REP. NO. 116-171, at 8.

⁴⁰⁴ 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. *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.

⁴⁰⁵ 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).

excepts debts of an individual.⁴⁰⁶ Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

In *In re JRB Consolidated, Inc.*,⁴⁰⁷ 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).”⁴⁰⁸ Instead, the court concluded, “debts of the kind” is limited to the types of debts that the subparagraphs of § 523(a) identify.⁴⁰⁹ Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.⁴¹⁰

The court in *In re Breezy Ridge Farms, Inc.*,⁴¹¹ adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)⁴¹² 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.⁴¹³ 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.⁴¹⁴

⁴⁰⁶ *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).

⁴⁰⁷ *In re JRB Consol.*, 188 B.R. at 373.

⁴⁰⁸ *Id.* at 374.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.

⁴¹² Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. See Section X(A).

⁴¹³ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.

⁴¹⁴ *Id.*

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.⁴¹⁵ 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.⁴¹⁶ 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 actual notice of the deadlines in time to do so.⁴¹⁷ The clerk’s office must give at least 30 days’ notice of the deadline.⁴¹⁸

The court in *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021), ruled that 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 876. Legislative history explaining the intent of Congress in enacting subchapter V, the court noted, supported its interpretation. *Id.* at 876, 878. Another judge in the same district reached this conclusion in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 2021 WL 2667735 (Bankr. D. Md. 2021).

⁴¹⁵ § 523(c)(1).

⁴¹⁶ FED. R. BANKR. P. 4007(c).

⁴¹⁷ § 523(a)(3).

⁴¹⁸ 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.

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.⁴¹⁹ 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.⁴²⁰ 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 Traditional Chapter 11 Cases

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).⁴²¹

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.

⁴¹⁹ New § 1181(a).

⁴²⁰ § 1186.

⁴²¹ § 541.

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,⁴²² 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).⁴²³ Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.⁴²⁴ In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.⁴²⁵

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

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

⁴²² 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.

⁴²³ § 541(a)(6).

⁴²⁴ *Id.*

⁴²⁵ §§ 1207(a), 1306(a).

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,⁴²⁶ and earnings from postpetition services,⁴²⁷ 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.⁴²⁸ 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).⁴²⁹ 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 § 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

⁴²⁶ § 1115(a)(1).

⁴²⁷ § 1115(a)(2).

⁴²⁸ New § 1181(a).

⁴²⁹ New § 1186(a).

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 13.⁴³⁰

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.”⁴³¹ 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.⁴³²

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 § 1141(b) provides for vesting of property of the estate in the debtor upon confirmation. New § 1186, however, keeps the property in the estate when cramdown confirmation occurs.

⁴³⁰ §§ 1227(b), 1327(b).

⁴³¹ § 362(c)(1).

⁴³² § 1141(b).

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 confirmation⁴³³ and makes payments under the plan,⁴³⁴ and discharge does not occur until the debtor has completed payments for the specified period.⁴³⁵

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.⁴³⁶ 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.

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,

⁴³³ See Section IV(D)(1).

⁴³⁴ See Section IX(B).

⁴³⁵ See Section X(B).

⁴³⁶ “[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statutes 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.).

property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.⁴³⁷ 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?

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

The court concluded that the postpetition gambling did not constitute gross mismanagement of the estate that would provide cause for dismissal under § 1112(b)(4)(B)

⁴³⁷ *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).

because the debtor had disclosed it in his monthly report and because nothing showed that the loss was material or had an adverse impact on the estate or its creditors. *Id.* at *7-8.

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

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?⁴³⁸ 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.⁴³⁹

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

⁴³⁸ Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

⁴³⁹ New § 1186.

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.

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.”⁴⁴⁰ The only specific remedy in new § 1191(c)(3)(B) is “the liquidation of nonexempt assets.”⁴⁴¹

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

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of 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.

⁴⁴⁰ New § 1191(c)(3)(B).

⁴⁴¹ *Id.*

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.”⁴⁴² If removal of the debtor in possession occurs after the trustee's service has been terminated upon 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

⁴⁴² New § 1185(a). Section V(C) discusses removal for cause.

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.⁴⁴³ 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 estate remains property of the estate under new § 1186⁴⁴⁴) 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 reverts 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.⁴⁴⁵ 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

⁴⁴³ See Section XI(B).

⁴⁴⁴ See Section XI(B).

⁴⁴⁵ New § 1193(b).

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.⁴⁴⁶

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes "material default by the debtor with respect to a confirmed plan."⁴⁴⁷ 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.⁴⁴⁸

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.

⁴⁴⁶ § 721.

⁴⁴⁷ § 1112(b)(4)(N).

⁴⁴⁸ § 702(d).

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under new § 1191(a).⁴⁴⁹ 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.⁴⁵⁰

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.⁴⁵¹ Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the case is dismissed prior to the entry of discharge.⁴⁵² Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

⁴⁴⁹ See Section X(A).

⁴⁵⁰ 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).

⁴⁵¹ New § 1192.

⁴⁵² 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 F.3d 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.

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) reverts property of the estate in the entity in which such property was before the filing of the case.⁴⁵³

2. Postconfirmation conversion

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

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under new § 1191(a), but not when cramdown confirmation occurs under new § 1191(b) because new § 1186 keeps property in the estate.⁴⁵⁴

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not reconvert property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.⁴⁵⁵ Other courts have ruled that property of the estate

⁴⁵³ § 349.

⁴⁵⁴ See Section XI(B).

⁴⁵⁵ *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 reverted in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case.”); *Lacy v. Stinky Love, Inc. (In re Lacy)*, 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re L & T Machining, Inc.*, 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re Sundale, Ltd.*, 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re Canal Street Limited Partnership*, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re K*

upon conversion consists of property owned by the debtor at the time of commencement of the case,⁴⁵⁶ on the confirmation date,⁴⁵⁷ or on the date of conversion.⁴⁵⁸

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

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

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

⁴⁵⁶ *Smith v. Lee (In re Smith)*, 201 B.R. 267 (D. Nev. 1996), *aff’d* 141 F.3d 1179 (9th Cir. 1998).

⁴⁵⁷ *Carey v. Flintridge Lumber Sales, Incl (In re RJW Lumber Co.)*, 262 B.R. 91 (Bankr. N.D. Ca. 2001).

⁴⁵⁸ *In re Midway, Inc.*, 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

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.

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.”⁴⁵⁹

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.”⁴⁶⁰ The court observed

⁴⁵⁹ Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).

⁴⁶⁰ *In re Double H Transportation, LLC*, 614 B.R. 553 (Bankr. W.D. Tex. 2020).

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.⁴⁶¹

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.⁴⁶² 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;⁴⁶³ the court need not approve the election.⁴⁶⁴

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

⁴⁶¹ *Id.* at 554.

⁴⁶² *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*, *In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La. 2020); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

⁴⁶³ *See* Section III(A).

⁴⁶⁴ *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).

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.⁴⁶⁵

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

⁴⁶⁵ *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, In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020).

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

The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.

The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor’s conduct and potential prejudice to creditors.

Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor’s chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case. The court in *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020), concluded that the *Trepetin* approach to extension of the deadlines in a case converted from chapter 7 to chapter 11 was the proper one. The court denied the debtor’s motion to convert to chapter 11, however, because under that approach the court would decline to extend the time to file a plan. In *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor’s control and for which the debtor should be held accountable. *Id.* at *9.

the debtor's control.⁴⁶⁶ 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.⁴⁶⁷

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*.⁴⁶⁸ The *Moore Properties* court and others⁴⁶⁹ have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*⁴⁷⁰ 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.”⁴⁷¹ 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.”⁴⁷²

The *Landgraf* Court explained that the presumption against retroactive application arises from “[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly,” and from the principle that

⁴⁶⁶ *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020).

⁴⁶⁷ *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.

⁴⁶⁸ *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).

⁴⁶⁹ *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).

⁴⁷⁰ *Landgraf v. USI Film Products*, 511 U.S. 244, 264-71 (1994).

⁴⁷¹ *Id.* at 264, *quoting* *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974).

⁴⁷² *Id.* at 264, *quoting* *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

“settled expectations should not be lightly disrupted.”⁴⁷³ 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.”⁴⁷⁴ 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*.⁴⁷⁵ At issue in *Security Industrial Bank* was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest in exempt personal property.⁴⁷⁶ 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 clause⁴⁷⁷ “has been regularly construed to authorize the retrospective impairment of contractual obligations”⁴⁷⁸ 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.⁴⁷⁹ The Court thus recognized

⁴⁷³ *Id.* at 265.

⁴⁷⁴ *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.

⁴⁷⁵ *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

⁴⁷⁶ 11 U.S.C. § 522(f)(1)(B).

⁴⁷⁷ U.S. Const. Art. I, § 8, cl. 4.

⁴⁷⁸ *United States v. Security Industrial Bank*, 459 U.S. 70, 74 (1982), *citing* *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

⁴⁷⁹ *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.⁴⁸⁰

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.”⁴⁸¹

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*.⁴⁸² 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.”⁴⁸³

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

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 81, citing *Holt v. Henley*, 232 U.S. 637 (1913) and *Auffm’ordt v. Rasin*, 102 U.S. 620 (1881).

⁴⁸² *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).

⁴⁸³ *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.⁴⁸⁴ 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.⁴⁸⁵

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.⁴⁸⁶

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.⁴⁸⁷

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

⁴⁸⁴ See Section VII(A).

⁴⁸⁵ See Section VII(B).

⁴⁸⁶ *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.

⁴⁸⁷ *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.⁴⁸⁸

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.”⁴⁸⁹

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.”⁴⁹⁰ 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.’”⁴⁹¹

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.⁴⁹²

⁴⁸⁸ *Id.* See Section VIII(B)(3), (4).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *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).

⁴⁹² *Id.*

The bankruptcy court in *In re Body Transit*⁴⁹³ 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.⁴⁹⁴

The *Body Transit* court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.⁴⁹⁵ 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.⁴⁹⁶ 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.⁴⁹⁷

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

⁴⁹³ *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020).

⁴⁹⁴ 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.

⁴⁹⁵ *Id.* at 408.

⁴⁹⁶ *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).

⁴⁹⁷ 213 B.R. at 409.

burden of showing prejudice in the case before it.⁴⁹⁸ 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.”⁴⁹⁹

In *In re Ventura*,⁵⁰⁰ 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 part of the property for her residence,⁵⁰¹ 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.⁵⁰²

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

⁴⁹⁸ *Id.* at 409.

⁴⁹⁹ *Id.* at 410.

⁵⁰⁰ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).

⁵⁰¹ Other courts have accepted the debtor’s position. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE, § 5:42 (2d ed. 2019).

⁵⁰² *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.⁵⁰³ 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.⁵⁰⁴

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

⁵⁰³ *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.

⁵⁰⁴ *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.”⁵⁰⁵ 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.⁵⁰⁶ 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.⁵⁰⁷

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].”⁵⁰⁸

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a subchapter V debtor under SBRA’s revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-

⁵⁰⁵ *Id.* at 17.

⁵⁰⁶ *Id.* at 17.

⁵⁰⁷ *Id.* at 24-25. Section VII(B) discusses this aspect of the court’s ruling in connection with consideration of new § 1190(3).

⁵⁰⁸ *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.⁵⁰⁹ 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.⁵¹⁰

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.⁵¹¹ 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.⁵¹² Although the CARES Act provided for the increased debt limit to expire one year after its enactment, the Covid-19 Bankruptcy Relief Extension Act of 2021⁵¹³ amended the CARES Act to extend the increased debt limit for an additional year.

⁵⁰⁹ *In re Body Transit, Inc.*, 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).

⁵¹⁰ *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.).

⁵¹¹ Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See* Section III(B).

⁵¹² *See 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.)

⁵¹³ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

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.

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

The strategy did not work well for the individual debtors in *In re Crilly*, 2020 WL 3549848 (Bankr. W.D. Okla. 2020). A few hours after dismissal of their chapter 11 case filed in 2018 for cause, the individual debtors filed a new case and elected subchapter V. The debtors filed a motion to extend the automatic stay, which under § 362(c)(3) would expire 30 days after filing the second case unless extended based on a showing that the second case was filed in good

faith. Under § 362(c)(3)(C)(i)(III), a filing is presumptively not in good faith if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the previous case.

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

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

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

Enacted August 23, 2019, Effective February 19, 2020

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

May 2020

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

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

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

	§ 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).	
§ 1107	<p>§ 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.</p> <p>§ 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.</p>	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)	<p>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.</p> <p>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.</p>	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)	<p>“Cramdown” provisions are not applicable.</p> <p>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.</p> <p>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.</p> <p>For a secured creditor, the “fair and equitable” requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1).</p> <p>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).</p>	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)	<p>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.</p> <p>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).</p>	New § 1181(c)
	<p align="center">Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V</p>	
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	<p>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).</p> <p>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</p>	§ 4(a)(5); CARES Act § 1113(a)(4)(B)

	<p>under a confirmed plan and that is unclaimed to become property of the debtor.</p> <p>It is unclear under these amendments what happens to funds that a trustee disburses under a confirmed plan that a creditor does not claim. Amended § 347(a) directs the trustee to pay them into court, but amended § 347(b) makes them property of the debtor. Perhaps the intended result is that unclaimed disbursements that a trustee makes become unclaimed funds subject to § 347(a) whereas unclaimed disbursements that a debtor makes become the debtor's property under § 347(b).</p>	
§ 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	<p>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</p> <p>No debt limit or income requirement.</p> <p>Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person whose primary activity is the business of owning single asset real estate or operating real property or</p>	<p>At least 50% of small business debtor's debt is from commercial or business activities.</p> <p>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.</p> <p>Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended</p>	<p>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).</p> <p>For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the</p>	<p>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); §</p>

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.

	<p>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.</p> <p>Aggregate noncontingent, liquidated, secured and unsecured debts of \$2,725,625 or less.</p> <p>No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over \$2,725,625. § 101(51D).</p> <p>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</p>	<p>§ 101(51D)(A); new § 103(i); BR 1020(a).</p> <p>No committee of creditors unless the court orders for cause. § 1102(a)(3).</p>	<p>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).</p> <p>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).</p>	1113, CARES Act.
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	<p>debtor's small business status. The UST appoints any such committee. <i>Id.</i></p> <p>Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.</p>			
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	<p>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.</p> <p>Code does not define "disbursements."</p> <p>Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).</p>	<p>None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).</p>	<p>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.</p>	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.

	<p>final decree is entered. BR 2015(a).</p> <p>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.</p>			
Automatic Stay & Co-Debtors	<p>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.</p>	<p>No separate rule.</p>	<p>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. <i>See</i> § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. <i>See In re SFW, Inc.</i> 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).</p>	<p>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).</p>
Trustees	<p>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</p>	<p>A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13</p>	<p>A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11</p>	<p>A disinterested trustee is appointed in every ch. 13 case. § 1302.</p>

	<p>Possession (DIP) falters.</p> <p>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).</p> <p>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.</p>	<p>trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5).</p> <p>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).</p> <p>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.</p>	<p>cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions.</p> <p>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).</p> <p>The trustee conducts any asset sales of farmland and farm equipment. § 1206.</p> <p>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).</p> <p>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</p>	<p>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).</p> <p>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).</p> <p>The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."</p>
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Adequate Protection	<p>Section 361 applies.</p> <p>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.</p>	<p>Section 361 applies.</p> <p>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).</p>	<p>Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a).</p> <p>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).</p>	<p>Section 361 applies.</p> <p>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).</p>
Avoidance Powers	<p>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.</p> <p>A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order.</p>	<p>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.</p>	<p>The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.</p>	<p>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.</p>

	§ 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.

	<p>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.</p> <p>Plans <i>may</i>: 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."</p> <p>Cannot modify consensual liens on a principal residence.</p>	<p>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).</p> <p>Plans <i>may</i>: 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).</p>	<p>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.</p> <p>Under § 1222(b)(1)-(12), the plan <i>may</i> 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.</p> <p>Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.</p>	<p>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.</p> <p>Under § 1322(b)(1)-(11), the plan <i>may</i> designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts.</p> <p>Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan.</p> <p>Cannot modify consensual liens on a principal residence.</p>
Sales Free and Clear of Liens	<p>Ch. 11 <i>debtors in possession</i> 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</p>		<p>Ch. 12 debtors in possession <i>and</i> trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206.</p> <p>In addition, § 1206, which</p>	<p>Ch. 13 <i>debtors</i> 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</p>

	<p>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; <i>or</i> 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).</p>		<p>applies only in ch. 12, allows <i>trustees</i> 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.</p>	<p>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; <i>or</i> 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).</p>
<p>Special Tax Provisions for Chapter 12</p>			<p>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.</p> <p>Section 1232 was signed into law on October 26, 2017.</p>	

			<p>Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act.</p> <p>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.</p> <p>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 <i>pro rata</i>) distribution amongst unsecured claimants.</p>	
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Plan Confirmation Requirements	<p>Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b).</p> <p>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).</p> <p>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. <i>In re Rogers</i>, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016).</p> <p>Creditors must object to the plan or risk forfeiting their objection. BR 3015(f).</p> <p>Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed.</p> <p>Small business plans follow the same confirmation requirements</p>	<p>To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191.</p> <p>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).</p> <p>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).</p> <p>The absolute priority rule does not apply. § 1181(a).</p>	<p>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).</p> <p>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.</p> <p>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.</p> <p>Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b).</p> <p>Permissible plan duration is up to 5 years. No "means test" for disposable income.</p>	<p>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).</p> <p>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.</p> <p>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.</p> <p>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).</p>
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	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	<p>The plan proponent may modify a plan any time before confirmation. § 1127(a), (c).</p> <p>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).</p>	<p>The debtor may modify the plan at any time prior to confirmation. §1193(a).</p> <p>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, <i>and</i> finds that circumstances warrant the modification. § 1193(b).</p> <p>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), <i>and</i> the court must find that circumstances warrant the modification. § 1193(c).</p> <p>A consensually confirmed plan may only be modified by consent. § 1193(b).</p>	<p>Debtor may modify the plan at any time before confirmation. § 1223.</p> <p>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.</p> <p>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.</p> <p>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).</p>	<p>Debtor may modify the plan at any time before confirmation. § 1323.</p> <p>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.</p> <p>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.</p> <p>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</p>

				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	<p>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. <i>Id.</i></p> <p>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).</p> <p>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).</p> <p>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).</p> <p>A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor</p>	No separate rule.	<p>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. <i>Id.</i></p> <p>A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a).</p> <p>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).</p> <p>The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. <i>See In re Campbell</i>, 313 B.R. 871 (B.A.P. 10th Cir. 2004), <i>and see In re Ridgely</i>, 93 B.R. 683 (Bankr. E.D. Mo. 1988); <i>but cf. In re Feely</i>, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch.</p>	<p>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. <i>Id.</i></p> <p>A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a).</p> <p>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).</p> <p>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).</p> <p>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</p>

	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	<p>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).</p> <p>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).</p> <p>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.</p>	<p>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.</p> <p>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.</p> <p>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.</p>	<p>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.</p> <p>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).</p> <p>Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.</p>	<p>Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328.</p> <p>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).</p> <p>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.</p> <p>Debts excepted from</p>

	<p>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).</p> <p>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).</p> <p>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.</p>			<p>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.</p>
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Key Events in the Timeline of Subchapter V Cases¹

Benjamin A. Kahn²

Samantha M. Ruben³

- 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.

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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 Hearing⁶
 - 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 Deadlines¹¹

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	Deadline	Act to Be Performed	Code or Rule¹²
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 <u>if</u> 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. <u>See note 17, infra.</u>	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. <u>See note 17, infra.</u>	Rule 3017(a)
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of time for filing objections to an injunction provided in a chapter 11 plan	Rule 3017(f)(1)
The court	No deadline	Fix a date for the hearing on confirmation.	Rule 3017.2(c)
Holders of claims or interests	Time fixed by the court	Accept or reject the plan	Rule 3017.2(a)
Equity security holder	Time fixed by the court	Record date for eligibility to accept or reject the plan	Rule 3017.2(b)

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

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

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

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

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

DEADLINES THROUGHOUT THE CASE

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

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

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

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

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

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

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

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

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

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

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

Professionalism:

Just the Facts

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Professionalism: Just the Facts

By

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Introduction

After about your fourth year as a member of the Georgia Bar, assuming you keep up with CLE requirements, you likely have memorized the oft repeated phrase: “Ethics is what you must do. Professionalism is what you should do.”² This has become our testimony.³ We are frequently presented with the Lawyer’s Creed and aspirational challenges to achieve professionalism.⁴ Professionalism is much more important than simply learning to recite axioms, no matter how true they sound.

In an effort to break from the trend of simply providing a light overview of professionalism, this paper will seek to provide an in-depth review of what is professionalism, dissect the Lawyer’s Creed and aspirational statements and, finally, provide an opportunity to review hypotheticals situations an attorney might encounter a professionalism issue.

² This is paraphrased from *Green v. Green*, 263 Ga. 551, 553-54 (1993).

³ To this author, these words have become akin to the Apostle’s Creed or other affirmations of faith that are remembered and recited.

⁴ Copies of the same are herein as Appendix “A.” These are taken from: <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm> and will be discussed in greater detail in this paper.

I. Professionalism Revisited

a. What (or who) is a professional?

Profession is defined by Merriam Webster's as "a calling requiring specialized knowledge and often long and intensive academic preparation."⁵ Most people have a rudimentary understanding of this definition and, likely, would be able to identify certain types of "professions" and professionals" using the basics of this definition. And most people could identify certain qualities or acts they would deem "unprofessional" or otherwise unbecoming of a professional.

Dating back to medieval times, the term "professional" was used to describe three distinct (but similar) professions: law, medicine, and divinity.⁶ Each of these required some level of training and, thus, were considered to be the three "learned professions."⁷ But beyond that, each of those three professions commanded a certain degree of respect from the community. People trusted ministers. People trusted doctors. People even trusted lawyers.

b. Professionalism Today

Georgia's appellate courts have, as of writing, invoked the word "professionalism" a total of 76 times. Perhaps the most all-encompassing of these invocations comes from Chief Justice Benham:

The practice of law is an honorable profession that requires a high standard of conduct of its members. It is a high calling where competence, civility, community service, and public service are integral parts of the professional standards. It is not a profession

⁵ <https://www.merriam-webster.com/dictionary/profession#learn-more>

⁶ Perks, R.W.(1993): *Accounting and Society*. Chapman & Hall (London); ISBN 0-412-47330-5. p.2.

⁷ *Id.*

where disrespectful, discourteous, and impolite conduct should be nurtured and encouraged. Such conduct should be alien to any honorable profession. **Those who hold themselves out as lawyers should realize that they help shape and mold public opinion as to the role of the law and their role as lawyers.** The law sets standards for society and lawyers serve as problem solvers when conflicts arise. To fulfill their responsibility as problem solvers, lawyers must exhibit a high degree of respect for each other, for the court system, and for the public. By doing so, lawyers help to enhance respect for and trust in our legal system. These **notions of respect and trust are critical to the proper functioning of the legal process.**

While serving as advocates for their clients, lawyers are not required to abandon notions of civility. Quite the contrary, **civility, which incorporates respect, courtesy, politeness, graciousness, and basic good manners, is an essential part of effective advocacy. Professionalism's main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.**

Civility is more than good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others; corporations would become irresponsible in conducting their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible. To avoid incivility's evil consequences of discord, disrespect, unresponsiveness, irresponsibility, and blind advocacy, we must encourage lawyers to embrace civility's positive aspects. Civility allows us to understand another's point of view. It keeps us from giving vent to our emotions. It allows us to understand the consequences of our actions. It permits us to seek alternatives in the resolution of our problems. All of these positive consequences of civility will help us usher in an era where problems are solved fairly, inexpensively, swiftly, and harmoniously. The public expects no less and we must rise to the occasion in meeting those expectations.

Butts v. State, 273 Ga. 760, 772-73 (2001)(emphasis added.)

Civility and respect are common themes in both the Lawyer's Creed and the Aspirational Statements on Professionalism. And it is a common focus of the Georgia Supreme Court and Court of Appeals when discussing professionalism. In a concurring opinion in a legal malpractice case, Justice Benham urged against unbridled and blind advocacy:

I fear also that many professions, in prudent response to the majority opinion, will throttle back on their ethical requirements. Rather than advancing ethics and professionalism, the majority opinion may cause many professional codes to be allowed to stagnate; others will be repealed outright to avoid their use in malpractice actions. Ethical rules which require lawyers to act as officers of the court may be subordinated to rules requiring advocacy on behalf of clients in order to avoid potential tort liability to a client dissatisfied with an attorney's level of aggressiveness. Unbridled and blind advocacy could become the order of the day and the professionalism movement, for all practical purposes, would be dead in the water.

Allen v. Lefkoff, Duncan, Grimes & Dermer P.C., 265 Ga. 374, 382 (1995)

More recently, Judge McFadden noted “our standards of professionalism mandate courtesy and formality.” *State v. Arline*, 345 Ga. App. 178, 181 (2018). But these are not new concepts, as far back as 1852 the Georgia Supreme Court has noted the need for dignity and honor by those of us in this profession:

[T]he habit of counsel in addressing the Jury, of commenting upon matters not proven and not growing out of the pleadings . . . [is] illegal and highly prejudicial to a fair and just administration of the rights of parties. . . . [I]t is the duty of counsel to guard, by the most scrupulous propriety of demeanor, in the conduct of a cause, the dignity and honor of the profession.

Mitchum v. State, 11 Ga. 615(1852) (7).

c. Professionalism extends beyond you.

In a concurring opinion, Justice Benham noted professionalism extends beyond lawyers and includes law enforcement officers:

In 1985, this court established a Commission on Professionalism to improve the image of the bench and bar by emphasizing a sense of honesty, trustworthiness, truthfulness, integrity, fairness and civility. Recently, in commenting on the need for professionalism, Chief Justice Clarke said, "Ethics is that which is required and professionalism is that which is expected." In stressing the need for professionalism among judges and lawyers, we in no way meant to exempt law enforcement officers from acting professionally in their appearances before the various courts of this state.

King v. State, 262 Ga. 477, 478 (1992).

Any litigation practice, whether through bankruptcy or other litigation, regularly involves us preparing clients to testify in various courts, hearings, or meetings. They, too, must be expected to adhere to a level of professionalism.

But we must take note of who is ultimately responsible for the lack of professionalism of others:

The professional nature of the law practice and its obligations to the public interest require that each lawyer be civilly responsible for his professional acts. A lawyer's relationship to his client is a very special one. So also is the relationship between a lawyer and the other members of his or her firm a special one. When a client engages the services of a lawyer the client has the right to expect the fidelity of other members of the firm. It is inappropriate for the lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism.

First Bank & Tr. Co. v. Zagoria, 250 Ga. 844, 846 (1983)

We are responsible for preparing our cases for court, which necessarily includes preparing our clients to testify and conduct themselves in a professional manner.

d. Things you should never do.

Often we focus on purely aspirational statements without considering those instances where our Justices and Judges have clearly identified unprofessional conduct. For instance, Chief Justice Hunstein described a prosecutor's theatrics by turning off the lights, lighting candles on a birthday cake, and singing "Happy Birthday" to a murder victim as unprofessional:

The prosecutor's birthday production was not meant to be argument or rebuttal: it was a theatrical stunt spun out of pure fantasy. Its sole purpose was to prejudice the rights of appellants before the jury in an impermissible attempt to invoke the jury's passions and divert the jury from the evidence.

It offended the dignity and decorum of the court and violated every precept of professionalism and fair play.

Smith v. State, 288 Ga. 348, 359 (2010).

And it is clear attacking a witness for sport or to badger the witness is off limits:

Their present brief is only somewhat better. It includes, for example, repeated unsupported and irrelevant assertions that a particular witness has substance abuse problems. We again rebuke appellants. This lack of professionalism does less than nothing to advance their cause.

Murphy v. Murphy, 330 Ga. App. 169, 173 n.2 (2014)

Perhaps more obvious is to not engage in ex-parte communication:

A lawyer who obtains a judge's signature on a decree in the absence of the opposing lawyer where certain aspects of the decree are still in dispute, may have violated Rule 3.5: *Impartiality and Decorum of the Tribunal* regardless of the lawyer's good intentions or good faith.” Comment 3B to Rule 3.5 of the Georgia Rules of Professional Conduct. At the least, this conduct demonstrates a disappointing lack of professionalism of Husband's trial counsel

Buckner v. Buckner, 294 Ga. 705, 709 (2014).

It is also worth noting a lawyer acts unprofessionally, according to Judge Smith, when they describe themselves as incompetent or otherwise “fall on their sword” for a client:

Typically, trial counsel in such situations testify primarily to the factual details of their conduct and decisions, and admit errors only with reluctance and with due regard for their professionalism and pride in their work. The developing trend of emphatically and even eagerly testifying to one's own incompetence or misconduct is dangerous to the administration of justice, particularly if it is allowed to continue without any consequences for the testifying trial counsel.

Nejad v. State, 296 Ga. App. 163, 170 (2009)

II. The Lawyer's Creed and Aspirational Statements on Professionalism

Meriam-Webster defines “creed” as a brief authoritative formula for religious beliefs or a guiding principle.⁸ The Lawyer's Creed and aspirational statements were adopted by the Chief Justice's Commission on Professionalism in 1990 and by Supreme Court order made a part of the Rules and Regulations for the Organization and Government of the State Bar of Georgia.⁹ The Lawyer's Creed fulfills a role of providing a basic “outline” whereas the aspirational statements go into a greater depth. Using The Lawyer's Creed as a roadmap, the concepts in both will be addressed in tandem:

a. To the Client

To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

The Lawyer's Creed directs us to be faithful, competent, diligent, and use good judgment. These should not seem like lofty goals. Indeed, they are required, to some degree, by the Georgia Bar Rules.

The aspirational statements call for more. Lawyers should aspire to expeditiously and economically achieve all of their client's objectives. This is not a direction to cut corners. But one should be mindful of whether there is a more efficient—read economical and expeditious—manner to achieve our client's goals that are compliant with the law and our client's own internal policies.

Lawyers should also aspire to ensure our client is making fully informed decision-making. This extends to the fee agreement between us and our client as well.

⁸ <https://www.merriam-webster.com/dictionary/creed>

⁹ <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm>

Finally, we must aspire to ensure maintain confidentiality and conflicting loyalties. This is especially important given the type of information—regarding the public—we are privy to and is required by many filings. We must not only keep our client’s information confidential but also personal and financial information regarding third parties protected.

b. Opposing Parties/Counsel

To opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

As noted supra, it is possible to represent your client with tenacity and zeal and still be civil. This is what the Lawyer’s Creed and the aspirational statements seek from lawyers in dealing with opposing counsel and opposing parties.

With respect to dealing with opposing counsel and parties, an old adage rings true: do unto others as you would have them do unto you. We should strive to treat our opposition with fairness and dignity in all things. This may manifest as ensuring another attorney is given proper notice of a hearing, not at the last minute, or not hanging up on a pro se party.

c. The Courts

To the courts, and other tribunals, and those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

Most of the aspirational statements regarding the courts are required by various rules. We of course should be honest, seek to ensure cases are handled in a timely fashion, and seek to not waste the court’s time.

But perhaps we should pay special attention to the aspirational statement to refrain from “undue familiarity” with the judiciary. Because it is easy to develop a relationship with a particular judge. Judges can be your friend. There is no requirement that judges go

into hiding once they put on a robe or be social outcasts. The key is for us to avoid undue familiarity, which would be using friendship to the disadvantage of opposing parties, calling a judge by their first name in open court, or using the court's familiarity with you to obtain relief in an unfair fashion.

d. Colleagues

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

This is an adversarial profession. This is still a profession. We should treat each other with due care, regardless of our practice areas or which side of a case we are on. It may seem unthinkable, but even Aaron Burr ran to the side of Alexander Hamilton in *Hamilton* after fatally wounding Hamilton.

e. The profession

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

It is easy to look over this tenet as just a call to do *pro bono* work. Not so fast. The aspirational statement suggests:

As to our profession, I will aspire:

- (a) To improve the practice of law. As a professional, I should:
 - (1) Assist in continuing legal education efforts;
 - (2) Assist in organized bar activities; and
 - (3) Assist law schools in the education of our future lawyers.
- (b) To protect the public from incompetent or other wrongful lawyering. As a professional, I should:
 - (1) Assist in bar admissions activities;

- (2) Report violations of ethical regulations by fellow lawyers; and,
- (3) Assist in the enforcement of the legal and ethical standards imposed upon all lawyers.

These are fairly straightforward and simple to understand. You may be familiar with the quote “a rising tide raises all boats.” The same is true of a harbor full of mines—all ships will sink. If nothing else, it is incumbent on you to try and make our profession better by assisting in the betterment of the profession through mentoring or bar activities, or ensuring rogue lawyers do not harm the profession with unethical conduct.

f. The public and system of justice

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

We should strive to assist the public and our system of justice by ensuring the public is informed about the law, relevant to our practice area, and working to abate any notion that the justice system is rigged or stacked against certain parties.

HYPOTHETICALS TO BE DISCUSSED DURING CLE PRESENTATION

Appendix A

A LAWYER'S CREED

To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

ASPIRATIONAL STATEMENT ON PROFESSIONALISM

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily illustrative. Our purpose is not to regulate, and certainly not to provide a basis for discipline, but rather to assist the Bar's efforts to maintain a professionalism that can stand against the negative trends of commercialization and loss of community. It is the Court's hope that Georgia's lawyers, judges, and legal educators will use the following aspirational ideals to reexamine the justifications of the practice of law in our society and to consider the implications of those justifications for their conduct. The Court feels that enhancement of professionalism can be best brought about by the cooperative efforts of the organized bar, the courts, and the law schools with each group working independently, but also jointly in that effort.

General Aspirational Ideals

As a lawyer, I will aspire:

- (a) To put fidelity to clients and, through clients, to the common good, before selfish interests.
- (b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.
- (c) To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me.
- (d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.
- (e) To make the law, the legal system, and other dispute resolution processes available to all.
- (f) To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.
- (g) To preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.
- (h) To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.
- (i) To practice law not as a business, but as a calling in the spirit of public service.

Specific Aspirational Ideals

As to clients, I will aspire:

- (a) To expeditious and economical achievement of all client objectives.
- (b) To fully informed client decision-making. As a professional, I should:
 - (1) Counsel clients about all forms of dispute resolution;
 - (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
 - (3) Maintain the sympathetic detachment that permits objective and independent advice to clients;
 - (4) Communicate promptly and clearly with clients; and,
 - (5) Reach clear agreements with clients concerning the nature of the representation.
- (c) To fair and equitable fee agreements. As a professional, I should:
 - (1) Discuss alternative methods of charging fees with all clients;
 - (2) Offer fee arrangements that reflect the true value of the services rendered;

- (3) Reach agreements with clients as early in the relationship as possible;
- (4) Determine the amount of fees by consideration of many factors and not just time spent by the attorney;
- (5) Provide written agreements as to all fee arrangements; and
- (6) Resolve all fee disputes through the arbitration methods provided by the State Bar of Georgia.

(d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations.

As to opposing parties and their counsel, I will aspire:

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties. As a professional, I should:

- (1) Notify opposing counsel in a timely fashion of any cancelled appearance;
- (2) Grant reasonable requests for extensions or scheduling changes; and,
- (3) Consult with opposing counsel in the scheduling of appearances, meetings, and depositions.

(b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. As a professional, I should:

- (1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response;
- (2) Be courteous and civil in all communications;
- (3) Respond promptly to all requests by opposing counsel;
- (4) Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations;
- (5) Prepare documents that accurately reflect the agreement of all parties; and
- (6) Clearly identify all changes made in documents submitted by opposing counsel for review.

As to the courts, other tribunals, and to those who assist them, I will aspire:

(a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice. As a professional, I should:

- (1) Avoid non-essential litigation and non-essential pleading in litigation;
- (2) Explore the possibilities of settlement of all litigated matters;
- (3) Seek non-coerced agreement between the parties on procedural and discovery matters;
- (4) Avoid all delays not dictated by a competent presentation of a client's claims;
- (5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual; and
- (6) Advise clients about the obligations of civility, courtesy, fairness, cooperation, and other proper behavior expected of those who use our systems of justice.

(b) To model for others the respect due to our courts. As a professional I should:

- (1) Act with complete honesty;
- (2) Know court rules and procedures;
- (3) Give appropriate deference to court rulings;
- (4) Avoid undue familiarity with members of the judiciary;

- (5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary;
- (6) Show respect by attire and demeanor;
- (7) Assist the judiciary in determining the applicable law; and,
- (8) Seek to understand the judiciary's obligations of informed and impartial decision-making.

As to my colleagues in the practice of law, I will aspire:

- (a) To recognize and to develop our interdependence;
- (b) To respect the needs of others, especially the need to develop as a whole person; and,
- (c) To assist my colleagues become better people in the practice of law and to accept their assistance offered to me.

As to our profession, I will aspire:

- (a) To improve the practice of law. As a professional, I should:
 - (1) Assist in continuing legal education efforts;
 - (2) Assist in organized bar activities; and,
 - (3) Assist law schools in the education of our future lawyers.
- (b) To protect the public from incompetent or other wrongful lawyering. As a professional, I should:
 - (1) Assist in bar admissions activities;
 - (2) Report violations of ethical regulations by fellow lawyers; and,
 - (3) Assist in the enforcement of the legal and ethical standards imposed upon all lawyers.

As to the public and our systems of justice, I will aspire:

- (a) To counsel clients about the moral and social consequences of their conduct.
- (b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods. As a professional, I should ensure that any advertisement of my services:
 - (1) is consistent with the dignity of the justice system and a learned profession;
 - (2) provides a beneficial service to the public by providing accurate information about the availability of legal services;
 - (3) educates the public about the law and legal system;
 - (4) provides completely honest and straightforward information about my qualifications, fees, and costs; and
 - (5) does not imply that clients' legal needs can be met only through aggressive tactics.
- (c) To provide the pro bono representation that is necessary to make our system of justice available to all.
- (d) To support organizations that provide pro bono representation to indigent clients.
- (e) To improve our laws and legal system by, for example:

- (1) Serving as a public official;
- (2) Assisting in the education of the public concerning our laws and legal system;
- (3) Commenting publicly upon our laws; and,
- (4) Using other appropriate methods of effecting positive change in our laws and legal system.

Ethical Hypotheticals:
A Bankruptcy Lawyer's
Journey through
Several Common Scenarios

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Ethical Hypotheticals: A Bankruptcy Lawyer's Journey Through Several Common Scenarios

Presented to the Attendees of the Annual Bankruptcy Seminar on
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By:

Ishaq Kundawala

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W. Homer Drake Jr. Endowed Chair in Bankruptcy Law
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Professor Ishaq Kundawala – Speaker’s Biography

Ishaq Kundawala joined Mercer Law in the Fall 2021 as a tenured Professor of Law and as the Southeastern Bankruptcy Law Institute & W. Homer Drake Jr. Endowed Chair in Bankruptcy Law.

Professor Kundawala earned a Juris Doctor from Tulane Law School (New Orleans, Louisiana) and a Bachelor of Arts from Austin College (Sherman, Texas).

Prior to beginning his teaching career, Professor Kundawala was in private practice in Dallas, Texas for over five years working at some of the most respected law firms in the country. While he was an Associate at the international law firm of Baker Botts L.L.P., he handled the estimation and ultimate resolution of approximately \$1.5 billion of toxic tort related bankruptcy claims against one of the nation’s largest copper producers. He has a diverse practice background representing complex chapter 11 debtors, secured and unsecured creditors, trustees and creditor committees in a variety of bankruptcy cases. He also clerked for the Chief Bankruptcy Judge of the United States Bankruptcy Court for the Northern District of Texas.

Professor Kundawala has extensive experience participating in court hearings, depositions, and mediations. During his years in practice, he was named a “Rising Star” by Texas Monthly and Law & Politics. He was also active in the Dallas Volunteer Attorney Program representing distressed women in divorce matters on a pro bono basis.

Professor Kundawala began his teaching career in 2008 at Nova Southeastern University’s Shepard Broad College of Law in Fort Lauderdale, Florida (“NSU Law”). Over the past thirteen years, he has taught Bankruptcy, Contracts, Secured Transactions, and Legal Ethics. At NSU Law, he created an innovative consumer bankruptcy externship program that enabled students to gain practical experience representing consumer debtors in bankruptcy proceedings on a pro bono basis. He will bring the same type of program to Mercer Law in the very near future.

Professor Kundawala’s research interests include Bankruptcy Reform and Legal Ethics. He has also discussed bankruptcy and contract-related issues on national and local radio and television stations. He enjoys writing and speaking about areas of the law that will enable scholars and practitioners to better understand some of the more complex areas of law.

Professor Kundawala is licensed to practice law in both Texas and Georgia. He enjoys living in Macon with his wife Joy (also an attorney), daughter Jasmine and their three dogs.

Hypothetical #1 – Advice to Incur Debt: You represent Dan Debtor. Dan works as a manager at Macon Men’s Fashions, a local upscale men’s clothing boutique. Dan’s primary income comes from sales commissions. During the pandemic, sales were down substantially, and Dan’s debts kept piling up. He is considering bankruptcy as an option. He currently owns a 2012 Mercedes convertible with relatively high mileage but otherwise in good condition. He still owes a substantial balance on the car and is paying \$650 per month on it. You are worried that Dan’s car, which is more than 9 years old, may not be the best fit for him in his post-bankruptcy life. One of your concerns is that Dan may be denied credit to purchase a newer car at a favorable interest rate after he files his bankruptcy case. Dan has not mentioned any concerns about his car, but you cannot help but wonder whether you should give him some unsolicited pre-filing advice about obtaining a newer model car that may be more reliable for him in the long term. What should you do?

Attendee’s Notes:

Hypothetical #2 – Reaffirmations: You still represent Dan Debtor (the same guy from Hypothetical #1, above). You just filed his chapter 7 bankruptcy case last week. Dan still owns that 2012 Mercedes convertible. The car is worth approximately \$25,000 with an outstanding loan balance of \$32,000. Dan really loves his car and needs it to commute to work and he still pays \$650 per month on it. He told you that the lender, Bubba Bank, had recently reached out to him by letter asking him to reaffirm the debt – they even told him he could keep his same monthly payment – how kind! Dan asks you for guidance regarding the reaffirmation of this secured debt. What will you do? Can you validly exclude reaffirmations from your practice? Should you?

Attendee's Notes:

Hypothetical #3 – Disappearance of Assets: Remember Dan Debtor (from Hypotheticals #1 and #2, above)? His bankruptcy case went smoothly, and he recently obtained a discharge – congratulations! Dan was so impressed with your legal expertise and thoughtful advice that he recommended you to his good friend, Fred, who is also interested in bankruptcy relief. After Fred retained you, you began doing your pre-filing due diligence. A few things caught your attention right away. Fred is an avid, semi-professional golfer with an impressive collection of golf memorabilia that he’s collected over his life. In fact, his collection of golf memorabilia is likely his most valuable asset. In the paperwork you sent him, he listed the value of his collection at \$5,000. You seriously doubted the accuracy of that valuation. After doing some preliminary research, you realized the value of Fred’s collection is likely hovering around \$50,000. You are now concerned about Fred’s ability to exempt his collection in a chapter 7 case. You are also concerned about whether Fred has been less than forthcoming with other information you need to file his case.

You suggest a chapter 13 bankruptcy case to Fred so that he can keep his collection, but he gets very angry. Fred wants immediate relief just like Dan got and he doesn’t want to pay a trustee every month for 5 years in a chapter 13 case just to keep his collection. He fires you on the spot. Fred then hires Anthony Attorney from a few blocks down the road. You went to law school with Anthony and never really liked him, so losing a client to him bothered you. Out of curiosity, you decided to follow up on the case. Within a week, Anthony filed Fred’s chapter 7 case, which baffled you. You downloaded Fred’s schedules from PACER and you notice that Fred’s collection of memorabilia is not listed as an asset in his case. Curiosity killed the cat, so they say. What should you do now that you suspect Fred lied to Anthony (or even worse, that Anthony was complicit)? Did you have an obligation to ascertain the value of his assets in the first place? If so, how far did that obligation extend?

Attendee’s Notes:

Hypothetical #4 – Adequate Disclosures: After being soured by the whole Fred fiasco (in Hypothetical #3, above), you decide to try your hand at a business bankruptcy case that walks through your door. Guess who? Macon Men’s Fashions (“MMF”) (Dan’s employer from Hypothetical #1, above) is now considering a chapter 11 reorganization and it wants to retain you for that purpose. MMF is a traditional brick and mortar store with no online presence so it has been unable to properly compete in the new post-pandemic business environment but it thinks it will immediately bounce back once we get back to normal. You tend to agree since MMF was very profitable during the good old pre-pandemic years. You are running a conflicts check before you get the engagement letter ready and you run into a bit of a snag. One of MMF’s largest unsecured creditors is Peach Bank, with an outstanding debt of \$5 million. While you have never actually done any work for Peach Bank, your law partner currently represents Peach Bank in a litigated case that does not in any way involve MMF. You’d really like to take on MMF’s case, so you decide to omit your law partner’s relationship to Peach Bank in your Rule 2014 disclosures, especially since you have never personally worked on any of Peach Bank’s files. Is there a problem? If so, was there any workaround to prevent it? What are the consequences?

Attendee’s Notes:

Hypothetical #5 – Alcohol/Substance Abuse: Angela Attorney graduated law school last year and was admitted to the Georgia Bar. She joined a prominent local bankruptcy law firm specializing in business bankruptcies. She is a promising young associate who has been proving herself to be a formidable opponent with a great reputation within the bankruptcy bar. Unfortunately, Angela suspects that one of the partners with whom she closely works may have an alcohol and/or substance abuse problem. At several lunches with Pam Partner at the Idle Hour Country Club, Angela noticed that Pam would regularly consume 2-3 alcoholic beverages with her meal. On one occasion after lunch, Angela noticed Pam was “high as a Georgia pine” and probably should not attend her 2 p.m. court hearing – bless her heart! When Angela mentioned this to Pam, Pam became very agitated but Pam nevertheless asked Angela to attend the hearing in her stead which Angela did. Unfortunately, Angela did not have sufficient time to prepare for the hearing and the Judge was not pleased with her lack of knowledge about the case. Angela noticed that Pam is drinking more and more and thinks Pam needs assistance before it really affects the firm’s clients. Since Pam is Angela’s supervisor, she is confused about how to handle this issue. What should Angela do?

Attendee’s Notes:

Library of Applicable Rules & Authorities

Georgia Rules of Professional Conduct

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

- a. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- b. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- c. A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- d. A lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

RULE 1.4. COMMUNICATION.

- a. A lawyer shall:
 - 1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0 (h), is required by these rules;
 - 2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - 3. keep the client reasonably informed about the status of the matter;
 - 4. promptly comply with reasonable requests for information; and
 - 5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Georgia Rules of Professional Conduct or other law.
- b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

- a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the court.
- b.
 - 1. A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:
 - i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
 - ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;
 - iii. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - iv. to secure legal advice about the lawyer's compliance with these rules.
 - v. to detect and resolve conflicts of interest arising from the lawyer's change of employment or changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
 - 2. In a situation described in paragraph (b) (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.
 - 3. Before using or disclosing information pursuant to paragraph (b) (1) (i) or (ii), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.
- c. The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

- a. A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).
- b. If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:
 - 1. consultation with the lawyer, pursuant to Rule 1.0 (c);
 - 2. having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation, and
 - 3. having been given the opportunity to consult with independent counsel.
- c. Client informed consent is not permissible if the representation:
 - 1. is prohibited by law or these rules;
 - 2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
 - 3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.
- d. Though otherwise subject to the provisions of this rule, a part-time prosecutor who engages in the private practice of law may represent a private client adverse to the state or other political subdivision that the lawyer represents as a part-time prosecutor, except with regard to matters for which the part-time prosecutor had or has prosecutorial authority or responsibility.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

- a. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7: Conflict of Interest: General Rule, 1.8 (c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.
- b. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
 - 1. the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - 2. any lawyer remaining in the firm has information protected by Rules 1.6: Confidentiality of Information and 1.9 (c): Conflict of Interest: Former Client that is material to the matter.
- c. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7: Conflict of Interest: General Rule.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

- a. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - 1. the representation will result in violation of the Georgia Rules of Professional Conduct or other law;
 - 2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - 3. the lawyer is discharged.
- b. except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
 - 1. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - 2. the client has used the lawyer's services to perpetrate a crime or fraud;
 - 3. the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
 - 4. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - 5. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - 6. other good cause for withdrawal exists.
- c. When a lawyer withdraws it shall be done in compliance with applicable laws and rules. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- d. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

RULE 1.18. DUTIES TO PROSPECTIVE CLIENT

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

In the representation of a client, a lawyer shall not:

- a. file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;
- b. knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

- a. A lawyer shall not knowingly:
 1. make a false statement of material fact or law to a tribunal;
 2. fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 3. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 4. offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- b. The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- c. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- d. In an ex parte proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

- a. A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.

- b. A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.

Rule 4-104. Mental Incapacity and Substance Abuse

1. Mental illness, cognitive impairment, alcohol abuse, or substance abuse, to the extent of impairing competency as a lawyer, shall constitute grounds for removing a lawyer from the practice of law.
2. Upon a determination by the State Disciplinary Board that a lawyer may be impaired or incapacitated to practice law as a result of one of the conditions described in paragraph (a) above, the Board may, in its sole discretion, make a confidential referral of the matter to an appropriate medical or mental health professional for the purposes of evaluation and possible referral to treatment and/or peer support groups. The Board may, in its discretion, defer disciplinary findings and proceedings based upon the impairment or incapacity of a lawyer to afford the lawyer an opportunity to be evaluated and, if necessary, to begin recovery. In such situations the medical or mental health professional shall report to the State Disciplinary Board and the Office of the General Counsel concerning the lawyer's progress toward recovery. A lawyer's refusal to cooperate with the medical or mental health professional or to participate in the evaluation or recommended treatment may be grounds for further proceedings under these Rules, including emergency suspension proceedings pursuant to Rule 4-108.

Bankruptcy Code & Bankruptcy Rules

11 U.S.C. § 327 – Employment of professional persons

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
- (b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.
- (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
- (d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.
- (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in

the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

11 U.S.C. § 524(c) – Effect of Discharge

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(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

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11 U.S.C. § 526 – Restrictions on debt relief agencies

(a) A debt relief agency shall not--

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to--

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have--

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State--

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall--

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability--

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

11 U.S.C. § 707(b)(4)(D) – Dismissal of a case or conversion to a case under chapter 11 or 13

...

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

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Rule 2014. Employment of Professional Persons

(a) Application for an order of employment

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(b) Services rendered by member or associate of firm of attorneys or accountants

If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 9011(b). Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers ...

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

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Caselaw

Milavetz, Gallop & Milavetz, P.A. v. U.S., 130 S. Ct. 1324 (2010): Narrowly construed, the section of the Bankruptcy Code added by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) which provides that a debt relief agency shall not advise an assisted person to incur more debt in contemplation of such person filing for bankruptcy is not impermissibly vague; scope of the prohibition was adequately defined, both on its own terms and by reference to other sections of the Code whose consequences govern debtors who in bad faith incur additional debt prior to filing, and so provision was not too indefinite to withstand constitutional scrutiny, nor would uncertainty regarding its scope chill protected speech.

In re Parikh, 508 B.R. 572 (Bankr. E.D.N.Y. 2014): While the attorney's investigation does not have to be to the point of certainty, he "must explore readily available avenues of factual inquiry."

Secondary Sources

The Attorney Gag Rule in Consumer Bankruptcy Cases and the Continued Efficacy of it in a Post-Milavetz World, 43 U. Mem. L. Rev. 1 (2012) by Prof. Ishaq Kundawala: [T]he Court offered dicta in footnote six of its Milavetz opinion to explain how certain legal advice would not be prohibited by § 526(a)(4), even if such advice consisted of an attorney counseling a client to incur more debt prior to filing for bankruptcy relief. These types of permissible legal advice include attorneys advising debtors or prospective debtors to refinance a mortgage, purchase a reliable car on secured credit, and buy groceries and pay certain bills using unsecured credit prior to filing for bankruptcy relief. The Court, by including a noncomprehensive list of what would be permissible, leaves much in doubt as to transactions not covered in the list.

Community Resources

State Bar of Georgia – The Lawyer Assistance Program (LAP) – <https://www.gabar.org/committeesprogramssections/programs/lap/> - The LAP provides a broad range of helping services to members seeking assistance with depression, stress, alcohol/drug abuse, family problems, workplace conflicts, psychological and other issues. You can contact the LAP by calling 800-327-9631, or by emailing Lisa Hardy, vice president, CorpCare Associates, Inc., at lisa@corpcareap.com.

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Chapter 13 Case Update

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2020 – 2021 Consumer Bankruptcy Cases of Interest to Georgia Practitioners¹

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¹ This document outlines significant consumer bankruptcy decisions in Chapter 13 cases from the Supreme Court, the Eleventh Circuit Court of Appeals, plus district and bankruptcy courts throughout Georgia, decided between Sept. 1, 2020, and August 31, 2021.

I. Supreme Court

1. Violation of stay—Retention of property of estate.

City of Chicago, Illinois v. Fulton, --- U.S. ----, 141 S.Ct. 585, 208 L.Ed.2d 384 (U.S., Jan. 14, 2021) (case no. 19-357)

This was the most interesting decision from the Supreme Court in the consumer bankruptcy area during the covid crisis. It involved cars impounded for nonpayment of parking tickets and other fines by the city government in Chicago Illinois, an issue that evidently generates a significant number of Chapter 13 filings in the Chicago area.

The decision was unanimous, but Justice Barrett did not participate.

The cases before the court involved four car owners who had outstanding parking fines and other fines that prompted the City of Chicago to impound their vehicles for nonpayment. Each owner filed bankruptcy seeking to discharge the fines and regain possession of their vehicle. In each case, the City refused to turn over the vehicle upon demand. The car owners argued that the City had an affirmative duty to turn over the cars upon the filing of the bankruptcy petition. They argued that the City's refusal to do so violated the automatic stay pursuant to Code §362(a)(3), under which the filing of a bankruptcy petition operates as a stay of "any act" to "exercise control" over the property of the estate and continued retention was such an act. No motion for turnover was filed by the debtors.

The four companion cases made their way to the Supreme Court.

Justice Alito's opinion held that the City's mere retention of the vehicles did not violate §362(a)(3), stating:

“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). 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.” *City of Chi. v. Fulton*, 141 S.Ct. 585, 208 L.Ed.2d 384 (2021).”

Justice Sotomayor’s concurrence reiterated that the Court’s holding is limited to §362(a)(3) and does not address whether any of the other subsections of §362(a) – such as (a)(4) and (a)(6) – were violated. She states:

"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." *City of Chi. v. Fulton*, 141 S.Ct. 585, 208 L.Ed.2d 384 (2021) (Sotomayor, J., concurring).

On remand, the Seventh Circuit, in an unpublished opinion, also interpreted the Court’s holding to be limited to §362(a)(3) and remanded the cases to their respective bankruptcy courts.

"Accordingly, the question of whether or not the City's conduct was impermissible on grounds other than §362(a)(3) remains unresolved." In re Fulton (7th Cir. 2021)

Two of the four bankruptcy courts had relied exclusively on §362(a)(3) to decide the City had violated the stay. These two courts were instructed to vacate their respective orders on remand.

The other two bankruptcy courts had relied on §362(a)(3) and other subsections of §362(a) to decide the City had violated the stay. However, in one case, the debtor had already completed plan payments and was about to receive a discharge, and the other case had been dismissed in 2019 while the appeal was pending. Thus, on remand, the issue was resolved without the need for any further

appeals. Consequently, litigation regarding this issue in the four companion cases is concluded.

II. 11th Circuit Court of Appeals

1. **Alabama Debtor with Title pawn who filed before default can keep her car, a possible route around Northington if the debtor files bankruptcy before default.**

In re Womack, --- Fed. Appx. ----, 2021 WL 3856036 (11th Cir., August 30, 2021) (case no. 21-11476)

Affirming *TitleMax of Alabama, Inc. v. Womack*, 2021 WL 1343051 (M.D. Ala., April 9, 2021), which had affirmed *In re Womack*, 616 B.R. 420 (Bankr. M.D. Ala., June 9, 2020), the Court of Appeals held that, where the debtor filed her Chapter 13 case prior to the maturity date of the pawn contract for her vehicle, the debtor retained possession of the vehicle and her ownership rights in the vehicle as of the petition date and those rights entered into the bankruptcy estate, while the pawn lender was merely a lienholder, so that the pawn lender was the holder of a secured claim that was subject to modification through the debtor's plan under the Code. Pursuant to §1322(b)(2), the debtor could pay the debt owed to the lender over the term of the plan.

The debtor's fixed interest in her vehicle was distinguishable from the contingent interest that the Georgia debtor had in *In re Northington*, 876 F.3d 1302 (11th Cir. 2017), where the debtor had defaulted on his pawn contract prior to his bankruptcy filing so that the property of the debtor's bankruptcy estate consisted only of a right to redeem his pawned vehicle. The statutes are worded differently as well, so timing alone might not win the day, and I expect there will be more litigation in this area.

2. **Lease creditors right to administrative expense claim for post-petition default on payments of lease assumed by debtor in a Chapter 13 plan.**

Cumbess v. Microf, 960 F.3d 1325 (11th Circuit, June 3, 2020)

Debtor Cumbess leased an HVAC unit from creditor Microf. He was behind on the lease at the time of filing, but the debtor cured the default and assumed the lease in the plan. As often happens, however, the debtor again fell behind on the lease after confirmation and Microf then filed a request to have the missed post-petition payments paid as an administrative claim. The trustee and debtor objected to the allowance of this post-petition default as an administrative claim arguing that only post-petition defaults on leases necessary for the debtor's performance under the plan were entitled to an administrative expense priority (see §503(b)(1)(A)) contending that air conditioning was not necessary for the debtor's performance under the plan. The bankruptcy court ruled in favor of the trustee and the debtor, but the holding was based on an entirely different ground than those argued by the parties. Judge Carter ruled that Microf was not entitled to an administrative expense priority because I, as Trustee, had not assumed the lease which is necessary for administrative expense status by dint of §365(p)(1) and (p)(3). The only case cited by Judge Carter in support of this argument was an unreported decision by Judge Isicoff who is a Bankruptcy Judge in Miami.

Section 365(p) was added to the Code as part of BAPCPA, but I never noticed its possible import and none of the Bankruptcy materials I reviewed after BAPCPA mentioned this part of the statute. BAPCPA was enacted with no legislative history so it is a bit of a mystery why §365 was changed. §365(p)(1) states: "If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d) the leased property is no longer property of the estate".

§365(p)(3) allows the debtor to assume a lease but if the lease is not assumed by the trustee, the lease is not property of the estate and hence a post-petition default is not entitled to an administrative expense.

Judge Carter's opinion was upheld by the District Court and by the 11th Circuit.

3. Debtors have the right to confirmation of a post-confirmation modified plan even if there has been no change of circumstances.

Guillen v. Whaley, 972 F. 3d 1221(11th Circuit, August 25, 2020)

The debtor's plan had contained a specific dollar amount to be distributed to unsecured creditors pursuant to the best interest of creditors' test. The debtor scheduled a second mortgage as voidable, so I assume this lien was not counted when the best interest of creditors test was calculated. After confirmation, Debtor's counsel successfully litigated a lien strip adversary against the voidable lien. After this success, the Debtor's attorney was awarded attorney's fees and the debtor modified the plan to pay these fees, which then reduced payments to other secured creditors. The Chapter 13 trustee objected and argued the modification should not be allowed because there was no demonstrated change of circumstances. (It is not clear to me why the award of fees was not considered a change, but that was not discussed.)

This is the first ruling in the 11th Circuit on the necessity of showing a change of circumstances and other Circuits are divided on the issue of whether a change of circumstances need be demonstrated. 11 U.S.C. §1329 governs what can be done in a modification. The statute mentions nothing about a change of circumstances, but some courts have essentially grafted that requirement into it.

This holding does not mean debtors may willy-nilly modify everything in the plan, but apparently case law, not the statute, will provide some limits. Relitigation of any issue litigated by the parties and any issue necessarily determined by the confirmation order is prohibited by ***Bullard v. Blue Hills Bank***,

575 U.S. 496, 135 S. Ct 1686, 1692, 19 L. ED. 2d 621 (2015) and *In re Gonzalez*, 832 F.3d 1251, 1258 n.4 (11th Cir. 2016).

Also note that what can be modified in §1329 is limited to 4 things.

1. Increase or reduce payments on claims of a particular class.
2. Extend or reduce the time for such payments.
3. Reduce distributions to a plan creditor to the extent necessary to offset payments of the claim outside the plan.
4. Reduce payments to the extent necessary to purchase health insurance for the debtor or their dependents (with some restrictions).

III. Georgia Bankruptcy Courts

A. Northern District of Georgia

1. Violation of stay—Jurisdiction:

In re Kennedy, 2021 WL 1396565 (Bankr. N.D. Ga., April 13, 2021) (case no. 1:19-bk-64620; adv. proc. no. 1:20-ap-6167) (Chief Bankruptcy Judge Wendy L. Hagenau)

Bankruptcy courts have subject matter jurisdiction over a claim under Code §362(k) for violation of the automatic stay even when the debtor asserts the claim after dismissal of the debtor's bankruptcy case, and a debtor is not required to reopen the bankruptcy case before bringing such a claim. As long as you file the motion before dismissal, it can be prosecuted after dismissal of the case.

2. Default judgment can be relitigated in dischargeability action in Bankruptcy court.

In re Vidah, 2020 WL 5805440 (Bankr. N.D. Ga., Sept. 29, 2020) (case no. 1:19-bk-56687; adv. proc. no. 1:19-ap-5267) (Bankruptcy Judge Lisa Ritchey Craig)

Issue preclusion—Application under circumstances; dischargeability of debt—Under Code §523(a)(2)(A): Here there was a default judgment against the debtor in a prepetition Georgia state action in which the creditor asserted claims for breach of contract, fraud, civil conspiracy, unjust enrichment the as the basis for a nondischargeability action. The court ruled that the debtor had a right to litigate these issues before in the bankruptcy proceeding.

B. Middle District of Georgia²

1. Tax Lien Foreclosure

In re Wood ----B.R.----, 2021 WL 2946103 (Bankr. M.D. Ga., July 13, 2021) (case no. 5:21-bk-50276) (Chief Bankruptcy Judge James P. Smith)

Debtor failed to pay property taxes and the Tax commissioner brought a tax sale action against the debtor which was completed in November of 2019. The property was sold by the tax commissioner to ETC and a deed conveying the property to ETC was recorded on December 2019.

The ability of a homeowner to redeem foreclosed property after a tax sale is governed by O.C.G.A. §44-4-46(b) that permits the original homeowner to redeem the property within 12 months from the date of the sale. If redeemed by the deadline, the tax sale is rescinded. The tax sale purchaser must start the clock ticking on the redemption period by sending a notice of the deadline for redemption to the former owner. This notice is to be sent before the expiration of the redemption period after the sale and the notice must be delivered to the Sheriff no less than 45 days before the redemption period expires. Known as a “barment notice,” this document must explain that the former owner has a right to redeem that will expire by a certain date and time.

In this case, ETC sent the barment notice to the Sheriff after the tax sale and the former owner received the barment notice thirty days prior to the sale.

² For Judge Laney’s cases, please see Jonathan DeLoach’s materials which follow page 12.

The barment notice was marked “Received” by the sheriff’s office 42 days before the barment date, 3 days short of the 45-day time period found in O.C.G.A. §44-4-46(b), but the sheriff served the notice timely, more than 30 days before the expiration of the redemption period. The redemption period expired on March 22 at 4:00 pm.

The Debtor filed a Chapter 13 bankruptcy petition on March 22, 2021, at 11:16 a.m. a few hours short of the expiration of the redemption, the plan treated the ETC as a secured creditor and to pay the tax lien, with interest, over the life of the plan.

Tax sale creditor ETC objected to confirmation of Debtor’s Chapter 13 plan.

The bankruptcy court did not express an opinion as to whether a debtor has a right to redeem a tax sale property if the barment notice was not sent pre-petition. Judge Carter has ruled on this issue in *Sheppard and Son Properties LLC*, Case No 18-11388 (Bankr. M.D. Ga. May 30, 2019) holding that if no barment notice is sent prepetition a debtor can redeem the property through a Chapter 13 plan.

In the facts before the court in *In re Wood*, however, Judge Carter ruled that since the Debtor had been personally served more than 30 days before the barment date, the constitutional due process requirements of the state statute were met, and thus the barment notice was effective.

The court further explained that since the Barment notice was effective, the property was no longer property of the estate at the time of confirmation and sustained the tax sale creditor’s objection.

Bankruptcy courts in the Northern District of Georgia are split on the issue of whether the debtor can extend the redemption period if a barment notice was properly served before the filing of the bankruptcy case.

C. Southern District of Georgia

1. If debtor pays less than the monthly disposable income into the plan each month, interest must be paid to the unsecured creditors.

In re Matthews, 623 B.R. 818 (Bankr. S.D. Ga., Sept. 30, 2020) (case no. 1:19-bk-11098) (Bankruptcy Judge Susan D. Barrett)

There is a split of authority on whether interest is required under Code §1325(b)(1)(A) when an above-median Chapter 13 debtor chooses not to satisfy §1325(b)(1)(B) and opts to retain a portion of the debtor's monthly disposable income rather than devote it to his plan payments. This court previously followed the line of cases concluding that interest must be paid. See *In re Barnes*, 528 B.R. 501 (Bankr. S.D. Ga. 2015). For those courts requiring interest, there is a further split on the appropriate interest rate. Compare *In re Braswell*, 2013 WL 3270752 (Bankr. D. Or., June 27, 2013) (adopting the *Till* rate) with *In re Parke*, 369 B.R. 205 (Bankr. M.D. Pa. 2007) (applying the federal judgment interest rate). The court concluded that the proper interest rate a Chapter 13 debtor is required to pay to satisfy Code §1325(b)(1)(A) when the debtor's plan proposes to pay unsecured creditors in full while not committing all of the debtor's projected disposable income to his plan payments is the *Till* formulaic rate. This is the rule in the Middle District as well.

POST-PETITION MORTGAGE FEES

In re McCants, 626 B.R. 80 (Bankr. M.D. Ga. 2021)

Judge Laney considered the effect of a creditor's failure to provide notice of post-petition mortgage fees in a prior, dismissed case.

In the previous case, the confirmed plan required the Debtor to maintain direct mortgage payments on his principal residence. The creditor filed a proof of claim including principal and interest but did not provide notice of post-petition fees. Subsequently, the court dismissed the case for default in payments to the trustee.

Within two weeks of dismissal, a fire destroyed the home, and an insurance check was mailed to the Debtor. Less than 3 weeks after receipt of the check, the Debtor filed another Chapter 13 case. The new confirmed plan proposed direct payments to the creditor for the total loss to include principal and interest. To increase its share of the insurance proceeds, the creditor added 15% collection fees and a \$259.00 bankruptcy fee to the principal and interest in its proof of claim. No notice of post-petition fees and costs was filed.

The Debtor objected to the claim on two grounds. First, he contended that Rule 3002.1(i) should bar the claim for fees and costs. Second, he argued the binding effect of confirmation should limit the claim to principal and interest. The court rejected both arguments. Following dismissal of the first case, §349(b) restored both parties to the financial positions they occupied before the case was filed. Therefore, the mortgage agreement and non-bankruptcy law determined the debt amount. In the second case, Rule 3002.1 did not apply. The fire forced the Debtor to move, and the home was no longer his principal residence. The binding effect argument did not persuade the court. The confirmed plan indicated the claim would include principal and interest but did not prohibit fees and costs.

Rule 3002.1 is an important consumer protection added to the bankruptcy code. However, to benefit in the long-term, a Debtor must successfully complete the plan.

DISMISSAL OF ADVERSARY PROCEEDING

In re McCutcheon, 626 B.R. 344 (Bankr. M.D. Ga. 2021)

In re McCutcheon, 629 B.R. 311 (Bankr. M.D. Ga. 2021)

In re McCutcheon, 2021 WL 1158289

Pursuant to §1330, Plaintiff filed a complaint to revoke Defendant's discharge alleging false representations. Despite repeated extensions of time granted by the court, Plaintiff refused to answer Defendant's interrogatories. Upon the close of discovery, the court issued a scheduling order requiring the timely exchange of exhibits. Defendant complied. Plaintiff did not. Defendant filed a motion to compel, and to no avail, the court ordered the Plaintiff to produce exhibits. Defendant then filed a motion to dismiss and a motion for sanctions.

Applying Rule 7041, Judge Laney granted the motion to dismiss. Defendant persuaded the court that Plaintiff's actions created a clear record of delay resulting in prejudice against the Defendant. The court also found that no lesser sanction, such as monetary damages, was sufficient.

Plaintiff moved for reconsideration. After considering Rules 7052 and 9023, the court concluded that to alter or amend a judgment, the movant must prove a mistake of law or fact or offer newly discovered evidence. The motion was denied.

The law pertaining to motions to reconsider may have interesting applications in the Middle District. These motions are common in the Albany, Columbus, and Valdosta divisions, particularly with respect to orders granting trustee motions to dismiss. If a motion to reconsider is contested, Debtors should be prepared to prove a mistake of law or fact. Improved financial prospects after dismissal are not sufficient grounds.

LEASE OR SECURITY AGREEMENT?

In re Pascal, 619 B.R. 278 (Bankr. M.D. Ga. 2020)

Debtor entered a lease agreement with Nissan for the use of an automobile. She contended the contract was in fact a disguised security agreement, and her Chapter 13 plan proposed to treat the debt as a secured claim. Nissan objected to confirmation and moved for relief from the stay citing a lack of adequate protection.

State law determines whether an agreement is a lease or a disguised security agreement. In Georgia, this determination is made on a case by case basis. The Georgia Code provides a list of factors to be considered. O.C.G.A. § 11-1-203. Relying on a Judge Hershner decision, Judge Laney distilled two factors that must be contained in an agreement to qualify as a lease:

- 1) The lessor owns the property, the lessee has only the right of use and possession, and the collateral is returned at the end of the term; and
- 2) The lessee's purchase option at the end of the lease requires payment of fair market value.

Applying these factors, the court concluded the agreement was a true lease. The contract clearly stated the Debtor must return the car at the end of the lease term. The purchase option required a payment of \$14,087.50, representing the car's fair market value. The motion for relief was granted.

Chapter 7 & Chapter 12

Case Updates

Tom Lovett

Thomas Lovett III

Kelley, Lovett, Blakey & Sanders PC

CH 7 & CH 12 UPDATE

Tom Lovett
Thomas Lovett

SCOTUS

Taggart v. Lorenzen

139 S. Ct. 1795, 2019 U.S. LEXIS 3890 (2019)

Debtor received discharge order in his Chapter 7 case. Prior to his Chapter 7 filing, the debtor had been sued by co-owners of a company for violating the company's operating agreement. After the discharge order was entered in his Chapter 7 case, an Oregon state court entered judgment against the debtor and awarded attorney's fees to the plaintiff/claimants. The Supreme Court held that a court may hold a creditor in civil contempt for violating a discharge order if there was no fair ground of doubt as to whether the order barred the creditor's conduct.

Rodriguez v. FDIC

140 S. Ct. 713, 2020 U.S. LEXIS 1364 (2020)

Chapter 7 Trustee competing with FDIC and others to recover a \$4,000,000 tax refund in connection with debtor, United Wester Bancorp, Inc. 10th Cir. employed the *Bob Richards* rule to determine proper allocation of the tax refund and found FDIC owned the tax refund. The Supreme Court cautioned that federal common lawmaking is only appropriate if strict conditions are met: most importantly, it must be necessary to protect uniquely federal interests. The Supreme Court determine no unique federal interest exists in this case and vacated the 10th Cir.'s decision and remanded for further proceedings consistent with the Court's opinion.

11TH CIRCUIT

Woodruff v. Kelley (In re Woodruff)

Trail Court: 610 B.R. 707 (detailed below)

District Court Appeal: 7:19-CV-216 and 217

11th Cir. Appeal: 20-13612 and 13613

These companion appeal cases arose from Judge Laney's granting of the Chapter 7 Trustee's motion for sanctions resulting in dismissal of the debtor's adversary complaint against the Trustee. Two appeals were filed because the Bankruptcy Court entered one final order in the adversary case and one final order in the main bankruptcy case – both were appealed. Woodruff appealed from the Bankruptcy Court to the District Court. The District Court dismissed both appeals for failure to remedy procedural defects and failure to otherwise pursue the appeal. Woodruff appealed the District Court's dismissal to the 11th Circuit. The Clerk of Court for the 11th Circuit dismissed Woodruff's appeal for failure to file appendices within the time required. This was a clerk's dismissal and no memorandum opinion was generated.

UNITED STATES DISTRICT COURT

Deutsche Bank National Trust Company v. Kelley (In re Bowers)

615 B.R. 940 (M.D. Ga. 2020)

Judge Lawson

Judge Laney's decision and memorandum opinion, from which this appeal arose, were previously reported at our 2019 Seminar. Judge Laney held that the cancellations recorded in chain of title, though erroneous, were sufficient for the trustee, as a bona fide purchaser under 11 U.S.C. § 544, to take priority over DBNT/Ocwen's security deed. Judge Hugh Lawson affirmed Judge Laney's decision.

Shareef v. Secretary of Veterans Affairs

2019 U.S. Dist. LEXIS 216355 (M.D. Ga. 2019)

Judge Self

District Court granted debtor's request to proceed *in forma pauperis* on basis her application to proceed *in form pauperis* indicated an inability to pay the costs of commencing her lawsuit. The debtor's lawsuit in District Court was based on allegations that the named defendants had violated the Fair Debt Collection Practices Act. The debtor's amended complaint did not specify when these FDCPA violations occurred, but apparently they happened prior to the filing of her Chapter 7 petition. Accordingly, Judge Self found that the debtor lacked standing to bring the lawsuit, the claims are considered prepetition assets and "only the Chapter 7 trustee has standing to pursue this civil legal claim unless the trustee abandons the asset and returns the claim to the possession and control of [the debtor]."

UNITED STATES BANKRUPTCY COURT

Kelley v. Haar (In re Haar)

2021 Bankr. LEXIS 2690 (Bankr. M.D. Ga. 2021)faillu

Judge Smith [9/29/21]

Chapter 7 Trustee was not entitled to avoid, as fraudulent conveyances, the transfer of two parcels of real property by the debtor to a relative because the debtor held the properties in constructive trust for the relative, and when she re-conveyed the properties, the debtor conveyed bare legal title only, and thus, the transfer did not constitute a transfer of an interest of the debtor's property under 11 U.S.C. § 544. At all times the relative retained all of the benefits and burdens of ownership of the properties such that equity required the court to recognize that the debtor held the properties in constructive trust for the relative since the debtor held mere legal title to the properties and the relative retained all the benefits and burdens of ownership, and the debtor continued to pay the relative rent even when legal title to the properties was in her name.

In re Bryant

630 B.R. 671 (Bankr. M.D. Ga. 2021)

Judge Laney [6/7/21]

Chapter 12 Trustee objected to Regions Bank secured claim on the basis that Regions failed to properly perfect its security interest in farm equipment by filing a seriously misleading financing statement. The Trustee cited the recent opinion of *AgGeorgia Farm Credit, ACA v. Wynn & Deere & Co.* and relied on other case law, including *In re Pierce* from the Southern District, and O.C.G.A. §§ 11-9-503(a)(4), 506(c) in arguing that Regions' failure to use the debtor's name as it appeared on his driver's license and the absence of Regions' financing statement in the results from a search in the filing office using standard search logic.

AgGeorgia Farm Credit, ACA v. Wynn & Deere & Co. (In re Wynn)

627 B.R. 192 (Bankr. M.D. Ga. 2021)

Judge Laney [4/2/21]

To properly perfect a security interest when filing a financing statement, Georgia law generally requires three (3) things: 1) a financing statement must be filed; 2) the financing statement must include the debtor's name; and 3) a search of the records of the filing office using the filing office's standard search logic must disclose the financing statement. Additionally, if the debtor has a Georgia driver's license, the financing statement must list the debtor's name as it is listed on the driver's license. However, if a search of the filing office's records using standard search logic still reveals a financing statement which fails sufficiently to name the debtor exactly as listed on a Georgia driver's license, the financing statement is not seriously misleading despite any errors with the debtor's name. Here, Deere & Co.'s financing statement listed the debtor's name as "Jerry W. Wynn." The debtor's Georgia driver's license listed his name as "Wilson Jerry Wynn." A search done with the standard search logic would not have disclosed the initial financing statement. Accordingly, the Court found AgGeorgia's lien takes priority over Deere & Co.'s lien. The Court also addressed Deere & Co.'s claim that res judicata bars AgGeorgia's claim. The Court found that since the confirmed plan explicitly reserved the jurisdiction of the Court until plan completion, including "allowance or disallowance of and determination of the amount, priority, validity, and dischargeability of all claims" and since the "priority of the liens of the collateral listed in the plan was neither litigated nor, because the Court confirmed the plan without such litigation, necessary to have been litigated to confirm the plan" res judicata and the preclusive effect of plan confirmation do not apply to AgGeorgia's claim. The Court also recognized Georgia has two (2) standard search logics: an "Exact Search" and a "Stem Search."

Townsend v. Willman (In re Willman)

2020 Bankr. LEXIS 2781 (Bankr. M.D. Ga. 2020)

Judge Smith [10/5/20]

Plaintiff held a 2014 judgment from an Ohio probate court. Plaintiff is the sister of one of the joint debtors, O'Hara. O'Hara and her joint debtor spouse had possession of a gun collection belonging to the estate of Plaintiff and O'Hara's late father. Plaintiff's judgment for \$125,940 was entered after the probate court found the debtors, who had been in possession of the gun collection, had withheld, concealed and disposed of guns in violation of previous probate court orders prohibiting such conduct. The Ohio probate court judgment was domesticated in Twiggs County, Georgia in 2019. The debtors filed a Chapter 7 petition in 2020. Plaintiff asserted her probate court judgment is nondischargeable under § 523(a)(4) and (6). The Court addressed Plaintiff's (a)(4) "Larceny" argument for nondischargeability and found that the debtors lawfully obtained possession of the guns which were the subject of the Ohio probate court proceedings. Since the debtor acquired possession of the guns lawfully, no larceny could have occurred and the Plaintiff's motion for summary judgment on the basis of 11 U.S.C. § 523(a)(4) must be denied. Next, the Court addressed Plaintiff's (a)(6) "Conversion" argument for nondischargeability and concluded that the Ohio probate court's finding that the debtors' failure to deliver the guns was "wrongful ... conduct" was sufficient to establish that the debtors conduct was "malicious." The Court found these facts made the judgment a nondischargeable debt under § 523(a)(6) and granted Plaintiff's motion for summary judgment on that basis. The Court also addressed issue preclusion and noted that Plaintiff could have also asserted a claim of embezzlement under § 523(a)(4).

In re King

Ch. 12 Case No.: 20-10020 (Bessie Mae Hall King)

Judge Carter [3/17/20]

Two orders of Judge Carter: The first resolving the Court's "Order to Show Cause Why this Case Should Not Be Dismissed With a Bar on Filing a New Case Within a Specified Period of Time" and the Chapter 12 Trustee's "Motion to Dismiss Chapter 12 Case." The Show Cause Order required the debtor or her representative to appear and prove the debtor's eligibility in the case, and explain why Mr. King should not be prohibited from filing another bankruptcy case for a specific period of time. The Trustee's Motion to Dismiss asserted the debtor was not eligible to be a debtor in the bankruptcy case. Mr. King filed the Chapter 12 case on behalf of his deceased mother, the named debtor. The Court granted the Chapter 12 Trustee's motion to dismiss the case, finding that the case was filed on behalf of a deceased individual. The Court's findings were based on: 1) Mr. King admitted the debtor was a deceased person; 2) taking of judicial notice of a death certificate filed on the docket in Bankr. M.D. Ga. Case No. 18-11105; 3) the last four digits of the social security number identifying the debtor in Case No. 18-11105 and two other cases matched those of the debtor in the instant case; and 4) Mr. King failed to offer any evidence that the debtor was not deceased. The Court reviewed the rules of eligibility for bankruptcy relief – most importantly: the term "individual" in the Bankruptcy Code refers to natural persons, and a deceased person cannot seek bankruptcy relief after death and neither can his or her probate estate. The Court also pointed out that in Georgia, agency by power-of-attorney is revoked by death; and that a party cannot be represented in bankruptcy court by a nonlawyer. The Court then barred Mr. King from filing a case in the Court for 1 year based on: 1) deficient filings; 2) Mr. King's knowledge that the debtor was deceased when he filed the

case; and 3) the instant case is the sixth petition Mr. King filed since 2018, each of which were dismissed at an early stage. The Court observed that sanctions are appropriate where “[a] pro se party’s assertion of a position he knows or should know is legally untenable can serve as a foundation of a court’s finding of bad faith[]” and “[s]imiliarly, false representation made in a bankruptcy case constitute bad faith.” In response to an oral motion to recuse raised at the hearing, the Court’s analysis also addressed the topic of recusal of a bankruptcy judge and denied that request.

The second resolving various motions filed by a Mr. King. The Court treated those motions as “Emergency Motion(s) for Reconsideration & Motion to Set Aside Dismissal(s)/Final Decree(s) (June 27, 2019, Aug.19, 2019) and Emergency Motion for Continuance Regarding Show Cause Hearing on Feb. 5, 2020.” Mr. King’s motions did not clearly indicate the relief sought, so the Court treated the motions as a request for additional time to retain legal counsel. The Court denied Mr. King’s motion(s) because a continuance could offer no relief for a debtor who is not eligible to be a debtor in a bankruptcy case. The Court further found that Mr. King’s request for additional time to retain counsel was not warranted based on the record showing adequate opportunity for him to obtain counsel.

John Michael Christian Woodruff v. Kelley (In re Woodruff)

610 B.R. 707 (Bankr. M.D. Ga. 2019)

Judge Laney [12/10/19]

Pro Se debtor, Woodruff filed an adversary complaint against his Chapter 7 Trustee, both individually and in his official capacity as Trustee, alleging the Trustee improperly received and distributed \$10,248 inherited by Woodruff. The Trustee responded by filing a motion for sanctions under Bankruptcy Rule 9011. The Court went through a 4-step analysis as directed by Rule 9011(b). The Court found: 1) based on the Woodruff’s past threats toward the trustee, and Woodruff’s history of harassment and delay of litigation, it is clear the adversary proceeding was brought for an improper purpose; 2) Woodruff’s arguments for return of \$10,248 representing post-petition dividends belonging to the bankruptcy estate were “not warranted by existing law nor do they advocate for an extension, modification, or reversal of existing law or establishment of new law;” 3) Woodruff failed to provide evidence to support his “factual allegations” and the “factual allegations” are *not* likely to have evidentiary support; and 4) the “denials of factual contentions” factor did not apply here since Woodruff, as plaintiff, did not submit writings that answered any factual contentions made by the movant (Trustee). The Court also pointed out that the Trustee cannot be sued individually or in his capacity as Trustee for acts performed pursuant to court order – the Trustee enjoys judicial immunity. The Court granted the Trustee’s motion for sanctions under Rule 9011 and ordered Woodruff’s complaint be dismissed.

Kelley v. Goforth (In re Brownlee)

606 B.R. 508 (Bankr. M.D. Ga. 2019)

Judge Laney [9/12/19]

This case was decided 2 days after materials were submitted for the 2019 MDGBLI Seminar so was not included in the 2019 Seminar publication materials; and if it was discussed during the Seminar presentation, it may have only been discussed briefly.

The Trustee sought to avoid a security deed to real estate from debtors to Defendants, Jack Goforth and Lana Stone. The security deed named both Defendants, as grantees. Defendant Jack Goforth was also an attesting witness to the security deed. The Trustee argued the security

deed was patently defective because one of the attesting witnesses was also a grantee in the instrument. The Court found that while a grantee's attestation of his own security deed may be defective, such a defect would be latent rather than patent. On its face, the deed showed two attesting witness signatures and a notary seal, making it eligible for recording under Georgia law. Accordingly, recordation of the security deed was enough to provide constructive notice, and the transfer is not avoidable by the Trustee as a bona fide purchaser.

The Otis Overby Co. v. Ray (In re Ray)

620 B.R. 418 (Bankr. M.D. Ga. 2020)

Judge Laney [10/15/20]

Debtor filed a Chapter 7 petition on July 31, 2019. Movant-creditor was listed in Schedule E/F and was notified of the bankruptcy case. The debtor appeared at her § 341 meeting and was questioned by Movant-creditor's attorney. The deadline for filing objections to discharge was November 12, 2019. Movant-creditor claims that on November 12 he attempted numerous times to file an objection to discharge through PACER electronic filing, but repeatedly received error messages. No objections having been filed, the debtor's discharge was entered the following day. Movant-creditor filed a motion to reopen the case under 11 U.S.C. § 350(b). Movant-creditor sought an extension of the deadline for filing a complaint to determine dischargeability under the doctrine of "equitable tolling" because of the technical difficulties with his attempt to file an objection to discharge. The court rejected Movant-creditor's argument for two reasons: 1) technical issues with the online filing system is not adequate grounds for equitable relief; and 2) Bankruptcy Rule 4007(c) generally does not allow equitable tolling, and Movant-creditor was omitted from the debtor's petition or otherwise deceived so as to create a basis for equitable tolling. Further, the Court found that even if it reopened the case, Movant-creditor would be barred from submitting a late-filed objection to dischargeability.

First Community Bank of Tifton, A Division of Synovus Bank v. Kelley (In re Brownlee)

624 B.R. 920 (Bankr. M.D. Ga. 2021)

Judge Laney [2/4/21]

A proposed settlement was approved over the objection of creditor Synovus Bank. The Court found the Chapter 7 Trustee's proposed settlement did not "fall below the lowest point in the range of reasonableness." The Court arrived at its conclusion by analyzing the four elements of the *Justice Oaks* test: 1) probability of success in litigation; 2) complexity of litigation involved and the expense, inconvenience and delay necessarily attending it; 3) the difficulties, if any, to be encountered in the matter of collection; and 4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In re Littleton

Ch. 7 Case No. 07-51353 (Jennifer P. Littleton)

Judge Carter [9/3/19]

An attorney filed a proof of claim for fees related to a wrongful foreclosure claim. The debtor objected to the claim on grounds the attorney did not represent the debtor or the bankruptcy estate. After an evidentiary hearing, the attorney filed a brief which asserted the claim for fees should be allowed as a general claim or, in the alternative, an administrative claim

under 11 U.S.C. § 503(b)(1)(A). The issue was whether the attorney's claim should be allowed as an administrative claim. The Court found the claim was disallowed in its entirety and did not qualify as an administrative claim. The Court found:

Claim not allowed under 11 U.S.C. § 502:

Attorney's billing statement shows all time was post-petition. Post-petition claims are not allowed under 11 U.S.C. § 502 since § 502(b) requires the court to determine the allowance of a claim based on the "date of the filing." The attorney did not present evidence of a pre-petition claim.

Claim not allowed under 11 U.S.C. § 503(b)(1)(A):

To be allowed, an administrative claim must meet a two-part test: 1) Claim must arise from a transaction with the bankruptcy estate, and 2) must have directly and substantially benefitted the bankruptcy estate. Attorney's claim did not arise from transaction with bankruptcy estate because attorney was not employed/appointed as special counsel for the Trustee, which is a prerequisite for allowance/payment of attorney fees permitted under 11 U.S.C. § 330. Further, claim was not timely as required by 11 U.S.C. § 503(a). Although no deadline is set for filing administrative claims, court has discretion to deny claim filed so late in case that prejudices other timely filed claims. Attorney's administrative claim asserted for the first time in post-hearing brief was more than 9 years after the billing statement dates.

Fidelity Bank v. Jimenez (In re Jimenez)

608 B.R. 322 (Bankr. M.D. Ga. 2019)

Judge Smith [10/10/19]

Fidelity sued four debtors in 3 bankruptcy cases. Debtor-defendants were doctors and principals of Primera medical practice. In January 2014, Fidelity loaned \$725,000 to Primera. In October 2019, Fidelity loaned \$1,485,000 to Primera and took security interest in all business assets. Debtor-defendants used loan proceeds to build surgical center and they were guarantors of the loans. Primera encountered financial distress in 2018, but did not alert Fidelity. Debtor-defendants filed Chapter 7 cases in January 2019. Prior to bankruptcy, Debtor-defendants negotiated acquisition of Primera by Village Podiatry Group, assisting Village with patient lists, records, the surgical center and other assets. Ultimately, post-petition, Village acquired these assets for less than reasonably equivalent value and promised employment of Debtor-defendants. Fidelity asserted 3 counts in its complaints for determination of dischargeability: 1) breach of fiduciary duty under § 523(a)(4); 2) embezzlement under § 523(a)(4); and 3) willful and malicious injury under § 523(a)(6). The Court dismissed Count 1, finding no breach of fiduciary duty because the debt was created before any fiduciary duty arose. The Court dismissed Count 2, citing a split of authority, and finding a creditor's security interest in property owned by the debtor is an insufficient ownership interest to support a claim under § 523(a)(4). The Court denied Defendant-debtors' request to dismiss Count 3 because the Defendant-debtors assisted in the transfer of Fidelity's collateral to Village for less than reasonably equivalent value – "this action was substantially certain to cause injury to [Fidelity]" and the Court found this was sufficient to support Fidelity's claim for relief on "willfull and malicious injury" under § 523(a)(6).

Kelley v. Midsouth Community Federal Credit Union (In re Churchwell)

2021 Bankr. LEXIS 461 (Bankr. M.D. Ga. 2021)

Judge Smith [3/1/21]

The Chapter 7 Trustee filed a motion for summary judgment on his complaint to avoid a preferential transfer where Midsouth took a security interest in the debtor's motor vehicle within the 90 day period preceding the petition date. Midsouth argued O.C.G.A. § 44-2-4 as a defense and asserted issues of fact with respect to insolvency. The Court found O.C.G.A. § 44-2-4 was not applicable to the facts of this case, and the evidence Midsouth relied on to dispute insolvency only related to income and income to debt ratio rather than the proper focus of liabilities versus assets. The Court granted the Trustee's motion for summary judgment.

GEORGIA SUPREME COURT

Synovus Bank v. Kelley

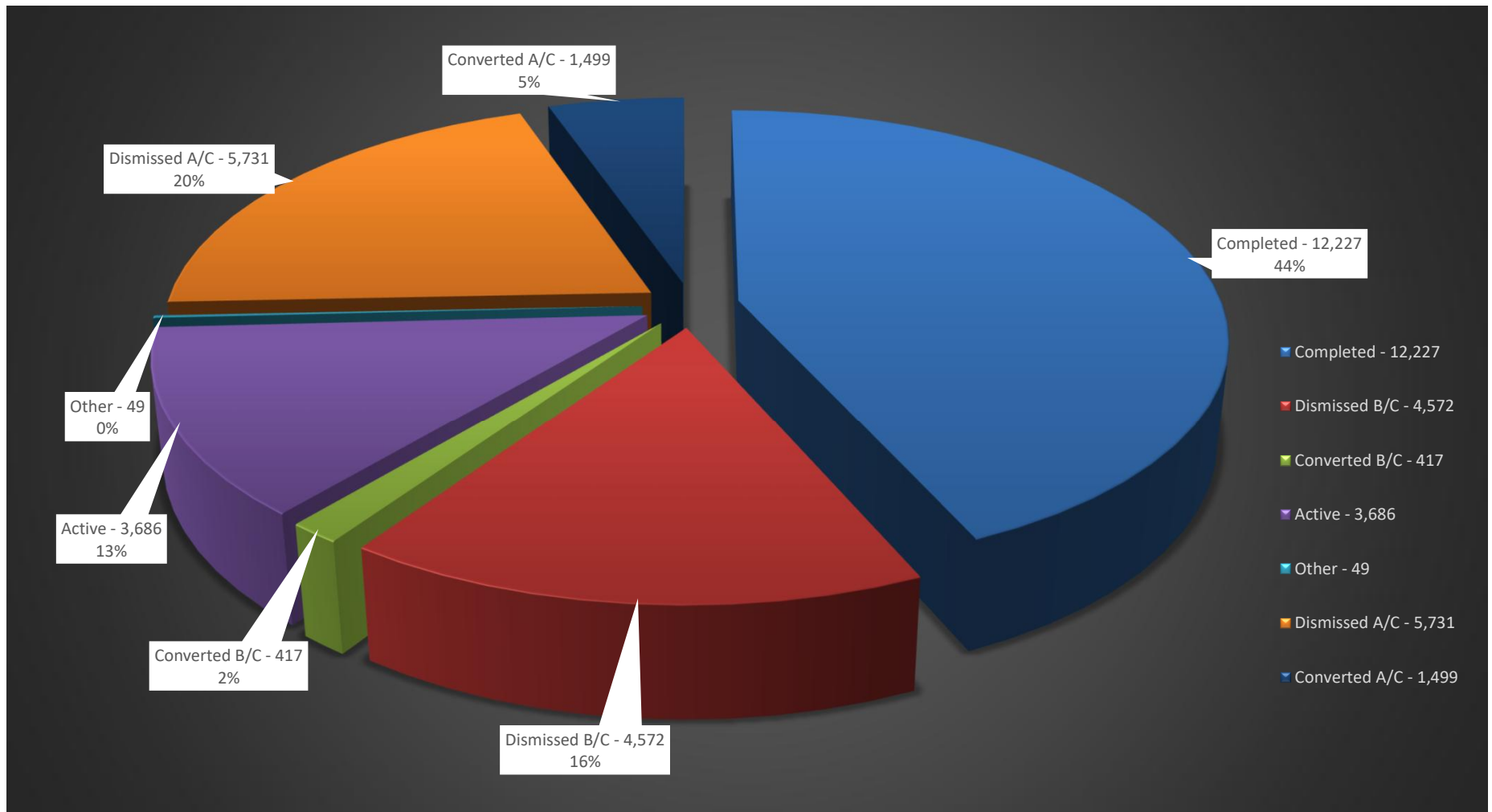
309 Ga. 654, 2020 Ga. LEXIS 587 (GA 2020)

Georgia Supreme Court responded to *certified question* from U.S. District Court. Supreme Court of Georgia held that a judgment does not affect or become a lien on real property until it is recorded.

RECALL: The Bankruptcy Court found that, pursuant to O.C.G.A. § 9-12-86, a judgment does not affect or become a lien on real estate until the judgment is recorded. Where the bank recorded its judgment against the debtors within 90 days before the petition date, that recording (and not merely the entry of the judgment) created a lien which amounted to a transfer of an interest of the debtors in property. Accordingly, the creation of the lien was a transfer subject to the avoidance powers of the trustee. The Georgia Supreme Court agreed, and, on remand, the District Court affirmed the Bankruptcy Court's decision in this case.

Case Disposition Analysis

Camille Hope
Chapter 13 Trustee
Middle District of Georgia



ATTORNEY ID	COMPLETED		DISMISSED BEFORE CONFIRMATION		CONVERTED BEFORE CONFIRMATION		ACTIVE		OTHER		DISMISSED AFTER CONFIRMATION		CONVERTED AFTER CONFIRMATION		TOTAL CASES FILED
17	379.00	37.8%	151.00	15.1%	22.00	2.2%	139.00	13.9%	0.00	0.0%	235.00	23.4%	77.00	7.7%	1,003.00
39	733.00	60.5%	35.00	2.9%	16.00	1.3%	165.00	13.6%	1.00	0.1%	194.00	16.0%	68.00	5.6%	1,212.00
58	53.00	22.9%	36.00	15.6%	2.00	0.9%	83.00	35.9%	0.00	0.0%	45.00	19.5%	12.00	5.2%	231.00
138	365.00	49.9%	82.00	11.2%	6.00	0.8%	94.00	12.8%	0.00	0.0%	171.00	23.4%	14.00	1.9%	732.00
276	107.00	63.7%	16.00	9.5%	0.00	0.0%	5.00	3.0%	0.00	0.0%	34.00	20.2%	6.00	3.6%	168.00
356	59.00	45.7%	16.00	12.4%	2.00	1.6%	23.00	17.8%	0.00	0.0%	27.00	20.9%	2.00	1.6%	129.00
434	248.00	45.8%	52.00	9.6%	13.00	2.4%	65.00	12.0%	4.00	0.7%	117.00	21.6%	43.00	7.9%	542.00
447	253.00	34.1%	199.00	26.9%	13.00	1.8%	79.00	10.7%	1.00	0.1%	175.00	23.6%	21.00	2.8%	741.00
450	269.00	27.6%	321.00	32.9%	38.00	3.9%	116.00	11.9%	0.00	0.0%	160.00	16.4%	72.00	7.4%	976.00
459	136.00	43.7%	68.00	21.9%	13.00	4.2%	36.00	11.6%	0.00	0.0%	31.00	10.0%	27.00	8.7%	311.00
523	26.00	76.5%	0.00	0.0%	1.00	2.9%	0.00	0.0%	3.00	8.8%	3.00	8.8%	1.00	2.9%	34.00
551	634.00	44.0%	189.00	13.1%	2.00	0.1%	276.00	19.1%	2.00	0.1%	325.00	22.5%	14.00	1.0%	1,442.00
629	46.00	16.8%	50.00	18.3%	3.00	1.1%	127.00	46.5%	0.00	0.0%	41.00	15.0%	6.00	2.2%	273.00
760	256.00	57.9%	46.00	10.4%	5.00	1.1%	3.00	0.7%	0.00	0.0%	123.00	27.8%	9.00	2.0%	442.00
821	292.00	54.5%	22.00	4.1%	15.00	2.8%	82.00	15.3%	0.00	0.0%	86.00	16.0%	39.00	7.3%	536.00
974	176.00	49.6%	31.00	8.7%	2.00	0.6%	37.00	10.4%	1.00	0.3%	80.00	22.5%	28.00	7.9%	355.00
996	0.00	0.0%	10.00	20.0%	1.00	2.0%	30.00	60.0%	0.00	0.0%	9.00	18.0%	0.00	0.0%	50.00
998	91.00	66.9%	3.00	2.2%	0.00	0.0%	0.00	0.0%	0.00	0.0%	32.00	23.5%	10.00	7.4%	136.00
1042	72.00	39.8%	22.00	12.2%	3.00	1.7%	48.00	26.5%	0.00	0.0%	32.00	17.7%	4.00	2.2%	181.00
1178	36.00	58.1%	10.00	16.1%	1.00	1.6%	5.00	8.1%	0.00	0.0%	6.00	9.7%	4.00	6.5%	62.00
1190	51.00	17.9%	100.00	35.1%	14.00	4.9%	51.00	17.9%	0.00	0.0%	47.00	16.5%	22.00	7.7%	285.00
1210	188.00	55.3%	23.00	6.8%	2.00	0.6%	65.00	19.1%	1.00	0.3%	49.00	14.4%	12.00	3.5%	340.00
1211	64.00	38.6%	33.00	19.9%	1.00	0.6%	24.00	14.5%	0.00	0.0%	38.00	22.9%	6.00	3.6%	166.00
1305	15.00	34.9%	13.00	30.2%	1.00	2.3%	0.00	0.0%	0.00	0.0%	11.00	25.6%	3.00	7.0%	43.00
1389	25.00	92.6%	0.00	0.0%	0.00	0.0%	0.00	0.0%	1.00	3.7%	1.00	3.7%	0.00	0.0%	27.00
1400	16.00	57.1%	5.00	17.9%	1.00	3.6%	0.00	0.0%	0.00	0.0%	4.00	14.3%	2.00	7.1%	28.00
1401	22.00	81.5%	0.00	0.0%	0.00	0.0%	0.00	0.0%	0.00	0.0%	4.00	14.8%	1.00	3.7%	27.00
1416	210.00	31.4%	183.00	27.4%	14.00	2.1%	32.00	4.8%	0.00	0.0%	169.00	25.3%	61.00	9.1%	669.00
1447	488.00	42.5%	191.00	16.6%	33.00	2.9%	127.00	11.1%	1.00	0.1%	224.00	19.5%	85.00	7.4%	1,149.00
1501	405.00	39.8%	149.00	14.7%	5.00	0.5%	150.00	14.7%	0.00	0.0%	269.00	26.5%	39.00	3.8%	1,017.00
1518	321.00	72.8%	13.00	2.9%	0.00	0.0%	37.00	8.4%	1.00	0.2%	60.00	13.6%	9.00	2.0%	441.00
1729	197.00	53.7%	37.00	10.1%	5.00	1.4%	8.00	2.2%	0.00	0.0%	88.00	24.0%	32.00	8.7%	367.00

ATTORNEY ID	COMPLETED		DISMISSED BEFORE CONFIRMATION		CONVERTED BEFORE CONFIRMATION		ACTIVE		OTHER		DISMISSED AFTER CONFIRMATION		CONVERTED AFTER CONFIRMATION		TOTAL CASES FILED
1767	32.00	66.7%	8.00	16.7%	1.00	2.1%	0.00	0.0%	0.00	0.0%	5.00	10.4%	2.00	4.2%	48.00
1782	123.00	46.6%	12.00	4.5%	1.00	0.4%	59.00	22.3%	0.00	0.0%	41.00	15.5%	28.00	10.6%	264.00
1854	67.00	37.0%	36.00	19.9%	2.00	1.1%	18.00	9.9%	1.00	0.6%	52.00	28.7%	5.00	2.8%	181.00
1867	126.00	21.3%	80.00	13.5%	14.00	2.4%	207.00	35.0%	0.00	0.0%	118.00	19.9%	47.00	7.9%	592.00
1924	20.00	44.4%	11.00	24.4%	0.00	0.0%	6.00	13.3%	0.00	0.0%	6.00	13.3%	2.00	4.4%	45.00
1959	0.00	0.0%	69.00	36.1%	1.00	0.5%	74.00	38.7%	0.00	0.0%	32.00	16.8%	15.00	7.9%	191.00
2006	86.00	33.6%	68.00	26.6%	3.00	1.2%	19.00	7.4%	0.00	0.0%	70.00	27.3%	10.00	3.9%	256.00
2034	54.00	59.3%	13.00	14.3%	1.00	1.1%	1.00	1.1%	0.00	0.0%	19.00	20.9%	3.00	3.3%	91.00
2153	503.00	66.0%	66.00	8.7%	0.00	0.0%	15.00	2.0%	2.00	0.3%	158.00	20.7%	18.00	2.4%	762.00
2451	542.00	46.0%	127.00	10.8%	16.00	1.4%	181.00	15.4%	0.00	0.0%	227.00	19.3%	85.00	7.2%	1,178.00
2482	175.00	55.0%	35.00	11.0%	0.00	0.0%	32.00	10.1%	0.00	0.0%	62.00	19.5%	14.00	4.4%	318.00
2520	337.00	40.7%	87.00	10.5%	11.00	1.3%	148.00	17.9%	0.00	0.0%	176.00	21.3%	69.00	8.3%	828.00
2603	329.00	69.0%	17.00	3.6%	5.00	1.0%	4.00	0.8%	10.00	2.1%	89.00	18.7%	23.00	4.8%	477.00
2605	7.00	17.9%	7.00	17.9%	2.00	5.1%	17.00	43.6%	0.00	0.0%	5.00	12.8%	1.00	2.6%	39.00
2665	631.00	47.9%	125.00	9.5%	10.00	0.8%	241.00	18.3%	0.00	0.0%	255.00	19.4%	55.00	4.2%	1,317.00
2761	79.00	55.2%	19.00	13.3%	4.00	2.8%	13.00	9.1%	0.00	0.0%	23.00	16.1%	5.00	3.5%	143.00
2945	481.00	28.2%	291.00	17.0%	31.00	1.8%	323.00	18.9%	1.00	0.1%	397.00	23.3%	183.00	10.7%	1,707.00
3004	138.00	67.6%	5.00	2.5%	3.00	1.5%	0.00	0.0%	0.00	0.0%	50.00	24.5%	8.00	3.9%	204.00
3129	410.00	51.4%	121.00	15.2%	12.00	1.5%	11.00	1.4%	0.00	0.0%	198.00	24.8%	45.00	5.6%	797.00
3463	14.00	51.9%	3.00	11.1%	1.00	3.7%	1.00	3.7%	0.00	0.0%	7.00	25.9%	1.00	3.7%	27.00
3622	315.00	56.0%	40.00	7.1%	2.00	0.4%	26.00	4.6%	0.00	0.0%	137.00	24.3%	43.00	7.6%	563.00
3801	45.00	43.7%	16.00	15.5%	6.00	5.8%	19.00	18.4%	0.00	0.0%	8.00	7.8%	9.00	8.7%	103.00
4019	177.00	59.2%	26.00	8.7%	2.00	0.7%	32.00	10.7%	0.00	0.0%	57.00	19.1%	5.00	1.7%	299.00
4127	33.00	66.0%	8.00	16.0%	2.00	4.0%	0.00	0.0%	0.00	0.0%	7.00	14.0%	0.00	0.0%	50.00
4217	26.00	45.6%	6.00	10.5%	0.00	0.0%	11.00	19.3%	0.00	0.0%	11.00	19.3%	3.00	5.3%	57.00
4967	13.00	30.2%	12.00	27.9%	0.00	0.0%	5.00	11.6%	0.00	0.0%	13.00	30.2%	0.00	0.0%	43.00
4975	80.00	31.3%	61.00	23.8%	2.00	0.8%	12.00	4.7%	0.00	0.0%	94.00	36.7%	7.00	2.7%	256.00
4998	88.00	48.4%	44.00	24.2%	6.00	3.3%	0.00	0.0%	1.00	0.5%	32.00	17.6%	11.00	6.0%	182.00
5356	18.00	33.3%	12.00	22.2%	0.00	0.0%	9.00	16.7%	0.00	0.0%	14.00	25.9%	1.00	1.9%	54.00
5418	101.00	71.1%	4.00	2.8%	0.00	0.0%	0.00	0.0%	0.00	0.0%	37.00	26.1%	0.00	0.0%	142.00
6172	422.00	42.7%	129.00	13.0%	11.00	1.1%	126.00	12.7%	1.00	0.1%	268.00	27.1%	32.00	3.2%	989.00
7614	221.00	53.3%	21.00	5.1%	1.00	0.2%	81.00	19.5%	1.00	0.2%	83.00	20.0%	7.00	1.7%	415.00

ATTORNEY ID	COMPLETED		DISMISSED BEFORE CONFIRMATION		CONVERTED BEFORE CONFIRMATION		ACTIVE		OTHER		DISMISSED AFTER CONFIRMATION		CONVERTED AFTER CONFIRMATION		TOTAL CASES FILED
Pro Se	18.00	2.3%	729.00	94.6%	10.00	1.3%	8.00	1.0%	1.00	0.1%	4.00	0.5%	1.00	0.1%	771.00
Other	283	41.8%	158	23.3%	23	3.4%	80	11.8%	15	2.2%	86	12.7%	32	4.7%	677.00
	12,227.00	43.4%	4,572.00	16.2%	417.00	1.5%	3,686.00	13.1%	49.00	0.2%	5,731.00	20.3%	1,499.00	5.3%	28,181.00

MIDDLE DISTRICT OF GEORGIA BANKRUPTCY LAW INSTITUTE
23rd ANNUAL BANKRUPTCY LAW SEMINAR
OCTOBER 29, 2021
EVALUATION SHEET

Please evaluate the topics of the seminar as follows:

- | | |
|--|--|
| (1) <u>Update from the Court</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (2) <u>Update from the USTP</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (3) <u>Practice in Subchapter V Cases</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (4) <u>Professionalism: Just the Facts</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (5) <u>Judges' Forum: Discussion of Hot Topics</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (6) <u>Ethical Hypotheticals: A Bankruptcy Lawyer's Journey through Several Common Scenarios</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (7) <u>Chapter 13 Case Update</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (8) <u>Chapter 7 & Chapter 12 Updates</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |

Please evaluate the seminar speakers as follows:

- | | |
|---------------------------------------|--|
| (1) <u>Kyle George</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (2) <u>Honorable Paul W. Bonapfel</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (3) <u>Leon Jones</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (4) <u>Robert M. Matson</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (5) <u>David L. Bury, Jr.</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (6) <u>Ronald Daniels</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (7) <u>Ishaq Kundawala</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (8) <u>Camille Hope</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (9) <u>Jonathan DeLoach</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (10) <u>Tom Lovett</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |
| (11) <u>Thomas Lovett III</u> | <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor |

[illegible]