TWENTY SIXTH
BANKRUPTCY LAW SEMINAR

PRESENTED BY:

THE MIDDLE DISTRICT OF GEORGIA BANKRUPTCY LAW INSTITUTE, INC.

AND

MERCER UNIVERSITY SCHOOL OF LAW

FRIDAY
SEPTEMBER 27, 2024

IDLE HOUR COUNTRY CLUB
251 IDLE HOUR DRIVE
MACON, GA 31210

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
and Mercer University School of Law
present the
ANNUAL BANKRUPTCY SEMINAR
Friday, September 27, 2024
6.0 Total CLE Hours
(Including 2 trial hours, 1 ethics hour, and 1 professionalism hour)
REGISTRATION DEADLINE SEPTEMBER 13, 2024

Schedule:
(Note: All underlined topics are live links to that page in the materials)

8:00	-	8:55	Registration – Continental Breakfast
8:55	-	9:00	Welcome – MDGBLI, Camille Hope
9:00	-	9:30	Updates from the Court Kyle George, Clerk of Court Updates from the USTP Mary Ida Townson, U.S. Trustee, Region 21 Elizabeth A. Hardy, Assistant U.S. Trustee
9:30		10:30	Subchapter V: Hot Topics and Updates Honorable Paul W. Bonapfel, Judge Northern District of Georgia Leon Jones, Jones & Walden, LLC David Bury, Stone and Baxter, LLC
10:30		10:45	BREAK
10:45	-	11:45	Professionalism – Past, Present, and Beyond Ronald Daniels, Daniels Taylor Law, LLC
11:45	-	1:00	LUNCH Sponsored by the State of Georgia Bankruptcy Law Section
1:00	-	2:00	Judges' Forum: Discussion of Hot Topics Questions & Answers
2:00	-	2:15	BREAK
2:15	-	3:15	Ethical Hypotheticals Part IV: A Bankruptcy Lawyer's Journey Through Several Common Scenarios Ishaq Kundawala, Professor of Law Mercer University School of Law
3:15	-	3:30	Student Loans William Woodall, Jr., Woodall & Woodall Tori Grantham, Law Clerk U.S. Bankruptcy Court Middle District of Georgia Barbara Parker, Assistant U.S. Attorney
3:30	-	4:30	Chapter 13 Case Update Camille Hope, Chapter 13 Trustee Chapter 7 Case Update and Tales from the Crypto Neil Gordon, Taylor English Duma LLP

Middle District of Georgia Bankruptcy Law Institute GAMB Update September 27, 2024

GAMB Clerk's Office Update

Hails and Farewells

Hails

- **Judge Matson** — **April 2024**
- **Christina Zeppa - IT** — **May 2024**
- **Hope Robledo – Case Manager Columbus** — **August 2024**

Farewells

- **Judge Smith** — **March 2024**
- **Scott Poupard – Chief Deputy** — **November 2024**
- **Robley Willis – IT Director** — **December 2024**
- **Alvin Brown – Law Clerk to Judge Matson** — **January 2025**

GAMB Clerk's Office Update

The Big Stuff….

- **Bench and Bar Committee Activities**
  - **Outgoing Chair – Joy Webster**
  - **New Chair – David Bury**
  - **New Members**
  - **Conducted "Zoom 341 In-Progress Review" Review with Trustees in November 2023**
  - **Conducted webinar on "Assisting Debtors with Their Student Loan Debt" in May 2024**
  - **November 12, 2024**
    - **Mercer School of Law Mock Hearings Program**
    - **Attorneys and Judges will conduct mock hearings to show students bankruptcy professionals in action**

GAMB Clerk's Office Update

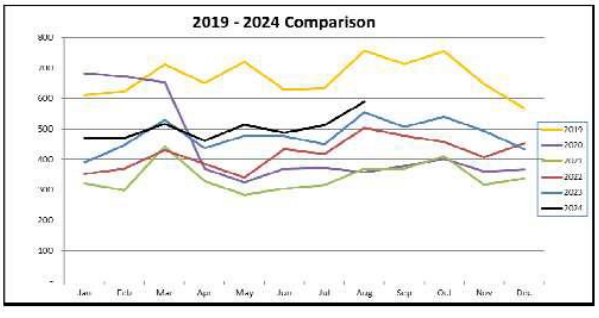
The Big Stuff….

- **Change from ZOOM to CISCO WEBEX**
  - **Teleconference phone numbers will change on November 15, 2024**
    - **Same procedures as before, just new numbers**
  - **Videoconference hearings will use CISCO WEBEX, which is very similar to ZOOM.**
    - **In the event of a required hearing, parties will be contacted individually, and a test will be conducted**
- **Columbus Lease Update**
- **Chapter 13 No Look Fee increased to $3,900 in February 2024**
- **Congress did not extend CARES Act debt limits for Subchapter V and Chapter 13**

GAMB Case Filings 2023 - 2024

Monthly Filings and Closings 2024

DISTRICT	Ch. 7	Ch.11	Ch.12	Ch.13	2024 Total	2023 Total	Trend	Reopens	Closed	AP Filed	AP Closed
Jan	117	0	0	355	472	390	21.03%	2	597	4	12
Feb	137	0	0	333	470	446	5.38%	7	573	4	7
Mar	183	2	0	332	517	530	-2.45%	6	582	9	10
Apr	124	4	0	333	461	436	5.73%	12	587	2	12
May	146	7	1	359	513	478	7.32%	2	388	12	5
Jun	119	1	1	366	487	476	2.31%	4	518	6	3
Jul	115	3	0	394	512	450	13.78%	6	572	4	7
Aug	153	5	1	431	590	554	6.50%	4	581	4	6
Sep	0	0	0	0	0	506		0	0	0	0
Oct	0	0	0	0	0	540		0	0	0	0
Nov	0	0	0	0	0	494		0	0	0	0
Dec	0	0	0	0	0	433		0	0	0	0
YTD	1094	22	3	2903	4022	3760	6.97%	43	4398	45	62
TOTAL	1094	22	3	2903	4022	5733					



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National and 11th Circuit
Case Filings 2023 - 2024

Table F.
U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending June 30, 2023 and 2024

Circuit and District	Filed			Terminated			Pending		
	2023	2024	Percent Change [1]	2023	2024	Percent Change [1]	2023	2024	Percent Change [1]
Total	**418,724**	**486,613**	**16.2**	**453,121**	**482,133**	**6.4**	**660,128**	**664,647**	**0.7**
11th	**70,333**	**80,190**	**14.0**	**76,941**	**79,579**	**3.4**	**128,450**	**129,075**	**0.5**
AL,N	8,704	9,493	9.1	9,446	9,212	-2.5	17,584	17,865	1.6
AL,M	5,571	5,600	0.5	6,350	5,976	-5.9	15,394	15,016	-2.5
AL,S	3,186	3,500	9.9	3,704	3,729	0.7	9,206	8,980	-2.5
FL,N	1,709	1,953	14.3	1,635	1,788	9.4	1,952	2,118	8.5
FL,M	14,597	18,471	26.5	15,439	16,689	8.0	17,980	19,787	10.1
FL,S	10,388	12,509	20.4	11,715	12,062	3.0	20,487	20,934	2.2
GA,N	16,865	18,825	11.6	17,770	19,762	11.2	22,269	21,337	-4.2
GA,M	5,514	5,954	8.0	6,111	5,972	-2.3	12,498	12,483	-0.1
GA,S	3,799	3,885	2.3	4,771	4,409	-7.6	11,080	10,555	-4.7

Federal Rule Changes December 2024 (1)

- **Restyled Federal Rules of Bankruptcy Procedure Parts I through IX**
  - **Formatting changes designed to make the structure of the rules clearer and make the restyled rules easier to read and understand**
  - **Changes to reduce inconsistent, ambiguous, redundant, repetitive, or archaic words which helps to reduce the inconsistencies by using the same words to express the same meaning.**
- **FRBP 1007 Lists, Schedules, Statements, and Other Documents; Time Limits**
  - **Amended to make the rule inapplicable to debtors who are not required to complete an instructional course concerning personal financial management as a condition to discharge.**
  - **Amended to require an individual debtor who has completed an instructional course concerning personal financial management to file the certificate of course completion issued by the approved provider.**
  - **LONGSTANDING PRACTICE IN OUR DISTRICT TO ALLOW DEBTOR TO FILE CERTIFICATE OF FINANCIAL MANAGEMENT COURSE (FMC).**

Federal Rule Changes December 2024 (2)

- **FRBP 4004 Grant or Denial of Discharge**
  - **Replaces the requirement for submission of a statement showing that the debtor has completed a course on personal financial management with the requirement that the debtor provide the certificate of course completion issued by the approved provider of that course.**
- **FRBP 5009 Closing of Chapter 7, 12, and 15; Order Declaring Lien Satisfied**
  - **(Same as for FRBP 4004)**
- **FRBP 7001 Scope of Rules of Part VII**
  - **Debtor can now proceed by motion to require turnover of tangible personal property (e.g. automobiles or tools of the trade) and procedures under FRBP 9014 will apply.**

Federal Rule Changes December 2024 (3)

- **FRBP 8023.1 Substitution of Parties (NEW)**
  - **Derived from FRAP 43 and governs substitution of parties upon death or for any other reason in appeals to the district court or bankruptcy appellate panel from a judgment, order, or decree of a bankruptcy court.**
  - **The new rule specifies who may file an appeal:**
    - **After a Notice of Appeal is filed**
    - **Before a Notice of Appeal is filed – Potential Appellant**
    - **Before a Notice of Appeal is filed – Potential Appellee**
- **FRBP 9006 Computing and Extending Time**
  - **(Same as for FRBP 4004)**

Local Rule or Proceural Changes (Since September 2023)

- **Motion to Re-Negotiate Home Loan on Negative Notice List**
  - **Previously, loan modification motions went straight to Judge for order**
  - **Now, parties will have the opportunity to object.**
- **Highly Sensitive Document Administrative Order**
  - **The example order provided to courts in 2023 was updated to provide greater clarity on the procedures to take when Highly Sensitive Documents are to be filed with the Court.**

Middle District of Georgia Bankruptcy Law Institute GAMB Update

September 27, 2024

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 17, 2023

I. Introduction

The Advisory Committee on Bankruptcy Rules met in West Palm Beach, Florida, on March 30, 2023. Two Committee members were unable to attend; the rest of the Committee met in person. * * *

At the meeting, the Advisory Committee gave its final approval to rule and form amendments that were published for comment last August. They consist of (1) the restyled Bankruptcy Rules; (2) amendments to Rule 1007(b)(7) (Schedules, Statements, and Other Documents Required) and conforming amendments to six other rules; (3) an amendment to Rule 7001 (Types of Adversary Proceedings); (4) new Rule 8023.1 (Substitution of Parties); and * * *

* * * * *

Part II of this report presents those action items and is organized as follows:

A. Items for Final Approval
- The restyled Bankruptcy Rules;
- Rule 1007; conforming amendments to Rules 4004, 5009, 9006; and abrogation of Official Form 423;
- Rule 7001;
- Rule 8023.1; and
- Official Form 410A.

* * * * *

II. Action Items

A. Items for Final Approval

The Advisory Committee recommends that the Standing Committee approve the proposed rule and form amendments that were published for public comment in 2022 and are discussed below. Bankruptcy Appendix A includes the rules and the form that are in this group.

Action Item 1. The Restyled Bankruptcy Rules. This submission marks the culmination of the Advisory Committee's Restyling Project. Parts I and II of the restyled Federal Rules of Bankruptcy Procedure were given approval after publication by the Advisory Committee in March 2021 and by the Standing Committee in June 2021. Parts III–VI were given approval after publication by the Advisory Committee in March 2022 and by the Standing Committee in June 2022. Parts VII–IX were given final approval after publication by the Advisory Committee in March 2023 and are being presented for final approval by the Standing Committee at this meeting.

Since they were approved, Parts I–VI have been modified in minor respects for three reasons:

- there have been substantive amendments made to the existing Federal Rules of Bankruptcy Procedure that needed to be reflected in the restyled versions of those rules;

- the style consultants did a "top-to-bottom" review of all the rules and made additional stylistic and conforming changes; and

- in reviewing the proposed changes of the style consultants, the Restyling Subcommittee suggested its own additional corrections and minor changes, which the Advisory Committee approved.

A copy of Parts I–VI showing changes from the versions that were previously approved is included in the appendix to this report.

With respect to Parts VII–IX, extensive comments were submitted on the restyled rules from the National Bankruptcy Conference, and comments were also submitted by several others. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. Comments and changes since publication are noted on the restyled rules in the appendix to this report.

Action Item 2. Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 4004 (Granting or Denying a Discharge), 5009(b) (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), 9006 (Computing and Extending Time; Motions), and the Abrogation of Official Form 423 (Certification About a Financial Management Course).

Bankruptcy Code § 727(a)(11) provides, subject to limited exceptions, that a debtor will not receive a discharge if "after filing the petition, the debtor failed to complete an [approved] instructional course concerning personal financial management." This restriction applies to individual debtors in chapter 7, in certain chapter 11 cases (*see* § 1141(d)(3)), and in chapter 13 (*see* § 1328(g)(1)). The amendment to Rule 1007(b)(7) would eliminate the requirement that the debtor file a statement on Official Form 423 to certify satisfaction of this requirement. Instead, it would require the filing of the certificate of course completion provided by the approved course provider. The amendments would also eliminate the requirement that a debtor who has been excused from taking such a course file Official Form 423, indicating the court's waiver of the requirement. The form would be abrogated, and references in Rules 1007, 4004, 5009, and 9006 that refer to the "statement" described in current Rule 1007(b)(7) would be amended to refer to a "certificate."

There were no comments on the proposed amendments, and the Advisory Committee approved them as published.

Action Item 3. Rule 7001 (Types of Adversary Proceedings). In August 2022 the Standing Committee published a proposed amendment to Rule 7001 that would allow the turnover of certain estate property to be sought by motion rather than by adversary proceeding. The original suggestion for an amendment was prompted by Justice Sotomayor's concurring opinion in *City of Chicago v. Fulton*, 141 S. Ct. 585, 595 (2021), in which she wrote that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." The proposed amendment would add an exception to Rule 7001(a)'s general requirement that the recovery of money or property be sought by adversary proceeding. It would allow a debtor to proceed by motion to require the turnover of tangible personal property under § 542(a), thereby permitting a swifter resolution of the matter.

Only one comment on the proposed amendment was submitted in response to publication. Bonial & Associates, P.C., a creditor law firm, wrote that it supported the amendment because it "will streamline the turnover process and should create consistency nationally." The comment noted the inconsistencies in current turnover practices from one district to another and stated that

"[c]reditors would benefit from one national and consistent approach to turnovers across all jurisdictions."

The Advisory Committee approved the amendment to Rule 7001 as published.

Action Item 4. New Rule 8023.1 (Substitution of Parties). Rule 8023.1 deals with the substitution of parties in the appeal of a bankruptcy case to a district court or a bankruptcy appellate panel. Bankruptcy Rule 7025, Fed. R. Civ. P. 25, and Fed. R. App. P. 43 do not apply to such appeals, and the new rule is intended to fill that gap. It is modeled on Fed. R. App. P. 43.

No comments were submitted on the proposed new rule. The Advisory Committee approved it with changes suggested by the style consultants.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File[1]

* * * * *

(b) Schedules, Statements, and Other Documents.

* * * * *

(7) ***Personal Financial-Management Course.*** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition or the debtor is not required to complete one as a condition to discharge, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which

[1] The changes indicated are to the restyled version of Rules 1007, 4004, 5009, 7001, and 9006.

§ 1141(d)(3) applies—must file a certificate of course completion issued by the provider.

* * * * *

(c) Time to File.

* * * * *

(4) ***Financial-Management Course.*** Unless the court extends the time to file, an individual debtor must file the certificate required by (b)(7) as follows:

(A) in a Chapter 7 case, within 60 days after the first date set for the meeting of creditors under § 341; and

(B) in a Chapter 11 or Chapter 13 case, no later than the date the last payment is made under the plan or the date a motion for a discharge is filed under § 1141(d)(5)(B) or § 1328(b).

* * * * *

Rule 4004. Granting or Denying a Discharge

* * * * *

(c) Granting a Discharge.

(1) ***Chapter 7.*** In a Chapter 7 case, when the times to object to discharge and to file a motion to dismiss the case under Rule 1017(e) expire, the court must promptly grant the discharge—except under these circumstances:

* * * * *

(H) the debtor has not filed a certificate showing that a course on personal financial management has been completed—if such a certificate is required by Rule 1007(b)(7);

* * * * *

(4) ***Individual Chapter 11 or Chapter 13 Case.*** In a Chapter 11 case in which the debtor is an

individual—or in a Chapter 13 case—the court must not grant a discharge if the debtor has not filed a certificate required by Rule 1007(b)(7).

* * * * *

Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied

* * * * *

(b) Chapter 7 or 13—Notice of a Failure to File a Certificate of Completion for a Course on Personal Financial Management. This subdivision (b) applies if an individual debtor in a Chapter 7 or 13 case is required to file a certificate under Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a). The clerk must promptly notify the debtor that the case will be closed without entering a discharge if the certificate is not filed within the time prescribed by Rule 1007(c).

* * * * *

Rule 7001. Types of Adversary Proceedings

An adversary proceeding is governed by the rules in this Part VII. The following are adversary proceedings:

(a) a proceeding to recover money or property—except a proceeding to compel the debtor to deliver property to the trustee, a proceeding by an individual debtor to recover tangible personal property under § 542(a), or a proceeding under § 554(b), § 725, Rule 2017, or Rule 6002;

* * * * *

Rule 8023.1. Substitution of Parties

(a) Death of a Party.

(1) ***After a Notice of Appeal Is Filed.*** If a party dies after a notice of appeal has been filed or while a proceeding is pending on appeal in the district court or BAP, the decedent's personal representative may be substituted as a party on motion filed with that court's clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 8011. If the decedent has no representative, any party may suggest the death on the record, and the appellate court may then direct appropriate proceedings.

(2) ***Before a Notice of Appeal Is Filed—Potential Appellant.*** If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if there is no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with (1).

(3) ***Before a Notice of Appeal Is Filed—Potential Appellee.*** If a party against whom an appeal may be taken dies after entry of a judgment or order in the bankruptcy court, but before a notice of appeal is filed, an appellant may proceed as if the death had not

occurred. After the notice of appeal is filed, substitution must be in accordance with (1).

(b) Substitution for a Reason Other Than Death. If a party needs to be substituted for any reason other than death, the procedure prescribed in (a) applies.

(c) Public Officer: Identification; Substitution.

(1) ***Identification of a Party.*** A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the appellate court may require the public officer's name to be added.

(2) ***Automatic Substitution of an Officeholder.*** When a public officer who is a party to an appeal or other

proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. Subject to Rule 2012, the public officer's successor is automatically substituted as a party. Proceedings after the substitution are to be in the name of the substituted party, but any misnomer that does not affect the parties' substantial rights may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

Rule 9006. Computing and Extending Time; Motions

* * * * *

(b) Extending Time.

* * * * *

(3) ***Extensions Governed by Other Rules.*** The court may extend the time to:

* * * * *

(B) file the certificate required by Rule 1007(b)(7), and the schedules and statements in a small business case under § 1116(3)—but only as permitted by Rule 1007(c).

(c) Reducing Time.

* * * * *

(2) ***When Not Permitted.*** The court may not reduce the time to act under Rule 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2) or

(c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, or 9033(b). Also, the court may not reduce the time set by Rule 1007(c) to file the certificate required by Rule 1007(b)(7).

* * * * *

Subchapter V: Hot Topics and Updates

Honorable Paul W. Bonapfel
Judge Northern District of Georgia

Leon Jones, Jones & Walden, LLC

David Bury, Stone and Baxter, LLC

SUBCHAPTER V UPDATE

September 2024

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

References in these materials to the "SBRA Guide" are to Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (June 2022 rev. ed.), *available at*:

https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

This Update is a revision of an earlier Update

*** indicates the beginning of new material

indicates the end of the new material

SUBCHAPTER V UPDATE

TABLE OF CONTENTS

I. How Is Subchapter V Working? ABI Subchapter V Task Force Final Report

Available data indicates that subchapter V is working as intended to permit smaller businesses to reorganize successfully.

Based on an empirical study, Bankruptcy Judge (and former bankruptcy professor) Michelle Harner and her staff concluded:[1]

> Overall, subchapter V appears to be working as intended. Small businesses are using the subchapter with some regularity. The businesses also are, for the most part, confirming reorganization plans at a relatively high rate in a relatively short period of time. Although more data is needed to fully understand the impact of invoking the subchapter on both the short- and longer-term prospects of financially distressed small businesses, the initial results are promising. Small businesses appear now to have a restructuring tool that is both affordable and effective for addressing their financial needs.

The survey shows that confirmation occurred in more than half of all the cases and in over 62 percent of those that were not dismissed.[2]

The results are consistent with data compiled by the United States Trustee Program with regard to subchapter V cases, which shows confirmation in approximately 55 percent of the cases.[3] The report notes that, compared to non-subchapter V cases historically, subchapter V

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[1] Hon. Michelle Harner, Emily Lamasa, and Kimberly Goodwin, *Subchapter V Cases By The Numbers*, 40-Oct Am. Bankr. Inst. J. 12, 59 (October 2021). Emily Lamasa is a career law clerk, and Kimberly Goodwin is Judge Harner's paralegal.

[2] The dataset included 438 randomly selected cases filed between February 19, 2020, and December 31, 2020, with data collection ending on December 31, 2021. The cases were randomly selected based on a list of 1,278 cases (excluding duplicate cases) filed during the period, representing approximately 36 percent of the cases filed. The data set included at least one case in each Circuit. Hon. Michelle Harner, Emily Lamasa, and Kimberly Goodwin, *Subchapter V Cases By The Numbers*, 40-Oct Am. Bankr. Inst. J. 12 & nn. 6-8 (October 2021).

As of December 21, 2020, the court had confirmed a plan in 221 cases, the debtor had filed a plan that had not yet been confirmed in 105 cases, the debtor had not filed a plan in 30 cases, and the court had dismissed 82 cases. The debtor had not filed a plan at the time of dismissal in 55 of them. *Id.* at 12 n. 10. In the 30 cases with no plan, the court had converted 25 cases (24 to chapter 7, one to chapter 13) and extended the deadline for the filing of a plan in five. *Id.* at 12.

Consensual confirmation occurred in 130 cases, approximately 59 percent. When nonconsensual confirmation occurred in the other 91 cases, 40 had at least one class of impaired creditors voting against the plan and 51 had impaired classes that did not vote. *Id.* at 59. The average time from filing of the case to confirmation was 184 days, and the median time was 168 days. *Id.* at 59.

[3] United States Trustee Program, *Chapter 11 Subchapter V Statistical Summary Through September 30, 2023*, available at https://www.justice.gov/ust/page/file/1499276/download (last visited Sept. 10, 2024). The data includes only cases filed in United States Trustee Program districts, which thus excludes Alabama and North Carolina.

For subchapter V cases through August 31, 2024, the report shows that confirmation occurred in 52 percent of them and that confirmation was consensual in 69 percent of them. Conversion occurred in 12 percent of the cases, and 31 percent were dismissed. The remaining four percent were pending without a confirmed plan. It reports the median months to confirmation as 6.6 and the median months to dismissal as 4.7.

cases "have had approximately double the percentage of confirmed plans and half the percentage of dismissals, as well as a shorter time to confirmation or dismissal."[4]

Anecdotal evidence indicates that most lawyers and judges agree that subchapter V is working well.[5] As the court noted in *In re Corinthian Communications, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022), subchapter V has been "a remarkably successful addition to Chapter 11 of the Bankruptcy Code."

***

The American Bankruptcy Institute established a Task Force to evaluate subchapter V and recommend improvements. In April 2024, the Task Force issued its Final Report after a comprehensive review. A free copy is available at https://subvtaskforce.abi.org/.

###

II. Amendments to the Bankruptcy Rules With Regard to Subchapter V Cases

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") promulgated Interim Rules pending amendments to the Bankruptcy Rules, which take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require. See SBRA Guide at 5-6.

Effective December 1, 2022, the provisions of the Interim Rules were incorporated as amendments to the Federal Rules of Bankruptcy Procedure.

The following summarizes the changes:

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) but 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).

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[4] *Id.*

[5] The author has presented more than 30 continuing legal education programs on subchapter V since its enactment. Although some have expressed reservations or problems with subchapter V, most conclude that it is working as intended to expedite reorganization of smaller businesses that should be reorganized and to expedite dismissal or conversion of cases where reorganization is not feasible.

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 creditors.

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) – (e) renumbered as Rule 2015(c)—(f). 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.

Rules 3010(b) and 3011 – Rules relating to trustee's payments of small dividends and unclaimed funds extended to subchapter V cases.

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 that, under SBRA, a subchapter V case is not a "small business case.")

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) – 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.

III. Application of § 523(a) Exceptions to Discharge of Corporation After Cramdown Discharge

In a subchapter V case, consensual confirmation under § 1191(a) results in a discharge under § 1141(d)(1). A corporation's discharge under § 1141(d)(1) after consensual confirmation is not subject to the § 523(a) exceptions.[6] When confirmation occurs under the cramdown provisions of § 1191(b), however, § 1141(d) does not apply. § 1181(c). Instead, § 1192 governs the discharge.

Section 1192(2) provides that the discharge does not discharge any debt "of the kind" specified in § 523(a). Section 523(a) provides that a discharge under § 1192 does not discharge an *individual* debtor from the 21 categories of debt § 523(a) lists.

SBRA Guide § X(D)(2) discusses whether the § 523(a) exceptions apply to the discharge under § 1192 of an entity after cramdown confirmation under § 1191(b). It explains the decisions of bankruptcy courts that had concluded that the exceptions do not apply[7] and the

[6] Autotech Technologies, LP v. Palmer Drives Controls and Systems, Inc. (*In re* Palmer Drives Controls and Systems, Inc.), 657 B.R. 650 (Bankr. D. Col. 2024).

[7] Jennings v. Lapeer Aviation, Inc. (*In re* LaPeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021); Cantwell-Cleary Co. v. Cleary Packaging, LLC (In *re* Cleary Packaging, LLC), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc., Crabcake Factory USA (*In re* Satellite Restaurants, Inc., Crabcake Factory USA), 626 B.R. 871, 876 (Bankr. D. Md. 2021). Two bankruptcy courts have reached the opposite conclusion. *In re* Duntov Motor Co., LLC. Docket No. 21-40348-MXM-11, ECF No. 27 (Bankr. N.D.

Fourth Circuit's opinion in *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), that the exceptions are applicable.

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Five more bankruptcy courts[8] and the Bankruptcy Appellate Panel for the Ninth Circuit[9] have ruled that the § 523(a) exceptions do not apply to the discharge of an entity, rejecting the Fourth Circuit's interpretation. The Ninth Circuit dismissed the creditor's appeal from the BAP's decision at the request of the parties.[10]

The Fifth Circuit in *Avion Funding, L.L.C. v. GFS Industries, L.L.C. (In re GFS Industries, L.L.C.)*, 99 F.4th 223 (5th Cir. 2024). agreed with the Fourth Circuit's conclusion in *Cleary Packaging.* Two bankruptcy courts have also agreed with *Cleary Packaging's* textual analysis that the language of the statutes means that the § 523(a) exceptions apply to a corporate discharge after cramdown confirmation.[11]

Tex. Aug. 26, 2021); Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), 2020 WL 13881422 (Bankr. E.D. Tex. 2020) (denying motion to dismiss complaint to except debt from discharge). The court in *Duntov Motor Co.* later concluded that the creditor had not meet its burden of establishing nondischargeability. *In re* Duntov Motor Company, LLC, 2023 WL 8252914 at *29-31, n. 265 (Bankr. N.D. Tex. 2023). The court in *Tonka* later dismissed the complaint after confirmation of a consensual plan. Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), 2020 WL 13881425 (Bankr. E.D. Tex. 2020). Another bankruptcy court ruled that a judgment for patent infringement against a corporation in a subchapter V case was excepted from discharge under § 523(a)(6) as a willful and malicious injury without addressing whether § 523(a) exceptions apply to the discharge of a corporation or citing the applicable subchapter V discharge provision, 11 U.S.C. § 1192(2). Concrete Log Systems, Inc. v. Better Than Logs, Inc. (*In re* Better Than Logs, Inc.), 631 B.R. 670, 688–89 (Bankr. D. Mont. 2021).

In *Synergetic Oil Tools, Inc. v. Relevant Holdings LLC (In re Relevant Holdings, LLC),* 2023 U.S. DistLEXIS 53042 (D. Colo. 2023), the bankruptcy court had denied the creditor's motion to extend the time to object to the dischargeability of its debt on the ground that no exceptions to discharge existed. The District Court reversed and remanded for further consideration in light of the Fourth Circuit's decision in *Cleary Packaging.*

[8] Primary Investments Group, Inc., v. RA Custom Design, Inc. (*In* re RA Custom Design, Inc.), 2024 WL 607716 (Bankr. N.D. Ga. 2024); Chicago & Vicinity Laborers' District Pension Plan v. R & W Clark Construction, Inc. (*In re* R & W Clark Construction, Inc.), 656 B.R. 628 (Bankr. N.D. Ill. 2024); BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC). 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, Eleventh Circuit Case No. 23-90009 (July 19, 2023), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023); Nutrien Ag Solutions v. Hall (*In re* Hall), 651 B.R. 62 (Bankr. M.D. Fla. 2023); Avion Funding LLC v. GFS Industries, LLC (*In re* GFS Industries, LLC), 647 B.R. 337 (Bankr. W.D. Tex. 2022), *rev'd,* 99 F.4th 223 (5th Cir. 2024).

[9] Lafferty v. Off-Spec Solutions, LLC (*In re* Off-Spec Solutions, LLC), 647 B.R. 337 (B.A.P. 9th Cir. 2023), notice of appeal filed, Ninth Circuit Case No. 23-60034 (July 20, 2023), appeal dismissed on stipulation of the parties, 2023 WL 9291577 (Nov. 2. 2003).

[10] Lafferty v. Off-Spec Solutions, LLC (*In re* Off-Spec Solutions, LLC), 651 B.R. 862 (B.A.P. 9th Cir. 2023), notice of appeal filed, Ninth Circuit Case No. 23-60034 (July 20, 2023), appeal dismissed on stipulation of the parties, 2023 WL 9291577 (Nov. 2. 2003).

[11] Christopher Glass & Aluminum, Inc. v. Premier Glass Services, LLC (*In re* Premier Glass Services, LLC), 2024 WL 3808696 (Bankr. N.D. Ill. 2024); Ivanov v. Van's Aircraft, Inc. (*In re* Van's Aircraft, Inc.), 2024 WL 2947601 (Bankr. D. Ore. 2024).

The Eleventh Circuit[12] has accepted a direct appeal.

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In addition to the text of the two statutes, the debate involves analysis of the context of the statutes, chapter 11 policy, and legislative history. For a detailed discussion of the reasons that support each of the competing interpretations and why the interpretation of the bankruptcy courts is the better one, see Paul W. Bonapfel and Robert Schaaf, *Do § 523(a) Exceptions to Discharge Apply to The Discharge of a Corporation in a Subchapter V Case After "Cramdown" Confirmation Under § 1191(b)?* 32 NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE (No. 4 Dec. 2023). See also SBRA Guide § X(D)(2). *See also* 8 COLLIER ON BANKRUPTCY ¶ 1192.03[2] (16th ed.).

After the Fourth Circuit's ruling in *Cleary Packaging* that the discharge exceptions apply to the discharge of an entity after confirmation of a cramdown plan, the debtor amended its subchapter V election to remove it and to proceed in a traditional chapter 11 case. The withdrawal of the election effectively mooted the dischargeability action because exceptions to the discharge of an entity do not exist in a traditional chapter 11 case. The court considered confirmation of plans filed by the debtor and by the creditor in *In re Cleary Packaging, LLC*, 657 B.R. 780 (Bankr. D. Md. 2023).

The debtor's plan provided for payment of its projected disposable income to creditors for five years, which would have resulted in an estimated 27 percent dividend to unsecured creditors, including the judgment creditor. The plan proposed for the owner to retain the ownership interest and for the principal to contribute $ 25,000 in cash, to waive prepetition claims of $ 49,000 (some of which were entitled to priority), and to waive an administrative claim for a postpetition loan of $ 35,000.

The creditor also filed a plan. The creditor proposed to purchase the equity in the debtor for $ 250,000, to operate the business, and to fund additional payments to unsecured creditors (including its claim) for nine years. It also proposed to preserve and pursue avoidance actions that would not be pursued under the debtor's plan. The plan subordinated payment on the creditor's claim to the claims of other unsecured creditors. Unsecured creditors would receive a greater percentage of their claims under the creditor's plan.

The judgment creditor and three general unsecured creditors voted on each plan. The judgment creditor, whose claim was separately classified in the debtor's plan, rejected the debtor's plan. The other creditors accepted it. The judgment creditor accepted its plan, but the other three creditors rejected it.

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[12] BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC). 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, No. 23-90009 (11th Cir., July 19, 2023), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023).

The court denied confirmation of both plans. The court concluded that the contribution of the principal did not satisfy the "new value" exception to the absolute priority rule, which applied in view of the judgment creditor's rejection of the plan.

The court concluded that the creditor's plan did not meet the requirements of paragraphs (a)(5) (dealing with postconfirmation management of the debtor) and (a)(11) (feasibility) of § 1129(a). The court noted the testimony of three key employees of the debtor that they would not continue to work for the debtor under the creditor's management.

With regard to postconfirmation management, the court concluded that the plan contained "no definite structure proposed or any plausible strategy to address potential employee and customer retention issues and other operational challenges that a reorganized Debtor under the Creditor's Plan might encounter." *Id.* at *22. The court noted that the creditor's principal had testified about his hopes of what would happen to allow the debtor's business to continue under the creditor's plan, but the court found "no evidence of the details of that strategy or the likelihood of its success." *Id.* The court ruled, therefore, that the creditor had failed to meet its burden to establish feasibility under § 1129(a)(11).

In *Agra v. Dolci (In re Major Model Management Inc.),* 2023 WL 5338580 at *7 (Bankr. S.D.N.Y. 2023), *aff'd* 2024 WL 3442964 (S.D.N.Y. 2024), the court ruled that it need not consider the creditor's request for determination that its debt was excepted from discharge after confirmation of a cramdown plan because the creditor had not filed a timely proof of claim. Because the creditor had not filed a timely proof of claim, the court reasoned, it was barred from asserting any prepetition claim against the debtor and thus had no debt to be discharged. The ruling seems inconsistent with the principle that disallowance of a claim is a separate matter from dischargeability.[13]

IV. Postconfirmation Modification

Subsections (b) and (c) of § 1193 govern postconfirmation modifications to subchapter V plans. Section 1193(b) addresses postconfirmation modification after consensual confirmation, and § 1193(c) deals with modification after cramdown confirmation.

Under both subsections, only the debtor can modify the confirmed plan, and the debtor must demonstrate that the "circumstances warrant such modification." Both subsections also require that the plan as modified meet confirmation requirements of § 1191(a) or § 1191(b), as applicable.

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[13] *See, e.g.,* State of Florida Dept. of Revenue v. Diaz (*In re Diaz),* 647 F.3d 1073, 1090 (11th Cir. 2011); Grynberg v. United States (*In re* Grynberg), 986 F.2d 367, 370-71 (10th Cir. 1993).

The key difference between the subsections is one of timing. A consensual plan may only be modified before the plan is "substantially consummated,"[14] whereas a nonconsensual plan may be modified at any time during the three to five year period for the payment of projected disposable income.

In *In re Samurai Martial Sports*, 644 B.R. 667 (Bankr. S.D. Tex. 2022), the debtor sought to modify its plan after cramdown confirmation when its business suffered due to air conditioning problems—a significant problem for an athletic facility operating in the Texas summer—and after defaulting on a few payments. The modification proposed to pause payments for three months and cure the arrearage near the end of the plan. The primary creditor and the subchapter V trustee objected.

At the hearing on modification, it became apparent that the debtor's principal had intentionally withheld plan payments on the advice of a group of potential investors, who had urged debtor's principal not to make payments in order to trigger foreclosure and permit the investors to acquire the assets at a lower price.

The court denied the modification. The court focused on two aspects of the requirements for postconfirmation modification: (1) whether the circumstances warranted modification, as § 1193(c) requires; and (2) whether the plan as modified satisfied § 1191(b).

In the absence of case law addressing when circumstances would warrant modification under § 1193, the court looked to cases analyzing similar language in § 1127.

The court rejected the proposition, advanced by other courts, that a debtor's inability to pay, without more, was insufficient to warrant modification. Instead, it adopted a test that examined the *circumstances* surrounding that inability to pay.

Thus, the court concluded that modification is warranted when the debtor shows that the circumstances that gave rise to modification were unforeseen and rendered the confirmed plan unworkable. *Id.* at 681. The court noted that the inquiries regarding both foreseeability and workability are factual ones where, particularly for the foreseeability inquiry, the "debtor's good faith and business judgment are relevant." *Id.* at 681.

The court concluded that the failure of the air conditioning equipment was a circumstance that could warrant modification, rejecting the argument that the debtor knew or should have known that it would fail in the near future. *Id.* at 681-82.

But the court concluded that the debtor's intentional failure to make plan payments, rather than the air conditioning problems, was the cause of the need for modification. The derailing of the confirmed plan "could only be attributed to Debtor's deliberate and conscious

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[14] *See* 11 U.S.C. § 1101(2); SBRA Guide at 161-64.

decision to disregard this Court's order directing Debtor to make all payments under the Plan, and not [to] any unforeseen circumstance rendering the Plan unworkable." *Id.* at 683.

The court reached a similar conclusion regarding the debtor's failure to maintain an escrow fund for emergencies as the plan required. The failure to fund the reserve, the court said, was also the result of the debtor's "bad faith or poor business judgment," because its accounting records indicated that the debtor had been capable of making the requisite payments. *Id.* at 683.

Although the court ruled that the debtor's failure to demonstrate that circumstances warranted modification was sufficient to deny modification, the court also considered whether the debtor's proposed modification complied with the requirements of § 1191(b).

After examining the provisions of that section and the sections it incorporates by cross-reference, the court concluded that the plan as modified (1) would not have been feasible, as required by § 1129(a)(11), in view of the debtor's deficient performance; (2) had not been proposed in good faith, as required by § 1129(a)(3), for the reasons discussed above; and (3) did not satisfy §1129(a)(1) because it did not include an updated liquidation analysis or adequate projections.

V. Revocation of Subchapter V Election Without Debtor's Amendment of Election

When debtor misbehavior in a subchapter V case results in removal of the debtor from possession, the subchapter V trustee takes over the assets and management of the business, but only the debtor can file a plan in a subchapter V case.

Does the court have authority to address this issue through revocation of the debtor's subchapter V election so that the case proceeds as a traditional or small business case, in which the trustee has authority to file a plan and the debtor has no exclusive period within which to file a plan? § 1121(c)(1).

In *In re National Small Business Alliance*, 642 B.R. 345 (Bankr. D.D.C. 2022), the court revoked the debtor's subchapter V designation, "converting" the case to a standard chapter 11. The debtor operated a 700-strong membership network for small businesses, providing its dues-paying members with referrals and marketing support. It filed under subchapter V in early 2021.

Two very active creditors—one secured and one unsecured—had used the case as a battleground to litigate claims among themselves and the debtor, to the detriment of other stakeholders in the debtor, *id.* at 349-50, and the case had accordingly sprawled. In the course of the lengthy proceedings, the debtor had been removed from possession for cause under § 1185, the docket had ballooned to over 300 entries, and the debtor had proposed five plans, none of which had been timely filed or were confirmable. *Id.* at 347.

After considering conversion to chapter 7 and dismissal under § 1112, the court concluded that the interests of creditors and of the estate would best be served by permitting the

debtor to remain in chapter 11 but revoking the debtor's subchapter V designation so that the trustee or other parties could file a plan.[15]

Although nothing in the Code specifically permits the revocation of a subchapter V election, the court noted, courts permitted pre-SBRA chapter 11 debtors to amend their petitions pursuant to Bankruptcy Rule 1009 to take advantage of the newly effective subchapter V provisions. "[I]f a petition may be amended to elect to proceed under Subchapter V post-petition, logically it follows that the opposite must also be an option for debtors and courts." *Id.* at 348.

The court also reasoned that the Code permitted an eligible debtor to convert its case from one chapter to another, and that—although moving into or out of subchapter V is not properly a *conversion* between chapters—"chapter 11 and Subchapter V are materially different, much like the differences in chapters under the Bankruptcy Code[, and] the ability to revoke a Subchapter V election is consistent with the Bankruptcy Code." *Id.* at 348.

The court accordingly revoked the subchapter V designation and directed that the U.S. Trustee immediately appoint a chapter 11 trustee to manage the estate.

In *In re ComedyMX, LLC*, 647 B.R. 457 (Bankr. D. Del. 2022), the court addressed whether revocation of the debtor's subchapter V designation was permissible but did not decide the issue, deciding that the proper remedy was removal of the debtor from possession.

Alleging that current management was unfit to manage the debtors, a rival company and the U.S. Trustee filed motions to minimize the principal's impact on the debtor's business. They requested, alternatively, (1) the conversion of the case to a traditional chapter 11 case to permit the appointment of a chapter 11 trustee, as had occurred in *National Small Business Alliance*; (2) the § 1185 removal of the debtor as debtor-in-possession, which would permit the already-appointed subchapter V trustee to run the debtor's business under § 1183(b)(5); or (3) the dismissal of the case for cause under § 1112(b).

In considering the "close" question of whether a court could permissibly revoke the subchapter V designation over a debtor's objection, the court noted that the *National Small Business Alliance* result was the right one on policy grounds, *id.* at *4, and that the cases permitting debtors in pending cases to elect subchapter V after its enactment support that result.[16]

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[15] "If a debtor discovers post-petition that it is unable to meet the deadlines of Subchapter V, the option to revoke such designation provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter 11." *In re* National Small Business Alliance, 642 B.R. 345, 349 (Bankr. D.D.C. 2022)

[16] The court elaborated on the argument: "Indeed, the argument can be taken a step further. Because Rule 1009(a) states that a petition may be amended 'on a motion of a party in interest,' while Rule 1009(b) permits the statement of intention to be amended only by 'the debtor,' one might draw an inference that the Advisory Committee, at least, made an express determination to permit parties in interest other than just the debtor to move the Court to amend a bankruptcy petition." *In re* ComedyMX, LLC, 647 B.R. at 463

The court was concerned, however, that § 103(i) reserves the decision to proceed under subchapter V to the *debtor*. In the post-SBRA cases in which the courts permitted a debtor to amend its petition to proceed under subchapter V, the debtor had requested the amendment.

Because non-debtor parties in interest may not force a debtor into subchapter V over the debtor's objection, the *ComedyMX* court reasoned, "it cannot be argued that parties in interest have *carte blanche* to . . . move debtors in or out subchapter V as they see fit." *Id.* at *5. Further, the court noted, Rule 1020[17] implies that the debtor's subchapter V designation controls unless the court finds the debtor statutorily ineligible to proceed. *Id.* at *5.

The court did not decide the issue because it concluded that revocation of the election would be permissible only as a measure of last resort and that removal of the debtors from possession was the appropriate remedy. Because the case was in an early stage and the debtors had not yet proposed a plan, the court reasoned that they should have the chance to proceed under subchapter V, although under the control of the subchapter V trustee. *Id.* at *5.

VI. Projected Disposable Income Issues

A. Can court require debtor to pay PDI based on actual results?

An issue with regard to the projected disposable income requirement of § 1191(c)(2) is whether a debtor can be required to pay PDI based on actual, as opposed to projected results.

Section 1191(c)(2) states two alternative ways to satisfy the PDI test.

The first alternative, subparagraph (A), is familiar from chapter 13. It states that the PDI requirement is met if:

> The plan provides that all of the projected disposable income of the debtor to be received
>
> [during the three to five year period] will be applied to make payments under the plan.

The second alternative, subparagraph (B), provides for satisfaction of the PDI requirement by payment of the *value* of the PDI. It thus permits a "cash-out" of PDI in a lump sum, something that chapter 13 does not permit. But it has other implications, which later text discusses.

[17] "The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect." Bankruptcy Rule 1020(a).

The language in subparagraph (A) says: calculate PDI and pay it for the applicable period. In chapter 13 cases, under this same language, the plan proposes fixed payments (that sometimes "step up" over time), usually payable monthly, for the required time.

In chapter 13 cases, courts have ruled that the payments must be based on *projected* disposable income and that payments to creditors cannot be based on the debtor's actual income and expenditures. *Anderson v. Satterlee (In re Anderson),* 21 F.3d 355 (9th Cir.1994). We come up with a fixed amount, monthly in chapter 13 cases, and pay it for the required time.

When chapter 12 was enacted as a temporary measure in 1986, it used the same language as the chapter 13 PDI test (and subparagraph (A) in subchapter V cases), which had come into the Bankruptcy Code in 1984. But in chapter 12 cases, courts began requiring that the debtor show, at the end of the case and in connection with an application for a discharge, that the debtor had paid all disposable income during the plan period to creditors. The court would then determine whether the debtor had paid all disposable income retroactively, and a debtor would have to either pay that amount or the case would be dismissed. *E.g., Rowley v. Yarnall (In re Rowley),* 22 F.3d 190 (8th Cir. 1994).

The chapter 12 case law would support the proposition that PDI in a subchapter V case under paragraph (A) should be determined on an actual basis, not a projected one, and would pose the interesting issue of whether subchapter V PDI should be based on a chapter 13 approach – determination of PDI at confirmation on the basis of projected income and expenses – or a chapter 12 approach – determination of PDI at the end of the case as a discharge matter on the basis of actual disposable income.

This analysis, however, does not take paragraph (B) of § 1191(c)(2) into account.

Paragraph (B) has its origins in amendments to Chapter 12 in 2005 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. We mostly know about BAPCPA because of the changes it made in consumer bankruptcy, but it did at least two things for farmers.

First, it made chapter 12 permanent.

Second, it added an additional alternative for satisfaction of the chapter 12 PDI test. The language of the alternative is the same language that is in subparagraph (B) of the subchapter V test. At least one contemporary commentator stated that the purpose of the amendment was to eliminate the retroactive determination of PDI, which was a hardship for farmers. Susan A. Schneider, *Bankruptcy Reform and Family Farmers: Correcting the Disposable Income Problem,* 38 Tex. Tech. L. Rev. 309, 342-43 (2006).

If the language in the second chapter 12 alternative has the same meaning in subchapter V, then a subchapter V debtor can insist that PDI be determined at confirmation on a projected basis and that the statute does not permit a "true-up" during or at the end of the case.

Without consideration of any of the foregoing, two cases have ruled on the issue.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (B.A.P. 9th Cir. 2022), the debtor's plan proposed to pay creditors from two sources. One was $433,000 the debtor had realized from the liquidation of an estate asset. The other was its actual disposable income over five years. The debtor's projections were that it would have disposable income of $287,000 over three years and $493,000 over five, but the plan provided that creditors might receive less, based on actual earnings.[18]

The Ninth Circuit Bankruptcy Appellate Panel concluded that the plan's provision for payment of projected disposable income based on actual results did not meet the requirement of § 1191(c)(2)(A) that the plan provide for payment of *projected* disposable income because it did not commit the debtor to pay what it projected. *Orange County Bail Bonds* thus holds that a provision for payment of disposable income based on actual results is impermissible, even if the debtor proposes it.

The court concluded, however, that the plan's provision for the payment of the liquidation proceeds of $433,000 met the requirement of § 1191(c)(2)(B) that the debtor pay the *value* of its projected disposable income for the commitment period. The $433,000 payment exceeded the projected disposable income of $287,000 for three years, which the court held was the proper period in the absence of the bankruptcy court's fixing of a longer time.

In *In re Staples*, 2023 WL 119431 (M.D. Fla. 2023), the *pro se* debtor proposed to pay projected disposable income of $150 per quarter for five years. The bankruptcy court confirmed the plan but changed the payment provision to require the debtor to pay actual disposable income as reflected on quarterly reports, with a minimum quarterly payment of $150.00. *Id.* at *2.

On appeal, the district court stated that paragraph 2(A) of § 1191(c)(2) "simply requires that a plan provide that all projected disposable income be applied to make the distribution payments" and that paragraph 2(B) requires that "the value of property to be distributed is not less than the projected disposable income. *Id.* at *3.

The court then concluded that "requiring all the disposable income to be reported and distributed does not violate" these rules. *Id*. at *3. The court added that the bankruptcy court's requirements were within its authority under the All Writs Act[19] and § 105(a) because they "were clearly necessary and appropriate under the facts of this case." *Id.* at *4.

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[18] The facts are simplified. For a more detailed statement of the facts, amplified by reference to documents in the bankruptcy court's record, see SBRA Guide at 154-55 & n. 406.

[19] 28 U.S.C. § 1651(a) provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In *In re Packet Construction, LLC,* 2024 WL 1926345 (Bankr. W.D. Tex. 2024), the court conducted a thorough analysis of whether cramdown confirmation requires that a plan contain a "true up" provision for the debtor pay more if actual disposable income exceeds projections. The court ruled that it does not, *id.* at * 1:

> [S]ubchapter V does not include a requirement that debtors true up their plan payments if actual income exceeds projected income. There may be circumstances under which a court could determine that the failure to provide actual disposable income, rather than projected disposable income, was not fair and equitable to a non-accepting impaired class of unsecured creditors. But in general, the Court does not believe that a true-up requirement can be imposed on subchapter V debtors.

The *Packet Construction* court first looked to the language of the statute and concluded that the ordinary meaning of "projected" is "estimated or forecast on the basis of current trends or data." A true-up requirement, the court reasoned, would read the word "projected" out of the statute. A forward-looking approach, the court continued, was consistent with the approach of the Supreme Court in the chapter 13 context in *Hamilton v. Lanning,* 560 U.S. 505 (2010). 2024 WL 1926345 at * 3.

The court declined to follow *In re Staples,* 2023 WL 119431 (M.D. Fla. 2023), discussed above, noting that *Staples* did not purport to announce a general rule and that the authorities it cited did not support imposition of a true up requirement as a general rule. 2024 WL 1926345 at * 3.

The court then discussed the chapter 12 and chapter 13 case law regarding projected disposable income, observing that the chapter 13 cases overwhelmingly adopt a prospective interpretation but that some chapter 12 cases required a true up. 2024 WL 1926345 at * 4-7. The court explained that the approach of the chapter 12 cases had been criticized and that the amendment of chapter 12's PDI test indicated that it should not be followed. Moreover, the court noted, the chapter 12 result was contrary to the Supreme Court's ruling in *Hamilton v. Lanning* in analyzing a closely analogous statute. *Id.* at 5-6.

Finally, the *Packet Construction* court noted that the inability of anyone other than the debtor to modify a plan after confirmation indicated that, "unless the debtor so chooses, no other party can force [the debtor] to increase projected payments to meet the actual income." *Id.* at *7.

The court acknowledged that a debtor after cramdown confirmation can modify a plan to reduce payments, but concluded that "this result is not absurd." *Id.* at * 7. The court explained, *id.* (footnote omitted)*:*

> [D]etermining projected disposable income is not a fanciful exercise; it must be established based on objective evidence, and it sets out a demanding standard for many debtors to meet. Vigilant creditors can and should evaluate and, if necessary, challenge projections before plans are confirmed. But construed properly, this aspect of subchapter V also provides incentive for debtors to exceed projections, because they get to keep the surplus. Perhaps Congress structured the statute this way precisely to induce small

business growth and to provide yet another incentive for parties to bargain on consensual plans.

In any case, whether it is ideal policy is not for courts to say. Congress has spoken and, in this Court's view, it has done so clearly. The result is not absurd, and the Court has no hesitation enforcing it.

The court concluded with an observation about the possibility of requiring a true up in other circumstances, *id.* at *7-8 (footnotes omitted):

> [S]ubchapter V includes no general rule imposing a true-up requirement on debtors confirming cramdown plans. It does not necessarily rule out the possibility that circumstances could arise under which a court would have the power to impose a true up. After all, section 1191 states that the "fair and equitable" test "includes" the requirement of meeting one of the alternative "project disposable income" tests; because "includes" is expressly non-limiting in the Bankruptcy Code, other elements could be added to the test, as circumstances warrant, beyond those actually present in the statute.
>
> The Court is skeptical that circumstances exist in which it is appropriate to require a true up. It appears that Congress has spoken squarely on this issue, ordaining that it is future-looking projections and not subsequent realities that determine the income to be contributed to a plan. Courts should be very wary of altering this policy choice in a significant way by requiring the devotion of not just projected but also actual disposable income, as determined retrospectively, to the plan.
>
> But this question need not be determined here. No special circumstances have been alleged, and therefore no true up is warranted.

B. PDI in individual cases

SBRA Guide § VIII(B)(1) discusses determination of disposable income under § 1191(d) for purposes of the projected disposable income requirement in § 1191(c)(2) for cramdown confirmation under § 1191(b). *In re Cesaretti*,2023 WL 3676888 (Bankr. D. Nev. 2023), concludes that appropriate guidance for determining an individual's reasonable expenditures in a subchapter V case is in chapter 13 case law in cases prior to enactment of the "means test" by the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005 and in cases of below-median debtors after its enactment (in which the means test standards do not apply). The opinion reviews the case law.

To establish compliance with the PDI requirement for cramdown confirmation, an individual debtor must produce projections of all personal income and expenses, not just net income from the operation of the debtor's business. In *In re McBride,* 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), the court required the debtor to amend schedules I and J to separately show gross receipts, necessary business expenses and total monthly net income for the debtor's business, as Line 8a of Schedule I requires; to show the debtor's personal expenses; and to show

the nonfiling spouse's income if schedule J showed all of their household expenses. The court stated, "The decision to include or omit the non-filing spouse's income and any corresponding allocation of household expenses should reflect the economic realities of the household." *Id.* at 3.[20]

The debtor in *McBride* had personally guaranteed a debt secured by real estate owned by a limited liability company in which the debtor had a 90 percent interest and owned a camp jointly with the nonfiling spouse that was subject to a mortgage. The plan provided for payment of both debts in accordance with the applicable loan documents.

The court stated that, if the guaranty claim was secured only by property of the LLC, the claim was a general unsecured one that should not be classified separately from the claims of other unsecured creditors.

The court also questioned whether the debtor's proposal to pay the mortgage on the camp was "fair and equitable when general unsecured creditors are receiving so little on their claims." *Id.* at *7. The court continued, *id.*:

> The Court views a camp as a luxury rather than a necessary expenditure. If the Debtor must resort to the provision of § 1191(b) for confirmation of an amended plan, she should be prepared to explain why continued ownership of the camp does not weigh against a finding of fairness and equity.

The *McBride* court stated that failure to address issues regarding payments on a mortgage secured by property the debtor did not own and payments on the camp might result in a finding of bad faith under § 1129(a)(3). *Id.*

C. Projected disposable income and payments on secured claims

In *In re McBride*, 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), a partially secured creditor held a secured claim for $ 214,000 (the value of its collateral) and an unsecured deficiency claim for approximately $ 261,300. The debtor proposed to satisfy the secured claim with a promissory note in the principal amount of the value of the collateral, payable with interest at 8.5 percent over eight years in quarterly installments. Like other general unsecured creditors, the creditor would receive a pro rata share of $ 105,000 on its unsecured deficiency claim. The plan also provided for issuance of a note payable over eight years to satisfy the fully secured claim of approximately $ 200,300 held by another creditor.

The creditor voted its secured and unsecured deficiency claims to reject the plan and objected to confirmation. No other creditors voted. The court concluded that the plan was not

[20] For a discussion of inclusion of a nonfiling spouse's income and expenditures in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:70.

confirmable because the debtor's calculation of projected disposable income was faulty, as the previous section discusses.

The court also addressed two issues regarding the operation of the alternative method in subparagraph (B) of § 1191(c)(2) for satisfying the projected disposable income test for cramdown confirmation.

Subparagraph (A) of § 1191(c)(2) requires that the debtor commit projected disposable income for a period of three to five years, as the court determines, "to make payments under the plan." § 1191(c)(2)(A). In *McBride*, however, the debtor contended that the plan satisfied the alternative in paragraph (B), which provides that the value of property to be distributed in the applicable period is not less than the debtor's PDI. *See McBride*, 2023 WL 8446205 at *3.

The first issue was the debtor's deduction of plan payments from the business's profits before determining projected disposable income. The court concluded that the deduction was improper. *Id.* at *5. (Note that the issue does not matter when confirmation involves payment of PDI under subparagraph (A) because PDI may be applied to make payments on the secured claim.)

The court stated, *id.*:

> In comparing the value of property to be distributed under the Amended Plan to the Debtor's projected disposable income during the commitment period for the purposes of § 1191(c)(2)(B), it makes no sense to deduct from disposable income the payments made for the benefit of creditors under the terms of the Amended Plan.
>
> In a plan confirmed under § 1191(c)(2)(A), the Debtor would pay all of her disposable income for the benefit of all classes, including [the two secured creditors]. In a plan confirmed under § 1191(c)(2)(B), the Debtor distributes property, not her disposable income.
>
> Before confirming under this section, then, the Court must ensure that creditors are no worse off than they would be under a plan confirmed pursuant to § 1191(c)(2)(A). Therefore, in calculating the Debtor's disposable income for the purpose of comparing that value to the value of the property to be distributed, no payments paid for the benefit of creditors under the terms of the Amended Plan should be first deducted from projected disposable income. This approach is consistent with the wording of § 1191(d) which makes no mention of plan payments in listing the types of expenses to be deducted from a debtor's net income when determining disposable income. Since [the Debtor's PDI calculation] first deducts the plan payments before determining the Debtor's projected disposable income, the projections are inaccurate.

Second, the court addressed the competing interpretations of subparagraph (B) of § 1191(c)(2) that the debtor and the creditor advanced. The debtor contended that the distribution of the notes to the two secured creditors met the requirement because their present

value exceeded its projected disposable income. The creditor argued that subparagraph (B) requires that each impaired class receive property with a value equal to or greater than the debtor's PDI. *Id.* at *7. (As noted earlier, the *McBride* court, as stated in the preceding excerpt from its opinion, had concluded that the subparagraph (A) alternative provides for application of PDI for payment of claims in all classes.)

The court reasoned that a debtor could not commit all of its disposable income to more than one class and that "to require a debtor to distribute property equal to or greater in value than his or her disposable [income] to more than one class would be overly burdensome." *Id.* at *7. The only way the creditor's interpretation avoids an absurd result, the court continued, "is if a debtor only needs to satisfy the requirements of § 1191(c)(2) with respect to just one class of claims." *Id.*

The court posited an interpretation of § 1191(c)(1) as containing all the requirements for classes of secured claims such that § 1191(c)(2) applies to all other classes of claims or interests. In the case before it, therefore, the debtor would have to satisfy subparagraph (B) only with respect to the class of unsecured claims. *Id.* at 7.

The court identified two problems with this approach.

The first problem is that § 1191(c)(2) is not expressly limited to a specific class of claims. The court noted that, although the cramdown provision applicable in a traditional case, § 1129(b)(2), explicitly states different requirements for classes of secured claims, unsecured claims, and interests, the subchapter V requirements in paragraphs (2) (PDI) and (3) (feasibility) of § 1191(c) are not similarly limited. The feasibility test in paragraph (3), the court observed, "does not address the treatment of claims at all and is obviously generally applied to a plan, as a whole." *Id.* at *7. In the absence of limiting language in § 1191(c), the court reasoned, "the more reasonable interpretation is that § 1191(c)(2), like § 1191(c)(3), is more globally applicable to the entire structure of the plan." *Id.*

Second, the court pointed out that, because § 1191(c) does not specifically address classes of interests, an interpretation applying § 1191(c)(2) to all other classes except classes of secured claims would require it to include classes of interests. In the unlikely event that both a class of unsecured claims and a class of interests rejected a plan, the court reasoned, the posited interpretation would require the commitment of all disposable income, or the distribution of property of equivalent value, to more than one class. *Id.* at *8.

The *McBride* court adopted, therefore, a "more reasoned approach," *id.* at *8:

> For a plan to be fair and equitable under § 1191(c), classes of secured claims that are impaired and do not accept the plan must be treated in accordance with § 1129(b)(2)(A) [pursuant to § 1191(c)(1)] and, in addition, a debtor must either pay all of [the debtor's] disposable income into the plan, or distribute property equal in value to that disposable income. Finally, the plan must also provide adequate remedies unless the debtor can meet the more stringent feasibility analysis [in § 1191(c)(3)(A)].

The court acknowledged the possibility that, under its interpretation, a debtor by giving promissory notes with a present value equal to or greater than its projected disposable income could pay little to unsecured creditors while accruing disposable income. *Id.* at 8. The court noted its "explicit and implicit authority to implement further measures to ensure fairness and equity," *id.*, such as increasing the applicable commitment period to five years. In addition, the court continued, because § 1191(c) states that the fair and equitable requirement *includes* the specific requirements in paragraphs (1) through (3), "a court might require something more to satisfy that condition." *Id.*

The combined effect of the two rulings is that, although PDI does not include payments on a secured claim satisfied by the distribution of a note, payments on the secured claim are accounted for because the notes are taken into account in determining whether the property distributed under the plan (including the notes) has a value equal to or greater than PDI.

D. Salary or other payments to owners

In *In re J & J Pizza*, 2022 WL 4082059 (D.N.J. 2022), the bankruptcy court confirmed a plan over the objection of a creditor that the principal's salary should be reduced from $100,000 to $50,000. The district court affirmed, noting the subchapter V trustee had testified that the salary was reasonable. *Id.* at *4.

In *In re Twisted Oak Winery, LLC*, 2022 WL 5264708, at * 3 (Bankr. E.D. Cal. 2022), the debtor avoided an objection to the debtor's payment of rent to an insider, which appeared to be compensation to the owners of the business for operating it, by terminating the payments during the plan period.

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In *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga. 2024), a creditor objecting to cramdown confirmation challenged the debtor's projections on the ground that they included improper and excessive expenses. The debtor's revenues, however, were based on fees it received for providing management services, largely to affiliated companies, calculated as a percentage of the debtor's expenses. Because reduction of expenses would reduce the amount of the fees, the court concluded that whether the expenses were excessive did not matter.

E. Length of PDI period

SBRA Guide § VIII(B)(4)(ii) discusses the "fair and equitable" requirement for cramdown confirmation in § 1191(c)(2) that the debtor commit projected disposable income for three years "or such longer period not to exceed 5 years as the court may fix."

In *In re Trinity Family Practice & Urgent Care PLLC*, 2024 WL 2704056 (Bankr. W.D. Tex. 2024), the court ruled that a plan for payment of PDI for three years satisfied the good faith

requirement of § 1129(a)(3) but that the debtor had not established that the three-year PDI period was fair and equitable under § 1191(b) and (c)(2)(A). Because the court concluded that the evidence was insufficient for it to determine if it should fix a longer plan payment period up to five years, the court denied confirmation and allowed the debtor an opportunity to propose an amended plan. The opinion analyzes the court's role in considering the term of the plan and sets out the non-exclusive factors that guide a court in exercising its discretion to determine the term of the plan.

The debtor proposed to pay PDI for three years, resulting in a distribution to the unsecured class of $ 38,761.29, an 8.2% distribution. A partially secured creditor voted its secured and unsecured claims to reject the plan and objected to cramdown confirmation on the grounds that the three-year period was not proposed in good faith as § 1129(a)(3) requires and that the plan was not fair and equitable under § 1191(b) and (c).

Taking a "totality of the circumstances" approach to the question of good faith, the court concluded that the plan satisfied the factors the courts have considered in evaluating the good faith requirement of § 1129(a)(3): (1) whether the plan provides a result consistent with the Bankruptcy Code's objectives; (2) whether the proposed plan has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected; and (3) whether the debtor exhibited fundamental fairness in dealing with its creditors. 2024 WL at *10-12.

Specifically, the court ruled that the proposal of a three-year plan, as § 1191(c)(2) expressly permits, "does not constitute lack of good faith solely because the Debtor could pay more if the proposed period of plan payments were longer. The Debtor's proposal of a three-year plan payment period is not consistent with the type of misconduct, actions, and behavior often accompanying a finding of a bad faith plan proposal." *Id.* at * 11 (footnotes omitted).

The *Trinity Family Practice* court interpreted the "fair and equitable" requirement of § 1191(b) and the provision in § 1191(c)(2) for the court to fix the PDI period between three and five years as involving two inquiries when a plan provides for payment of PDI for three years. First, the court must determine whether the three-year plan is "fair and equitable." Second, the court must determine whether it should fix a longer period not to exceed five years.[21]

The court began by noting that the "fair and equitable" provision in § 1191(b) *includes* the requirement that it comply with § 1191(c). 2024 WL at *12. The court explained:, *id.*:

> After the court determines that the proposed plan is in compliance with the baseline requirements of § 1191(c), the court has the "discretion to require more as a condition of

[21] The *Trinity Family Practice* court did not expressly state that the inquiry includes two separate components. It did, however, explain that its task was to determine "whether a subchapter V plan that provides for payment of all of the Debtor's projected disposable income to creditors for a period of three years is fair and equitable under § 1191(b) and (c)(2), or if the Court should fix a longer payment period." 2024 WL 2704056 at * 9. Moreover, the court consistently noted that its determination involved both questions. *Id.* at *12, *17, *19, *20, *22. Separate identification of both components is helpful for analytical purposes.

> finding [that the] plan is fair and equitable."[22]. . . In other words, meeting the baseline requirements of § 1191(c) is a *necessary* condition for the subchapter V plan to be fair and equitable, but does not assure that the plan is fair and equitable.

The *Trinity Family Practice* court noted the ruling in *In re Urgent Care Physicians,* 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021),[23] that "a plan term of three years is more reasonable, generally speaking (or as a default) that a five-year term, absent unusual circumstances." *Trinity Family Practice,* 2024 WL 2704056 at * 14.

The *Trinity Family Practice* court agreed that the language of § 1191(c)(2)(A) creates a "baseline plan payment period" of three years but disagreed with *Urgent Care's* statement that a three-year period is generally more reasonable absent "unusual circumstances." 2024 WL 2704056 at *14. Requiring a part objecting to three years to show "unusual circumstances," the court reasoned, would "impermissibly shift the burden under § 1191(c)(2)(A) from the debtor to the creditor," contrary to the court's conclusion that the debtor has the burden of proof regarding confirmation of a plan. *Id.* at *14. Further, the court observed, *Urgent Care* did not consider what "unusual circumstances" might be or identify factors for a court to consider in deciding whether to approve a three-year payment period or, if necessary, fix a longer payment up to five years. *Id.*

The *Trinity Family Practice* court observed that § 1191(c)(2)(A) provides no guidance or standards on how the court should fix the plan payment period and that provisions for determining the period for plan payments in chapter 12 and 13 cases and in individual chapter 11 cases likewise provide no guidance because the court does not fix the time in such cases. 2024 WL 2704056 at * 15-16. The court concluded that "Congress intended to leave to the sound discretion of bankruptcy courts the sole authority to fix the plan payment period in subchapter V cases." 2024 WL 2704056 at * 15.

Based on this analysis, the court concluded that it had "broad discretion" in deciding whether the proposed three-year period was "fair and equitable" or whether it should fix a longer period not exceeding five years. 2024 WL 2704056 at * 17. The court then set out the confirmation process for dealing with the payment period issue and identified the non-exclusive factors that guide the court's determinations.

Because § 1189 provides that only the debtor may file a plan and because § 1191(c)(2)(A) establishes a baseline payment period of three years, the court reasoned, a bankruptcy court should give "appropriate deference" to the debtor's business judgment and proposed period of payments in a subchapter V plan. This is consistent, the court continued, with the intent of Congress to create a quick, efficient reorganization process that results in discharge as soon as possible. In addition, it acknowledges the shorter life span of the average small business while properly balancing competing interests of debtors and creditors. 2024 WL

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[22] The court quoted *In re Orange Cnty. Bail Bonds, Inc.*, 638 B.R. 137, 146 (B.A.P. 9th Cir. 2022), discussed in SBRA Guide § VIII(B)(4)(ii).

[23] SBRA Guide § VIII(B)(4)(ii) discusses the *Urgent Care* decision.

2704056 at *17. In the absence of an objection to a three-year period, therefore, the court would not likely raise the issue of a longer period *sua sponte*, although it has the discretion to do so.

If an objection is filed, however, the debtor's proposal is no longer entitled to deference, and the debtor bears the burden of showing that the proposed payment period is fair and equitable. 2024 WL 2704056 at *17.

At the conclusion of the hearing on whether the court should require a longer period, the court explained, it has these alternatives, 2024 WL 2704056 at *17:

1. Conclude that a three-year period is fair and equitable and confirm the plan;

2. Conclude that the three-year period is not fair and equitable and deny confirmation;

3. Fix a longer period up to five years and confirm the plan; or

4. Determine it has insufficient evidence to fix the payment period and deny confirmation.

The *Trinity Family Practice* court then identified five factors for a court to consider in determining whether a three-year payment period is fair and equitable and whether to fix a longer period, 2024 WL 2704056 at *18:

1. Capital reserves or capital expenditures during the period of plan payments;

2. Reasonableness of income and expenses set forth in the plan projections during the period of plan payments as compared to historical operations and operations during the post-petition, pre-confirmation time period;

3. Salary and/or other payments to insiders during the period of plan payments;

4. Risks and consequences of a longer period of plan payments; and

5. Any other unique or extraordinary facts specific to the case.

The court emphasized that the debtor has the burden to prove that each of the factors support the proposed payment period, that the factors are not exclusive, and that no factor alone is dispositive or controlling with regard to fixing the payment period under § 1191(c)(2)(A). *Id.*

The *Trinity Family Practice* court concluded that the debtor had presented insufficient evidence relating to the first four factors for it to make a determination that the three-year payment period was fair and equitable or to fix a longer plan payment. *Id.* at *18-22. Neither the debtor nor the creditor offered any argument or evidence of unique or extraordinary facts or circumstances. *Id.* at 22. Accordingly, the court denied confirmation without prejudice and allowed the debtor an opportunity to file an amended plan.

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VII. Injunction To Prevent Collection from Principal on Guaranty Pending Payments Under the Plan

In *In re Global Travel International, Inc.*, 2022 WL 4690426 (Bankr. M.D. Fla. 2022), the debtor filed a subchapter V case to deal with financial distress arising from embezzlement of about $1.2 million by an internal accountant and from the coronavirus pandemic that adversely affected the travel company's business.

At the time of filing, Qualpay, Inc., had filed an arbitration proceeding against the principal of the debtor on his alleged guaranty of the company's debt to Qualpay. The debtor sought and obtained a preliminary injunction against the pursuit of litigation against the principal pending development of a reorganization plan.

The debtor proposed a plan that, among other things, provided for payment of unsecured claims, including Qualpay, from quarterly payments of projected disposable income over three years and from proceeds from certain causes of action after payment or priority claims. The only two classes were equity interests and unsecured claims.

Other unsecured creditors holding allowed claims of $732,745.95 voted to accept the plan; Qualpay, with a disputed claim of $288,596.70 allowed for voting purposes only, was the only creditor to reject it. Because a majority of the creditors in the class holding 71.72 percent of the value of the voting claims accepted the plan, the class accepted the plan. § 1126(c).

The plan contained a "conditional temporal injunction" that protected the principal and a key employee from litigation by the debtor's creditors against them during the three-year payment period, provided that the debtor was performing under the plan. It tolled and abated statutes of limitation so that enjoined parties could pursue their claims if the plan did not result in full payment. The plan provided for the two beneficiaries of the injunction to contribute $25,000 to the plan, to limit their compensation to 10% of the excess of actual income over projected income, and to continue to provide their time, resources, and industry knowledge towards the successful completion of the plan for the benefit of creditors.

The debtor asserted that the proposed injunction was fair in view of the contributions of the individuals and limitations on their compensation and that, absent the injunction, protracted litigation would jeopardize the debtor's restructuring by depleting its assets, primarily the principal.

Qualpay objected to confirmation on the ground that the injunction was an impermissible third-party release of claims against a non-debtor in violation of § 524(e).

The court concluded that the plan did not contain a third-party release or permanent bar to the assertion of claims on the guaranty. Although the injunction was not a permanent bar

order, the court evaluated the requested injunction by evaluating the factors identified in *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002), with regard to a plan's bar order, in accordance with the Eleventh Circuit's decision in *In re Seaside Eng's & Surveying, Inc.,* 780 F.3d 1070, 1079 (11th Cir. 2015), *abrogated by Harrington v. Purdue Pharma L.P.*, 144 S.Ct. 2071 (2024). *Global Travel,* 2022 WL 17581986 at *3.

Thus, the court listed these factors, *id.*:

> 1. Whether an identity of interests exists between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> 2. Whether the non-debtor has contributed substantial assets to the reorganization;
>
> 3. Whether the injunction is essential to the reorganization, namely whether the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
>
> 4. Whether the impacted class has overwhelmingly accepted the plan;
>
> 5. Whether the plan provides a mechanism to pay for all, or substantially all, of the class members affected by the injunction;
>
> 6. Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full.

The *Global Travel* court noted, 2022 WL 4690426 at *3, that the list is nonexclusive and flexibly applied, *Seaside,* 780 F.3d at 1079, that bar orders must be essential to a successful reorganization and that the bankruptcy court must make specific factual findings to support entry of a bar order, with discretion to determine which *Dow Corning* factors are relevant in each case. *Id.* at 1078-79.

Addressing the factors, the court concluded that the facts merited the injunction.

First, with regard to identity of interests, the court noted that, although no indemnity obligation existed, the principal was the debtor's primary asset and that without him the business would suffer. The court credited his testimony that the arbitration was "massively consuming" and that he would have to be replaced at an annual cost of $100,000 to $150,000 while he defended the arbitration. The court concluded that "the proposed injunction is essential to the reorganization due to the identity of interests" between the debtor and the principal. 2022 WL 4690426 at *4.

Second, the court concluded that the cash contribution and the limitation on compensation was "substantial and sufficient consideration" for the temporary injunction. *Id.* at *4.

Third, the court concluded that the temporary injunction was essential to the reorganization. *Id.* at *4.

Fourth, the court concluded that the impacted class had overwhelmingly accepted the plan. The court rejected Qualpay's contention that it was receiving worse treatment than other creditors in the class because the plan forced it to give up rights to pursue the principal on a guaranty that other members of the class did not have. The court concluded that Qualpay was an unsecured creditor like all other members of the class based on its rights against the debtor. *Id.* at *5.

Fifth, the court concluded that the plan had a mechanism to pay Qualpay, which would receive payments in the same manner as other members of the class, and expressly preserved Qualpay's rights on the guaranty if it did not receive payment in full. *Id.* at *5.

Finally, the court concluded that the plan provided Qualpay with the opportunity to recover on its claim in full because it left Qualpay's rights intact by tolling and abating all statutes of limitations and deadlines during the three-year term. *Id.* at *5.

The court summarized its ruling, *id.* at *6, "In sum, the Court finds that the Plan does not contain a nonconsensual third-party release. Qualpay's Objection is overruled, and the Plan is confirmed."

See also In re Central Florida Civil, LLC, 649 B.R. 77 (Bankr. M.D. Fla. 2023). (Plan confirmed with injunction preventing pursuit of guaranty claims pending payments under plan).

In *Ferrandino & Son, Inc. v. Sahene Construction, LLC (In re Sahene Constructions, LLC)*, 2023 WL 3010073 (Bankr. M.D. La. 2023), the debtor was a subcontractor on a construction project and indemnified the general contractor for any damages arising from its failure to perform the work properly. The property owner made demand on the general contractor for damages caused by the debtor's abandonment of work on the project and instituted an arbitration proceeding against the general contractor.

The general contractor sought a preliminary Injunction to stay the arbitration on the theory that the owner's demand and prosecution of the arbitration were effectively actions against the debtor and property of the estate because the debtor was ultimately responsible for any arbitration award under its indemnity obligations to the general contractor.

The court denied the preliminary injunction, concluding that the general contractor was not likely to prevail on its claim because it had an adequate remedy at law, did not show irreparable injury, and did not establish harm to the estate.

For a discussion of third-party releases in the Subchapter V context, see *infra* Section XXI(12).

VIII. Role and Compensation of the Trustee in Subchapter V Cases

A. Role of subchapter V trustee generally

A principal duty of the subchapter V trustee is to "facilitate the development of a consensual plan of reorganization." § 1186(b)(7).

In *In re Corinthian Communications, Inc.,* 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022), the court observed:

> Subchapter V provides for the appointment by the United States Trustee of a non-operating trustee who provides oversight of the debtor in possession and helps facilitate negotiation of what will hopefully be a consensual plan of reorganization plan. *See* 11 U.S.C. § 1183. In this Court's experience, Subchapter V trustees are the "honest brokers," who through their efforts have provided credibility in evaluating the debtor's business prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor's stakeholders, thereby enabling a small business to reorganize.

The court in *In re New York Hand & Physical Therapy PLLC*., 2023 WL 2962204, at *1 (Bankr. S.D.N.Y. 2023), summarized the subchapter V trustee's role**:**

> Importantly, Subchapter V provides for the appointment of a trustee to assist the debtor in possession, provide oversight, and to help facilitate negotiation of a consensual plan of reorganization. 11 U.S.C. § 1183. The Subchapter V trustee appears at status conferences and provides the Court with valuable information on the progress of the case. *Id.* § 1183(b)(3). The Subchapter V trustee may be called on to perform the duties of the debtor in possession and operate the business. *Id.* § 1183(b)(5). Bankruptcy courts rely on the Subchapter V trustee to provide candid advice concerning a debtor's efforts to comply with its duties under the Code. *Id.* § 1183(b)(4); *In re Corinthian Commc'n, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022) ("Subchapter V Trustees are the 'honest brokers,' who through their efforts have provided credibility in evaluating the debtor's business prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor's stakeholders, thereby enabling a small business to reorganize."). The success of an individual Subchapter V case and of the bankruptcy courts in overseeing them depends in part on "the openness and transparency of the debtor with the Subchapter V Trustee, the U.S. Trustee, creditors, and with the Court." *Id.*

Several cases illustrate how subchapter V trustees have assisted the confirmation process or the administration of subchapter V cases.

In *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), an objector attacked the projections attached to the debtor's plan. The court noted that the subchapter V trustee "testified convincingly that he not only had a hand in preparing the

financial projections but has also reviewed them and concludes they show a viable path forward for Debtor."

The court continued, *id.* at 6:

> As the subchapter V trustee, his primary duty is to facilitate development of a consensual plan of reorganization. 11 U.S.C. § 1183(b)(7). The [subchapter V] Trustee's expertise as a financial advisor is integral to this process of attempting to bridge the gap between debtors in distress and creditors seeking repayment."

Although the court concluded that other issues required amendment of the plan for it to be confirmable, the court ruled that the debtor had meet its burden of establishing that the plan complied with the requirement of § 1190(1)(C) that the plan contain financial projections that demonstrated the debtor's ability to make payments under the plan.

The *Channel Clarity* court also considered and discussed the subchapter V trustee's views and proposals, stated at the hearing, concerning management of the debtor and encouraged the debtor to explore them with the trustee and other parties objecting to confirmation in response to the court's concerns about management. Section XV(B) i*nfra* discusses this aspect of the case.

In *In re Lapeer Aviation, Inc.*, 2022 WL 7204871 (Bankr. E.D. Mich. 2022), the court denied confirmation because the plan did not meet the "best interests of creditors test" of § 1129(a)(7) and because it unfairly discriminated against the holder of an equity interest. The court overruled objections, however, based on good faith and feasibility.

The good faith objection, in part, was that the debtors had not provided accurate financial disclosures in their monthly operating reports. The court agreed that initial reports were not entirely accurate and were incomplete. The court found no absence of good faith, however, stating, *id.* at *4:

> [T]he Debtors readily provided Debtors' complete financial records to the Subchapter V Trustee, . . . a seasoned financial consultant with decades of experience assisting troubled companies, [who] testified that the Debtors were cooperative and responsive in providing the source documents containing the financial information he needed to prepare his 13 week cash flow and the projections which form the basis of the Plan. The monthly operating reports played no role in [the trustee's] formulation of the Plan's financial projections and, in any event, those monthly operating reports have now been amended and corrected.

The court concluded that the debtors had not filed the inaccurate reports to mislead creditors or the court and that, while "certainly imperfect," they generally complied with the reporting requirements in § 308.

With regard to feasibility, the court found that the plan was feasible based in part on the subchapter V trustee's testimony that he had reviewed all of the necessary source financial information to "model a 13 week rolling cash flow inclusive of all income and expenses" and that his plan projections based on this cash flow forecast were realistic and achievable. *Id.* at *6.

The "best interests" problem was that the debtors had identified potential claims that the debtors *might* pursue for the benefit of creditors. The court concluded that the best interests test required pursuit of the claims and that the plan must include provisions requiring the debtors to pursue them or granting derivative standing to other interested parties if the debtors chose not to pursue them. *Id.* at 5.

The court did not mention it, but an alternative might be to provide for the subchapter V trustee to pursue the claims.

In re Corinthian Communications, Inc., 642 B.R. 224 (Bankr. S.D.N.Y. 2022), involved an apparently viable business that might reorganize. The debtor's management, however, had been accused of fraud with several conflicts of interest and had failed to provide information to, and otherwise cooperate with, the subchapter V trustee. The court found that the debtor's "grudging disclosure of information" was "completely unacceptable." *Id.* at 232.

Concerned that "the result of removing the debtor as debtor-in-possession could very well lead to the failure or collapse of the business," the court instead expanded the powers of the subchapter V trustee to include investigation of the debtor under § 1183(b)(2). *Id.* at 234. The court noted that further relief, such as removal of the debtor from possession, dismissal, or conversion might be required, based on the outcome of the investigation. *Id.* at 234.

Corinthian Communications illustrates two points. First, it is an example of how a debtor should *not* deal with the subchapter V trustee. Second, it is an example of how the presence of the subchapter V trustee provides an opportunity to salvage a viable business *if* the debtor follows the approach of the debtors in *Channel Clarity* and *Lapeer Aviation.*

One of the duties of a trustee under § 704(a) is to "examine proofs of claims and object to the allowance of any claim that is improper," if a purpose would be served. § 704(a)(5). A subchapter V trustee has this duty under § 1183(a). In *In re Mallett, Inc.,* 2024 WL 150628 (Bankr. S.D.N.Y. 2024), the court approved the subchapter V trustee's settlement of claims of affiliates of the debtor after confirmation of a plan over the objection of the debtor's largest unsecured creditor other than the affiliates. The trustee's duties and authority with regard to the review of proofs of claims were not issues in the case, but it illustrates the role that the trustee may play in resolving issues with the debtor's insiders and confirms that the trustee's authority to object to proofs of claim necessarily includes the authority to settle objections under Bankruptcy Rule 9019.

In *In re Major Model Management, Inc.,* 641 B.R. 302 (Bankr. S.D.N.Y. June 21, 2022), the court declined to permit the filing of a proof of claim on behalf of a class under Rule 23 of the Federal Rules of Civil Procedure. Noting that an independent trustee serves in subchapter V

cases to provide "oversight and guidance" to the court and the parties, the court agreed with the subchapter V trustee's views at the hearing that the most efficient way to deal with the claims of the putative class members was through the claims objection process.

In *In re Central Florida Civil, LLC,* 649 B.R. 77 (Bankr. M.D. Fla. 2023), the court confirmed a plan providing for an injunction that prevented pursuit of guaranty claims against the debtor's managers pending payments under plan. The court observed that the input of trustee in support of confirmation was "especially instructive." The trustee stated the plan could not go forward without an injunction to protect the debtor's managers.

The court in *In re Rosa Mosaic & Tile Company*, 643 B.R. 865 (Bankr. W.D. Ky. 2022), permitted the debtor to reject a collective bargaining agreement after an extensive factual analysis of the debtor's negotiations with the union to determine whether § 1113(c) permitted the rejection. The subchapter V trustee participated in the negotiations and testified at the hearing on the debtor's application for approval of the rejection.

The subchapter V trustee's involvement in a subchapter V case provided an "extra safeguard" with regard to patient issues that provided "additional comfort" to the court that the debtor's dental practice operations were being monitored such that the appointment of a patient care ombudsman under § 333 was not necessary. *In re Sameh H. Aknouk Dental Services, P.C.*, 648 B.R. 755, 766 (Bankr. S.D.N.Y. 2023).

A subchapter V trustee and a bankruptcy administrator have standing to appear and be heard in an adversary proceeding brought by a creditor to determine ownership of personal property. *Palmetto State Armory, LLC v. Ikon Weapons, LLC (In re Ikon Weapons)*, 650 B.R. 670, 677 n. 3 (Bankr. M.D. N.C. Nov. 30, 2022)**.** *See also* 7 COLLIER ON BANKRUPTCY ¶¶ 1109.04, 1112.04[1] n. 5 (16th ed.).

B. Authority of subchapter V trustee to exercise trustee powers

Section 1184 provides that "a debtor in possession shall have all the rights, other than the right to compensation under [§ 330], and powers . . . of a trustee serving in a case under [chapter 11], including operating the business of the debtor." Section 1186(b) provides that the debtor remains in possession of all property of the estate, unless the debtor is removed from possession or a confirmed plan or confirmation order provides otherwise.

A question is whether the subchapter V trustee has the authority to exercise the rights that a trustee has in a chapter 11 case. A chapter 11 trustee's rights include the rights to use, sell, or lease property of the estate under § 363(b) other than in the ordinary course of business, to obtain postpetition financing under § 364, and to pursue avoidance actions under §§ 545, 547, 548, 549.

The court in *In re Roe,* 2024 WL 206678 (Bankr. D. Ore. 2024), addressed the issue in the context of a subchapter V trustee's motion under § 363(b) to require the debtor to post a retainer for the trustee's fees and expenses. The court observed that § 1184 does not provide for

the subchapter V debtor in possession to have the rights and powers of a trustee exclusive of the subchapter V trustee and concluded, *id.* at *2:

> [A] subchapter V trustee may use the trustee's rights and powers under the Bankruptcy Code to the extent it is necessary for a subchapter V trustee to fulfill the statutory duties given to subchapter V trustees in section 1183. Such authority is concurrent with the debtor's authority to use those same trustee's rights and powers under the Bankruptcy Code to fulfill the debtor's duties as a debtor in possession, including those duties under section 1184.

The *Roe* court held that it could not grant the trustee's motion because the trustee had not served it on all parties in interest, as Bankruptcy Rule 2002(a)(2) requires for a motion to use property outside of the ordinary course of business. The court ruled, however, that it would require the debtor to establish a trust account for the benefit of all administrative claimants if, after service of the motion on all parties in interest, no one objected. *Id.* at *5.

The next section discusses the *Roe* court's reasoning in support of its decision.

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In *Singh v. Price (In re Turkey Leg Hut & Co., LLC),* 659 B.R. 539 (Bankr. S.D. Tex. 2024), the subchapter V trustee filed a complaint and motion for a temporary restraining order and preliminary injunction on behalf of the debtor in possession to restrain the spouse of the debtor's principal from interfering with the debtor.

The court dismissed the complaint and motion *sua sponte* for lack of standing, concluding that the subchapter V trustee had no statutory authority to bring an action on behalf of the debtor. The court ruled, *id.* at 544:

> None of the subchapter V trustee's general duties authorize the Subchapter V Trustee to pursue claims belonging to the estate, on behalf of the estate. Therefore, this Court finds, that the debtor in possession has exclusive standing to pursue causes of action pursuant to 11 U.S.C. § 1184.

C. Deposit for payment of compensation and payment of the subchapter V trustee

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."[24] The orders require the debtor to pay $ 1,000 as interim compensation to the subchapter V trustee within 30 days of the petition date and monthly thereafter. The amount is subject to adjustment

[24] *E.g., In re Nostalgia Family Medicine P.A.,* Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Bankr. M.D. Fla. Mar. 26, 2021).

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.

Other courts are requiring similar deposits.

The court considered a subchapter V trustee's request for the debtor to post a retainer for the subchapter V trustee in *In re Roe,* 2024 WL 206678 (Bankr. D. Ore. 2024), discussed in the preceding section.

The *Roe* court concluded that the trustee had shown a valid business judgment to require the debtor to set money aside "to establish a viable source of funds to pay an obligation that Debtor has incurred in [the] case" and that a deposit of $ 7,500 was reasonable given the fees that the trustee had incurred and was likely to incur. *Id.* at *3. The court ruled, however, that the funds should be available for the pro rata benefit of all administrative claimants, not just the trustee, reasoning that claims of equal priority under the Bankruptcy Code must be treated the same. The court stated, *id.* at *3 (footnote omitted):

> [The] funds should be placed in a trust account to be used to pay administrative expenses, and not in the form of a retainer in which only the Subchapter V trustee would have a property interest. Section 1194(a) authorizes subchapter V trustees to hold funds before plan confirmation. Funds may not be paid from the trust account unless and until payment to the Subchapter V Trustee and any other administrative expenses is authorized by the Bankruptcy Code and approved by the court.

D. Trustee's receipt and distribution of preconfirmation payments -- § 1194(a)

SBRA Guide § IV(C)(1) discusses the trustee's preconfirmation receipt and distribution of payments and funds the trustee receives from the debtor prior to confirmation. It states, *id.* at 61, "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 debtor to make preconfirmation payments to the trustee."

The court in *In re Roe,* 2024 WL 206678 (Bankr. D. Ore. 2024), discussed in the previous Section, however, found an appropriate situation to require the debtor to make payments to the trustee. As section VIII(C) of this Update discusses, the court concluded that it had authority to require the debtor to make a preconfirmation payment to the trustee to establish a trust account for the benefit of administrative claimants, including the trustee. The court stated, *id.* at *3:

> Section 1194(a) authorizes subchapter V trustees to hold funds before plan confirmation. Funds may not be paid from the trust account unless and until payment to the Subchapter V Trustee and any other administrative expenses is authorized by the Bankruptcy Code and approved by the court.

A potential problem with the use of § 1194 in this circumstance is that § 1194(a) requires the trustee to hold prepetition payments and funds until confirmation or denial of confirmation of a plan. A court might avoid this complication (which could prevent, for example, use of the funds for the trustee's interim compensation prior to a hearing on confirmation) by stating the terms for disbursement in the order requiring the trust account. As the *Roe* court held (see *supra* Section VIII(C)), § 363(b) may authorize the trustee to use funds of the debtor outside the ordinary course of business to establish a trust account that the trustee controls, without the necessity of invoking § 1194.

E. Payment of trustee's fees as condition of dismissal

When a court considers dismissal of a subchapter V case, the subchapter V trustee may request that the dismissal be conditioned on payment of the trustee's fees. SBRA Guide § IV(E)(2) discusses the issue.

The court in *In re New York Hand & Physical Therapy PLLC,* 2023 WL 2962204 (Bankr. S.D. N.Y. 2023), concluded that § 349(b) permits a structured dismissal and that payment of professional fees as a condition to dismissal is appropriate. The court required payment of the trustee's fees within 45 days, in the absence of which the case would be converted to chapter 7.

In *In re East Coast Diesel, LLC,* 2022 WL 19078763 (Bankr. M.D.N.C. 2022), the court declined to condition dismissal on payment of the trustee's fees and postpetition taxes. The court refused to permit a structured dismissal as proposed because the evidence did not establish that all postpetition wages had been paid and because disputes over the amount of the prepetition taxes existed. Because the parties had not demonstrated that payments would occur in accordance with the priority provisions of the Bankruptcy Code, the court dismissed the case without conditions.

The bankruptcy court in *In re Baby Blue of Junction, LLC,* 2024 WL 1241940 (E.D.N.Y. 2024), had conditioned dismissal of the debtor's subchapter V case on payment of the trustee's compensation over the objection of the landlord who had received no postpetition rent for 10 months and sought conversion of the case instead. The district court reversed, concluding that the bankruptcy court had not analyzed whether conversion or dismissal was in the best interests of creditors.

IX. Debtor Misbehavior in Subchapter V Cases: Conversion or Dismissal; Removal of Debtor From Possession; Expansion of Trustee's Duties

One problem arising in subchapter V cases is not unique to them: debtor misbehavior.

In a traditional chapter 11 case, § 1112(b)(2) permits dismissal or conversion to chapter 7 for "cause," defined in § 1112(b)(4). Section 1104(a) requires appointment of a trustee for cause or if appointment of a trustee is in the interests of "creditors, any equity security holders, and other interests of the estate."

Section 1112 applies in a subchapter V case, and § 1185(a) permits removal of the subchapter V debtor in possession for cause.

A common thread in subchapter V cases considering dismissal, conversion, or removal of the debtor from possession is inaccurate or incomplete disclosure of required information, failure to file proper operating reports, or both. Cases may also involve questionable transactions with, or transfers to, insiders and failure to disclose information about them or conflicts of interest arising from them. They often involve a noncooperative relationship with the subchapter V trustee that may border on hostility, failure to timely comply with court orders, and feasibility issues. Gross mismanagement of the estate or continuing losses may also be issues. *E.g.,* ******* *In re Lashley,* 2024 WL 4047196 (Bankr. W.D. Ky. 2024) (Case converted to chapter 7 for cause, including (1) debtor's untimely filing of operating reports that were deficient because they do not explain $57,920 in cash withdrawals and cash app transactions; (2) debtor's failure to file or confirm a plan within a reasonable period of time; (3) debtor's little prospect for reorganization; and (4) payment of accountant to prepare tax returns without court permission. Under the circumstances, conversion was in best interest of creditors to permit trustee to administer unencumbered assets.); *In re Coeptis Equity Fund, LLC,* 2022 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff,d* 2024 WL 1133578, 2024 WL 1133580, and 2024 WL 1155450 (9th Cir. 2024) (all unpublished); *In re Jar 259 Food Corp.*, 2023 WL 6201739 (E.D.N.Y. 2023); *In re United Safety and Alarms, Inc.,* 2024 WL 973674 (Bankr. S.D. Fla. 2024); *In re Exigent Landscaping, LLC,* 656 B.R. 757 (Bankr. E.D. Mich. 2024); *In re California Palms Addiction, Recovery Campus, Inc.,* 2023 WL 2664284 (N.D. Ohio 2023), *aff'd* 87 F.4th 734 (6th Cir. 2023); *In re Duling Sons, Inc*., 650 B.R. 578 (Bankr. D. S.D. 2023); *In re East Coast Diesel*, 2022 WL 19078763 (Bankr. M.D. N.C. 2022)**;** *In re No Rust Rebar, Inc*., 641 B.R. 412 (Bankr. S.D. Fla. 2022). *In re Hao,* 644 B.R. 339 (Bankr. E.D. Va. 2022); *In re Corinthian Communications, Inc.,* 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re KLMKH, Inc.,* 2022 WL 4281478 (Bankr. W.D.N.C. 2022).

A trustee in a traditional chapter 11 case has investigative duties under §§ 1106(a)(3), (4), and (7). Section 1183(b)(2), however, provides for the subchapter V trustee to perform such duties only if the court orders it. The same types of debtor misbehavior may give rise to entry of an order expanding the trustee's duties as an alternative to removal of the debtor from possession when reorganization may require debtor management. *In re Corinthian Communications, Inc.,* 642 B.R. 224 (Bankr. S.D.N.Y. 2022).

Courts have faced the question of whether to convert the case to chapter 7, dismiss it, or remove the debtor from possession when cause for any of them exists. For example, in *In re Duling Sons, Inc.*, 650 B.R. 578 (Bankr. D. S.D. 2023), the court concluded that cause for dismissal, conversion, or removal existed because of incurable conflicts of interest between the debtor and the debtor's principal who held all corporate positions of the debtor and the debtor arising from prepetition conduct of the principal.

Because the debtor intended to market and sell its assets to fund a liquidating plan, the *Duling Sons* court concluded that the best remedy was removal of the debtor in possession. Liquidation by the subchapter V trustee, the court reasoned, would be better than conversion to

chapter 7 because trustee fees would be lower, the subchapter V trustee was already familiar with the case, and the "natural learning curve" for a chapter 7 trustee would require duplicative work and delay distributions to creditors.

The *Duling Sons* court addressed the fact that a subchapter V trustee cannot file a plan, regardless of the removal of the debtor in possession, by directing the debtor and the subchapter V trustee to file a joint plan and that, if they did not do so within 90 days, the case would automatically convert to chapter 7.

In *In re M.A.R. Designs & Construction, Inc.*, 653 B.R. 843 (Bankr. S.D. Tex. 2023), however, the court concluded that cause for conversion or dismissal existed and that no unusual circumstances prevented conversion to chapter 7. The court rejected the debtor's arguments that confirmation of a plan providing for liquidation by the subchapter V trustee would be better for creditors than conversion. The subchapter V trustee's familiarity with the case, the court ruled, did not establish unusual circumstances because a trustee's professional familiarity with a case is common to all cases.

The court in *In re Exigent Landscaping, Inc.*, 656 B.R. 757 (Bankr. E.D. Mich. 2024), concluded that conversion to chapter 7 was in the best interests of the estate rather than a proposed plan for liquidation by the debtor in view of the fact that the debtor proposed to sell the business to the spouse of its principal and the existence of postpetition operating losses and substantially inaccurate and incomplete disclosures.

SBRA Guide § V(C) notes that the Supreme Court's ruling in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023 (2004), appears to preclude compensation of the debtor's attorney for services following removal of the subchapter V debtor from possession. The court in *In re NIR West Coast, Inc.*, 638 B.R. 441, 451-52 (Bankr. E.D. Cal. 2022), applied *Lamie* to deny compensation to the debtor's attorney for services following removal.[25]

In an unreported order entered without objection by the U.S. Trustee or any other party after notice and a hearing, the court in *In re ComedyMX, LLC*, Case No. 22-11181 (CTG), D.

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[25] When the best interests of the estate require that the debtor be represented after its removal from possession, one potential argument is that the fees of the debtor's counsel (or other professionals) are actual, necessary costs and expenses of preserving the estate under § 503(b)(1)(A).

A second theory could be that fees are appropriate under § 330 because, as prior counsel to the debtor, the professional is a professional person employed under § 327. *Lamie* is potentially distinguishable because the case involved services after conversion to chapter 7. The Court did not address the contention that the attorney was a professional employed under § 327, perhaps in light of the directive in § 348(e) that conversion terminates the service of the trustee (the debtor-in-possession) in the chapter 11 case.

A third approach arises from the fact that dispossession under § 1185(a) does not alter the debtor's exclusive right under § 1189(a) to file a plan. The argument is that, after dispossession, the debtor retains the limited obligation of a trustee to file a plan so that the dispossessed debtor can retain counsel under § 327(a) (entitled to compensation under § 330(a)) for services necessary to perform that function. The difficulty with this position is that the duty of a trustee to file a plan under § 1106(a)(5) is not applicable in a subchapter V case. See § 1181(a). The argument thus depends on the proposition that the duty to file a plan is a trustee duty that § 1189 vests in the debtor and that the debtor retains this trustee duty even after dispossession.

Del. (Apr. 25, 2023), permitted attorneys to seek compensation for services rendered after the dispossession of the debtor under § 1185(a). The court stated (footnotes in original):

> Such compensation may be appropriate on several potential bases. The fees may be awardable on the ground that they are actual, necessary costs and expenses of preserving the estate under § 503(b)(1)(A). Alternatively, it could be argued that an award is appropriate under § 330 on the ground that, as prior counsel to the debtor, the firm is a professional person employed under § 327.[26] A third potential basis for the relief is that it could be argued that the effect of § 1189 is to leave a debtor that has been dispossessed under § 1185(a) with certain limited obligations of a trustee, such that the dispossessed debtor remains entitled to retain counsel under § 327(a) (who may thus be compensated under § 330) to carry out that role.[27] Each of these potential bases is subject to counterarguments that are at least colorable. This Order does not adjudicate or resolve any such issue. Rather, in the circumstances of this case, no party objects to awarding [the debtor's attorneys] compensation from the estate for actual, necessary work performed for the benefit of the estate after the Dispossession Date. The Court accordingly grants this relief on that basis. *See In re Arsenal Intermediate Holdings*, LLC, No. 23-10097, D.I. 176 (Bankr. D. Del. March 27, 2023) (addressing the circumstances in which it may be appropriate, in an adversary system, for a court to grant relief on the ground that it is unopposed).

A court may remove a debtor from possession or expand the trustee's powers *sua sponte. In re Coeptis Equity Fund, LLC,* 2002 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff,d* 2024 WL 1133580 (9th Cir. 2024) (unpublished); *In re Corinthian Communications, Inc.,* 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re Ozcelbi,* 639 B.R. 365, 425 (Bankr. S.D. Tex. 2022).

An order removing the debtor from possession is not a final order for purposes of appeal. *In re Green v. Nosek* (*In re Green),* 2022 WL 16857106 (D. Minn. 2022).

X. Deadline for Filing Plan; Extension of Deadline; Modification After Denial of Confirmation

Section 1189(b) requires the debtor to file a plan within 90 days of the order for relief, but subchapter V contains no deadlines for a confirmation hearing or entry of a confirmation

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[26] *But see Lamie v. United States Trustee*, 540 U.S. 526 (2004) (holding that counsel for chapter 11 debtor could not be compensated under § 330 following conversion of case to chapter 7, but not considering or addressing the contention that such counsel remained "a professional person employed under section 327," perhaps in light of the directive of § 348(e), which is inapplicable here).

[27] 11 U.S.C. § 1106(a)(5) describes the filing of a plan under § 1121 as a duty of a trustee. While §§ 1106 and 1121 are inapplicable in a subchapter V case, *see* 11 U.S.C. § 1181(a), one might nevertheless contend that these provisions suggest that the filing of a plan – which under § 1189 is a right vested exclusively in the debtor – is a duty of a "trustee.

order. *See* SBRA Guide § VI(D). Section 1193(a) permits preconfirmation modification of a plan at any time.

Section 1189(b) permits the court to extend the deadline for filing the plan "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." SBRA Guide § VI(J) discusses the different approaches courts have taken to the determination of what constitutes "circumstances for which the debtor should not justly be held accountable."

Courts continue to differ in the proper standard for extending the time for the debtor to file a plan.

In *In re Trinity Legacy Consortium, LLC*, 656 B.R. 429 (Bankr. D.N.M. 2023), the debtor sought an extension of the plan deadline, which had previously been extended several times, because it was still engaged in mediation with creditors that showed promise of resulting in settlements that would permit the debtor to file a meaningful and confirmable plan.

The court noted that the disagreement among courts about the standard for granting an extension "centers around whether the court may only consider whether the delay was due to circumstances beyond the debtor's reasonable control or whether the court can take other things into account that relate to the subchapter V case, such as undue prejudice, lack of good faith, or whether the debtor has made progress in drafting a plan." 656 B.R. at 434.

The court examined three approaches to the issue in the case law. One view is that the debtor must establish that the circumstances are beyond the debtor's control.[28]

A second approach involves a four-factor test: "(1) whether the circumstances raised by Debtor were within his control, (2) whether Debtor has made progress in drafting a plan, (3) whether the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances, and (4) whether any party-in-interest has moved to dismiss or convert Debtor's case or otherwise objected to a deadline extension in any way."[29]

The court identified a third approach that involves an equitable inquiry into whether the debtor is "fairly responsible for his inability" to file a plan by the deadline.[30] The inquiry seeks to "strike the correct balance of [subchapter V's] goals of speed and access to a realistic reorganization scheme" and takes into account "whether the debtor manipulated the timing of his

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[28] *Trinity Legacy Consortium*, 656 B.R. at 435-36. The court cited *In re* Majestic Gardens Condo. C Ass'n, Inc., 637 B.R. 755, 756 (Bankr. S.D. Fla. 2022); *In re* Keffer, 628 B.R. 897, 910 (Bankr. S.D.W. Va. 2021); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 346 (Bankr. S.D. Fla. 2020).

[29] *Trinity Legacy Consortium*, 656 B.R. at 436, quoting *In re* Baker, 625 B.R. 27, 35 (Bankr. S.D. Tex. 2020).

[30] *Trinity Legacy Consortium*, 656 B.R. at 436-37, quoting *In re* Trepetin, 617 B.R. 841, 849 (Bankr. D. Md. 2020). The court also cited: *In re* HBL SNF, LLC, 635 B.R. 725, 730 (Bankr. S.D.N.Y. 2022) (considering prejudice to the parties); *In re* Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742, 746 (Bankr. M.D. Fla. 2020) (considering prejudice to creditors).

bankruptcy case, potential prejudice to creditors, and whether the debtor [is complying] with his obligations under the Code."[31]

The *Trinity Legacy Consortium* court concluded that the determination of whether the need for an extension under § 1189(b) is "attributable to circumstances for which the debtor should not justly be held accountable" allows an equitable inquiry "to take into account all relevant circumstances surrounding the debtor's need for an extension of time to file a plan and to balance the interests of the affected parties." 656 B.R. at 437 (footnotes omitted).

The court continued, 656 B.R. at 440.:

> In striking that balance under § 1189(b), the Court should be guided by the overarching goals of subchapter V to (i) provide a process by which debtors may reorganize and rehabilitate their financial affairs, (ii) provide a framework for an expeditious and economical resolution of the case under subchapter V, and (iii) facilitate the development of a consensual plan. In striking the proper balance, the Court should give due regard to the particularly important protection § 1189(b) affords creditors because subchapter V eliminates various creditor protections available to creditors in chapter 11 cases not governed by subchapter V.

The court then identified specific factors to consider, *id.* at 440-41:

> Circumstances surrounding the debtor's need for an extension of time to file a plan which should be taken into account include whether the need for the extension is within the debtor's reasonable control and may include such things as the danger of prejudice by granting or refusing to grant the extension, the length of the extension, the debtor's good faith, the debtor's progress in formulating a meaningful plan, and the views of creditors as a whole and the subchapter V trustee.

Applying this standard, the court granted the extension. The court found that the debtor was close to concluding its negotiations with creditors in the mediation and that the extension would not unduly prejudice creditors. *Id.* at 442-43.

In re Mateos, 2023 WL 4842301 (Bankr. M.D. Fl. 2023), involved similar circumstances. The married debtors who had personally guaranteed debts of a company in chapter 11 sought an extension of time based on the need to resolve matters in the company's chapter 11 case so that their plan could properly take account of that resolution. The court found that the ability to settle matters in the company's case was important to their cases and granted the extension.

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[31] *Trinity Legacy Consortium*, 656 B.R. at 437, discussing *In re* Trepetin, 617 B.R. 841, 848-49 (Bankr. D. Md. 2020). The *Trinity Legacy Consortium* court observed that *Trepetin* stated that it was following the "circumstances beyond the control of the debtor" test but that the test *Trepetin* actually applied was an equitable one. 656 B.R. at 437.

The court in *In re Signia, Ltd.*, 2024 WL 331967 (Bankr. D. Colo. 2024), after a review of the various approaches in the case law and extensive analysis and application of principles of statutory construction, adopted the "beyond-the debtor's control" approach.

The court began by stating that it had "little doubt" about the plain or ordinary meaning of the operative statutory language, "the debtor should not justly be held accountable." The court stated, *id.* at *8:

> It means simply that the debtor should not be responsible for external events that the debtor did not cause. And, the corollary is that the debtor is responsible for the debtor's own conduct. This corresponds exactly with the Beyond-the-Debtor's-Control Standard. Extensions may be warranted for external events beyond a debtor's control which make it impossible for a debtor to file a timely plan."

The court checked its interpretation by consulting dictionary definitions of the two key statutory words, "justly" and "accountable." Definitions of "accountable," the court noted, included "expected or required to account for one's actions: answerable" and "liable to be called to account, or to answer for responsibilities and conduct: answerable, responsible." *Id.* at *9. The best meaning of "justly" in the context of the statute, the court said, is "in conformity with fact or reason: correctly, properly." *Id.* The court concluded that a reasonable reader would understand the words to have these meanings such that the statutory language "does mean that the debtor should not be responsible for external events that the debtor did not cause but is accountable for the debtor's own conduct." *Id.*

The *Signia* court then observed that, "[w]hile considering the constituent parts of the clause at issue – 'accountable' and 'justly' – might have some relevance, merely stringing the words together is not enough and could lead in the wrong direction." *Id.* at *9. The court explained that "the entire clause ('the debtor should not justly be held accountable') must be considered as a single unit in the special context of the Bankruptcy Code." *Id.* The court noted that, in the legal field, "terms of art" develop and that ordinary legal meaning may be different from common meaning. Specifically, the court referred to Justice Frankfurter's statement on statutory interpretation, *id.* at *9:[32]

> [I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

The *Signia* court concluded that, in addition to having plain or ordinary meaning, the clause also has "specialized meaning and 'old soil,'" the "old soil" being § 1221 in chapter 12, which permits an extension of the debtor's deadline for filing a plan with the same language as the subchapter V statute.

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[32] The Court quoted Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 73 (Thomson West 2012) and Felix Frankfurter, *Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 537 (1947).

The court extensively reviewed the legislative history of § 1221 and the case law interpreting that section, concluding that § 1221 permits an extension only if the inability to file a plan is due to circumstances beyond the debtor's control. *Id.* at *10-11. Accordingly, the court explained, *id.* at *12:

> When Congress copied the exact same language used in Section 1221 into Section 1189(b), it must be presumed that Congress meant for the same Beyond-the-Debtor's-Control Standard to apply given that that had been the law for decades. The Supreme Court has repeatedly invoked this "longstanding interpretive principle": "[w]hen a statutory term [or phrase] is 'obviously transplanted from another legal source,' it brings the old soil with it."[33]

The *Signia* court summarized its holding, *id.* at *11:

> So, the meaning of Section 1189(b) already has been settled in the context of Section 1221. The Court reaffirms that the Beyond-the-Debtor's-Control Standard (derived from Section 1221) is the right standard for evaluating requests for extension under Section 1189(b).

The court denied the motion to extend the deadline because the only basis for the extension was an unresolved dispute concerning financing. This circumstance, the court concluded, was not beyond the debtor's control because it could have filed its financing motion earlier, asked for an expedited hearing, reached some agreement with the objecting party, or drafted around the issue in a plan with differing provisions depending on whether the debtor prevailed. *Id.* at 12.

The *Signia* court observed that in its district debtors and their counsel were manipulating the § 1189(b) deadline by filing "bogus placeholder plans of reorganization on the ninetieth day" that were "obviously deficient (many containing blanks, inadequate information, and missing financials) [with] no chance of confirmation." *Id.* at 1. The court criticized the practice because the plans "seem to be filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement while obviously skirting the import of the statute." *Id.*

The court in *In re United Safety and Alarms, Inc.,* 2024 WL 973674 (Bankr. S.D. Fla. 2024), concluded that the filing of a plan that promised the liquidation analysis and financial projections that § 1190(1) requires on or before 21 days before the confirmation hearing did not meet the requirement of § 1189(b) for filing a plan within 90 days. Accordingly, the failure to timely file a plan constituted cause for dismissal or conversion under § 1112(b)(4)(J). The court converted the case to chapter 7, concluding that cause for dismissal also existed under § 1112(b)(4)(F) for failure to file timely reports.

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[33] *Quoting Taggart v. Lorenzen,* 587 U.S. 554, 560, 139 S.Ct. 1795, 1801 (2019) (construing bankruptcy statutes pertaining to injunctions), and *citing Hall v. Hall,* 584 U.S. 59, 73, 139 S.Ct.. 1118, 1128 (2018).

The debtor in *In re S-Tek 1, LLC*, 2023 WL 2529729 (Bankr. D. N.M. 2023), timely filed its original plan, followed by second and third plans that the court considered to be preconfirmation modifications of the original plan. After denial of confirmation of the third plan, the debtor filed a fourth plan.

The court ruled that, after denial of confirmation, no plan existed that the debtor could modify and that the fourth plan was not timely. *Id.* at *5. The court noted that chapter 12 cases had permitted modification after denial of confirmation. *Id.* at *5, n. 36 (citing *Novak v. DeRosa*, 934 F.2d 401, 403-04 (2d Cir. 1991) (providing that a chapter 12 plan may still be modified after denial of confirmation); *In re Mortellite*, 2018 WL 388966, at *1 n.3 (Bankr. D.N.J. Jan. 11, 2018) (same)).

The *S-Tek* court declined to give the debtor more time to file a plan based on the circumstances of the case, including the facts that the case had been pending for two years, was essentially a two-party dispute, and had involved contentious and expensive litigation. *Id.* at *8-9.

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The court in *In re Waterville Redevelopment Co. IV, LLC*, 2024 WL 3658765 (Bankr. D. Me. 2024), stated that it was persuaded by the *Signia* court's "beyond the debtor's control standard" but that the debtor had not met the requirements of any other standard.

The court had extended the deadline for filing for 45 days due to the need of the debtor to replace its attorney, whose employment had not been approved. On the date of the extended deadline, the debtor requested a further extension, which it asserted was preferable to filing a "placeholder plan." The debtor asserted that it needed more time to secure refinancing because of concerns the potential lender had expressed about a pending motion to dismiss.

The court denied the request for an extension, *id.* at *6:

> [At the hearing on the request for an extension], counsel to the Debtor plainly implied that no "*confirmable*" plan could be filed yet but did not shore up that insinuation with any specifics. He mentioned foregoing the option of filing a "placeholder plan" but did not explain what he meant by the term—that is, what the plan might be lacking. If one concern was that the plan's feasibility could not be shown due to lenders' wait-and-see approach, given the motion to dismiss, the confirmation process could have been paused accordingly, if needed. If the Debtor's projected confidence in its ability to obtain financing upon surviving a motion to dismiss corresponds to reality, then any wait-and-see approach should not have prevented the Debtor from timely filing a plan.
>
> As noted, subchapter V obligates debtors to pursue their plans expeditiously. If they cannot meet that obligation, they must show that the failure is due to circumstances beyond their control and that those circumstances warrant providing more time.

Otherwise, they cannot be permitted to continue to benefit from the advantages of subchapter V.

In a footnote, the court added, *id.* at *6, n. 9:

> To be clear, the Court is not suggesting in this decision that debtors should perfunctorily file plans. The Court strongly discourages debtors from "filing bogus placeholder plans of reorganization ... [that] are obviously deficient ([e.g.,]... containing blanks, inadequate information, and missing financials) and have no chance of confirmation ... [but rather are] filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement ....." *In re Signia*, 2024 WL 331967, at *1. The Court is, however, emphasizing the importance of supporting any motion for an extension of time under section 1189(b) with sufficient facts and, when necessary, evidence to meet the standard set forth therein.

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XI. What is "Unfair Discrimination" That Precludes Cramdown Confirmation?

One of the requirements for cramdown confirmation in both traditional (§ 1129(b)) and subchapter V (§ 1191(b)) cases is that the plan must not "discriminate unfairly."

The court in *In re Lapeer Aviation, Inc.*, 2022 WL 7204871, at *8-9 (Bankr. E.D. Mich. 2022), addressed the requirement in connection with the plan's treatment of equity interests. The plan provided that one holder would retain his equity interest but that the other would be required to accept $15,000 for his.

The court adopted the so-called "Markell test," articulated in an article by Hon. Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L. J. 227 (1998), and adopted by the bankruptcy court in *In re Dow Corning Corp.*, 244 B.R. 705, 710 (Bankr. E.D. Mich. 1999), *aff'd,* 255 B.R. 445 (E.D. Mich. 2000), *aff'd,* 280 F.3d 648 (6th Cir. 2002). *See also In re Mallinckrodt, PLC*, 639 B.R. 837, 898-99 (Bankr. D. Del. 2022) (applying the Markell test).

The court summarized the test as creating a "rebuttable presumption that a plan is unfairly discriminatory" when three conditions exist. *Lapeer Aviation* at *8. The first two are the presence of a dissenting class and of another class with the same priority.

The third condition is that the difference in the plan's treatment of the two classes result in either "(a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with the proposed distribution." *Id.* at *8.

The first two requirements were met because the plan put the two equity interests with the same priority in separate classes and one of them rejected the plan.

The third requirement was met because the cash-out provision had the potential to result in a materially lower recovery for the dissenting holder than the other would receive through retention of his interest in the reorganized debtor. *Id.* at *9. The court rejected the proposition that the discrimination was not unfair because of the dissenting holder's opposition to reorganization efforts, noting that he had no management or control rights. *Id.* at *9.

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The court in *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga. 2024), concluded that the combination of a small distribution to unsecured creditors and the same pro rata treatment of claims of affiliates did not establish unfair discrimination.

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XII. The "Appropriate Remedies" Requirement for Cramdown Confirmation, § 1191(c)(3)(B)(ii)

The Bankruptcy Threshold Adjustments and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022), amended § 1191(c)(3) to provide that, as a condition for cramdown confirmation, the plan must provide "appropriate remedies" to protect creditors only if the court concludes that there is a reasonable likelihood that the debtor will make plan payments. Prior to the amendment, the remedies requirement arguably also applied if the court found that the debtor would be able to make all payments under the plan. The amendment applies to cases filed before its enactment. *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602, at *15 n. 12 (Bankr. N.D. Ill. 2022).

The plan in *Channel Clarity Holdings* provided that a creditor could "pursue its remedies as are available to it pursuant to applicable law" if plan payments were not made. *Id.* at 16. The court concluded that it was "clear that the language proposed by Debtor is deficient." *Id.* at 16. The court explained, *id.* at 16*:*

> [I]t offers no specific protections for unsecured creditors who are forced to forgo some of the standard protections of a typical chapter 11 case when debtors elect to proceed under subchapter V. To assert that creditors can pursue remedies under applicable law if Debtor should default is a toothless remedy.

Noting that the debtor's limited assets would likely be depleted by the time of a default and that a "race to the courthouse" would be "contrary to the spirit and intent of the bankruptcy policy of orderly distribution of limited assets," the court suggested, *id.* at 16:

> Under these circumstances where the objecting unsecured creditor bears a disproportionate amount of risk, Debtor could offer options such as expedited liquidation of nonexempt assets, or a truncated process for declaring a default and allowing

> collections to begin, or immediate conversion to allow a chapter 7 trustee to take over business operations and possibly conduct a winddown and liquidation.

In *In re McBride*, 2023 WL 8446205 (D. Maine 2023), the court observed that a provision in a plan for the court to retain jurisdiction to address postconfirmation issues did not provide an adequate remedy. The court noted that a remedy is insufficient "if it is not tailored to the specific circumstances of the plan" and that "providing creditors with the opportunity to pursue their state law rights or to seek enforcement of a plan is insufficient." 2023 WL 8446205 at * 6.

In contrast, other courts have concluded that the availability of relief in the bankruptcy court to enforce the plan or seek relief available under federal or applicable state law is an adequate remedy. *In re Samurai Martial Sports, Inc.,* 644 B.R. 667, 691 (Bankr. S.D. Tex. 2022) (A provision in a plan permitting a creditor, upon the debtor's failure to cure a default after 30 days' notice, to proceed to collect "all amounts owed pursuant to state law without further recourse to the Bankruptcy Court" is a "marginally sufficient" remedy.); *In re Ellingsworth Residential Cmty. Ass'n, Inc.,* 2021 WL 6122645, at *2 (Bankr. M.D. Fla. 2020); *In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985, at * 11 (Bankr. E.D. Wis. 2021).

Hamilton v. Curiel (In re Curiel), 651 B.R. 548 (B.A.P. 9th Cir. 2023), *appeal dismissed,* 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023), did not directly involve the issue of appropriate remedies. Rather, the Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's cramdown confirmation of the debtor's plan over the objection of a secured creditor because the BAP concluded that the evidence did not establish feasibility under § 1129(a)(1). Nevertheless, the court's remand to the bankruptcy court is relevant to the adequate remedies issue for two reasons.

First, the court in remanding for further proceedings regarding feasibility specifically directed the bankruptcy court to determine whether the objecting secured creditor could invoke the subchapter V feasibility requirement for cramdown confirmation in § 1191(c)(3). *Id.* at 552. The same issue arises with regard to a secured creditor's objection to cramdown confirmation based on the adequate remedies requirement in § 1191(c)(3).

Second, the court commented on the question of whether the remedies in the plan were adequate, although that issue was not before it. The court stated, *id.* at 562, n. 11:

> [The debtor's] Plan provided that in the event of a default [the creditor] could serve a notice of default and give [the debtor] at least sixty days to cure the default. If the default was material, the creditor "may: (i) take any action permitted under bankruptcy or non-bankruptcy law to enforce the terms of the Plan; (ii) seek liquidation of nonexempt assets pursuant to § 1191(c)(3)(B); (iii) seek to remove the Debtor as a DIP; and/or (iv) move to dismiss this case or to convert this case to Chapter 7 pursuant to § 1112(b)." We note the dearth of cases discussing what are, or are not, appropriate remedies under § 1191(c)(3)(B)(ii). But we agree with the bankruptcy court's observation in *In re Channel Clarity Holdings LLC*, 2022 WL 3710602 at *16 [(Bankr. N.D. Ill. 2022], that

> merely allowing creditors to "pursue remedies under applicable law if Debtor should default is a toothless remedy." The requirement under § 1191(c)(3)(B)(ii) that the remedies provided be "appropriate" suggests that they should be tailored to the situation. [The debtor] could bolster the default remedies to provide for a prompt auction of the Properties, a stipulated foreclosure, or an automatic deed in lieu of foreclosure. The prospect of an immediate, certain, and inexpensive remedy would increase [the debtor's] incentive to obtain funding for the balloon payment and decrease the prejudice to [the creditor] if she is not successful.

Does the Bankruptcy Appellate Panel's discussion of remedies for the secured creditor indicate that the Panel thinks the § 1191(c)(3) requirements should govern cramdown confirmation of a secured claim?

In re McBride, 2023 WL 8446205 (Bankr. D. Maine 2023), supports the proposition that a secured creditor may invoke § 1191(c)(3) in opposition to cramdown confirmation of a plan that it has rejected. The court noted (in connection with its discussion of the projected disposable income requirement of § 1191(c)(2)(B), discussed in Section VI(C)) that § 1191(c)(3) "does not address the treatment of claims at all and is obviously generally applied to a plan, as a whole" and that § 1191(c)(3) is "globally applicable to the entire structure of the plan." *Id.* at *7.

The opposite view is that a secured creditor does not have the right to invoke § 1191(c)(3) in opposition to cramdown confirmation of its claim:

> Because section 1191(b) states that the plan must be "fair and equitable" with regard to the class that has not accepted the plan, and because section 1191(c)(1) states specifically that the plan must meet the requirements of section 1129(b)(2)(A) "with respect to a class of secured claims, one argument is that a secured creditor may not invoke the other fair and equitable requirements in paragraphs (2) and (3) of section 1191(c).

8 COLLIER ON BANKRUPTCY ¶ 1191.04[1] at 1191-16.

The issue may be more theoretical than real because the fair and equitable requirement of § 1129(b)(2)(A) applicable to cramdown of secured claims includes consideration of feasibility. 8 COLLIER ON BANKRUPTCY ¶ 1191.04[1] at 1191-16; *see also* 7 COLLIER ON BANKRUPTCY ¶¶ 1129.03[4]b][ii]; 1129.04[2][a][v].

XIII. Plan Provisions Inconsistent With Statutory Provisions

Section 1193(b) does not permit modification of a plan after consensual confirmation under § 1191(a) once "substantial consummation" has occurred. In *In re North Richland Hills Alamo, LLC*, 2022 WL 2975121 (Bankr. N.D. Tex. 2022), all impaired classes accepted the plan, *id.* at *9, and the debtor received a discharge upon the plan's effective date because the plan was confirmed under § 1191(a), *id.* at 15. Nevertheless, the confirmation order permitted postconfirmation modification at any time within the "Commitment Period," *id.* at 15.

If cramdown confirmation occurs under § 1191(b): (1) property of the estate includes postpetition assets and earnings, § 1186(a); and (2) the subchapter V trustee remains in place until completion of PDI payments. In *In re ActiTech, L.P.*, 2022 WL 6271936 (Bankr. N.D. Tex. 2022), the court confirmed the plan under § 1191(b) because all impaired classes did not accept it. *Id.* at *3. Nevertheless, the confirmation order provided for (1) the revesting of property in the reorganized debtor, *id.* at *9; and (2) termination of the trustee's services as of the effective date of the plan, *id.* at *14, which under the plan occurred upon entry of a final confirmation order, certain governmental and material third-party approvals, execution of required documents, and approval of settlements. *Id.* at *22, 42-43.

See also *In re Bronson,* 2022 WL 3637566, at *2 (Bankr. D. Or. 2022) (In resolving postconfirmation issues, the court noted that the plan confirmed under § 1191(b) had revested all property "except property required to perform obligations under the Plan" in the reorganized debtor.).

XIV. Confirmation Requirements of § 1129(a) Applicable for Confirmation in Subchapter V Cases

A. Compliance with provisions of Bankruptcy Code (§ 1129(a)(2))

In *In re Cesaretti,* 2023 WL 3676888 (Bankr. D. Nev. 2023), the debtor had paid prepetition credit card and tax debts without court approval. The court concluded that the unauthorized postpetition payment of prepetition debt violated § 363 and that the violation of this provision of the Bankruptcy Code precluded confirmation under § 1129(a)(2). The court also concluded that the plan was not confirmable for several other reasons. The court did not address whether the payments, made from postpetition earnings, did not violate § 363 because an individual's postpetition earnings are not property of the estate. *See* SBRA Guide § XI(B)(2).

B. Postconfirmation management (§ 1129(a)(5))

The confirmation requirement in § 1129(a)(5) requires the plan to disclose the identities of directors and officers and that their appointment to, or continuance in, office is "consistent with the interests of creditors and equity security holders and with public policy."

This requirement rarely receives much attention in confirmation disputes, but it was an issue in *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602, at * 11-12 (Bankr. N.D. Ill. 2022).

The court noted concerns about the lack of a "defined management structure" for the debtor that involved someone other than the principal, who was also the majority shareholder. The debtor's management structure lacked someone "who can hold him accountable" in view of the principal's conduct in securing preferred member majority status, his conflicts of interest as the principal of affiliates doing business with the debtor, a number of high-level vacancies, and the fact that the debtor might not have anyone in charge of accounting functions.

The court noted that the subchapter V trustee had made proposals for management that involved appointment of a plan administrator with authority ranging from full control over all debtor bank accounts and sole signing authority to no signing authority but responsibility for making disbursements. *Id.* at *12.

The court concluded that the debtor continuing its operation with only the principal in charge was inconsistent with the interests of creditors and equity security holders and public policy, stating, *id.* at *12:

> No evidence was presented at the hearing as to the propriety or legality of one proposal over another. The Court encourages Debtor to explore them all with the Objecting Parties and the SBRA Trustee in hopes of identifying an acceptable solution to allay the Court's legitimate concerns about Debtor putting all its eggs in [the principal's] basket at a time when he will be dealing with other pressing obligations. But to be clear, to satisfy section 1129(a)(5), any amended plan will need to specifically address Debtor's management structure, including but not limited to [the principal's] potentially conflicting roles and the provision of accounting services and financial controls.

C. Best interest of creditors test (§ 1129(a)(7))

The court in *In re Boteilho Hawaii Enterprises, Inc.*, 2023 WL 7117223 (Bankr. D. Haw. 2023), considered whether the debtor's subchapter V plan satisfied the "best interest of creditors" test of § 1129(a)(7), which requires that the plan provide for creditors who have not accepted it to receive not less than they would receive if the debtor were liquidated under chapter 7.

The court concluded that the debtor's plan met the test because a hypothetical liquidation of the debtor's assets by a trustee in a chapter 7 case would produce less than what the plan provided for creditors. In its analysis, the court took into account the facts and circumstances that exist when a chapter 7 trustee liquidates assets.

In its discussion of the hypothetical chapter 7 liquidation of the debtor, the court noted that a trustee must liquidate assets "as expeditiously as is compatible with the best interests of parties in interest" under § 704(a)(1) and that, therefore, the trustee must "always dispose of the property quickly (although not necessarily at 'fire sale' prices.)" *Id.* at * 2. The court rejected the valuations proposed by the objecting creditors based on its assessment of what the trustee's disposition of the assets would likely realize and concluded that the trustee's liquidation would not produce any funds for distribution to unsecured creditors after satisfaction of secured, administrative, and priority claims, including a postpetition loan made by the debtor's principal. Accordingly, the court concluded that the plan that provided for no payments to unsecured creditors complied with § 1129(a)(7). The court in a separate order concluded that the plan met all other requirements for cramdown confirmation under § 1191(b). *In re Boteilho Hawaii Enterprises, Inc.*, 2023 WL 7411176 (Bankr. D. Haw. 2023).

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A creditor objecting to cramdown confirmation in *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga. 2024), asserted that the plan did not comply with the best interest of creditors test because of the existence of accounts receivable owed by affiliates of the debtor that the debtor had valued at zero. Based on its review of the financial conditions of the affiliates, the court concluded that the receivables had no realizable value.

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D. Acceptance by all impaired classes (§ 1129(a)(8))

SBRA Guide § VIII(D)(2) discusses the issue of whether a class is deemed to accept a plan when no members of the class vote or object to confirmation.

Following *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267-68 (10th Cir. 1988), the court in *In re Jaramillo*, 2022 WL 4389292 (Bankr. D.N.M. 2022), ruled that a class is deemed to accept a plan when no one votes or objects. The court noted, however, that affirmative acceptance is required for compliance with § 1129(a)(10), which requires that at least one impaired class of creditors accept the plan if any class of claims is impaired. Section 1129(a)(10) applies in the case of consensual confirmation in a subchapter V case under § 1191(a), but not to cramdown confirmation under § 1191(b). (Section 1129(a)(10) is somewhat superfluous for consensual confirmation because, by definition, all impaired classes have accepted the plan.)

The court in *In re Creason*, 2023 WL 2190623 (Bankr. W.D. Mich. 2023), concluded that *Ruti-Sweetwater* was wrongly decided and ruled that a class that had not voted had not accepted the plan. The court, therefore, confirmed the plan under the cramdown provision in § 1191(b). ******* Two other courts have concluded that a plan cannot be confirmed as a consensual plan under § 1191(a), but may be confirmed as a cramdown plan under § 1191(b), when an impaired class of creditors does not accept the plan. *In re Florist Atlanta, Inc.*, 2024 WL 3714512 (Bankr. N.D. Ga. 2024); *In re M.V.J. Auto World, Inc.*, 661 B.R. 186 (Bankr. S.D. Fla. 2024). ###

In *In re Vega Cruz*, 2022 WL 2309798 (Bankr. D. P.R. 2022), the court had confirmed a consensual plan but had deferred entry of a discharge order because the court wanted briefing regarding whether the cancellation of junior liens under the plan would occur upon discharge. The court concluded that the individual was entitled to discharge upon confirmation and to an order discharging and cancelling the junior liens. It appears that the junior lienholders had not objected to confirmation, but it is not clear whether they had affirmatively accepted the plan. The court did not address the issue of whether their acceptance would be required for consensual confirmation.

Two courts outside the Tenth Circuit have concluded that classes that do not vote are not counted for purposes of determining whether § 1129(a)(8) is satisfied. *In re Hot'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S. D. Tex. 2023); *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023). The courts reasoned that section 1126(c) requires determination of acceptance by dividing the number of acceptances by the total votes in the class. When no

creditor in an impaired class has voted, the computation requires division of zero by zero, which produces an indeterminate result that is absurd and could not have been intended by Congress.

Thus, the court in *Hotz Power Wash*, 655 B.R. at 188, concluded:

> This Court concludes, similar to the court in *In re Franco's Paving LLC*, that the result of a § 1126(c) computation for a nonvoting class is absurd, unsolvable, and was not contemplated by Congress. Furthermore, as discussed *supra*, treating a nonvoting class as having implicitly accepted or rejected the plan is prohibited by the Code and applicable rules. Thus, since the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied.

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Two courts have rejected this approach. *In re Florist Atlanta, Inc.*, 2024 WL 3714512 (Bankr. N.D. Ga. 2024); *In re M.V.J. Auto World, Inc.*, 661 B.R. 186 (Bankr. S.D. Fla. 2024). In *M.V.J. Auto World*, the court concluded that the reasoning is "strained at best." The court explained, 661 B.R. at 189-90:

> The analysis in this case is quite simple. In order to be consensually confirmed under section 1191(a), the Plan must satisfy section 1129(a)(8). Section 1129(a)(8) requires that each impaired class accept the plan. Section 1126(c) provides that acceptance is calculated based on how many holders of allowed claims in the class have voted to accept the plan, not, as was required pre-Bankruptcy Code, based on the number of allowed claims. It is not absurd that no creditors in a class voting on a plan should be treated any differently than a situation where there is not a sufficient number of creditors voting in favor of a plan to satisfy section 1129(a)(8). Moreover, section 1129(a)(8) does not compel acceptance or rejection; section 1129(a)(8) looks to whether a class has accepted a plan, not whether a class has rejected a plan or stood silent.

###

E. Whether balloting is required

SBRA Guide § VIII(A)(4) considers whether balloting on a plan is necessary if the debtor wants to bypass the solicitation of acceptances and seek cramdown confirmation under § 1191(b).

In the course of dealing with the debtor's proposal that creditors who did not "opt out" of the plan's provisions for third-party releases would be bound by them, the court in *In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), addressed the need for balloting in the case, where the debtor intended to pursue cramdown confirmation without soliciting any acceptances. The court stated, *id.* at *2:

> The typical practice in this Court has been for creditors' consent (or not) to a third-party release to be determined in connection with the vote on the plan. In subchapter V cases, however, § 1191(b) of the Bankruptcy Code eliminates § 1129(a)(10)'s requirement of an impaired accepting class. As a result, so long as the plan is nondiscriminatory and satisfies absolute priority, there is no requirement that creditor votes be solicited in a case under subchapter V.

Another court took a different approach in *In re Samurai Martial Sports, Inc.,* 644 B.R. 667, 690-91 (Bankr. S.D. Tex. 2002). The court noted that the two subsections of § 1129(a) which impose the balloting duty—§ 1129(a)(8) and (a)(10) — do not apply in a cramdown situation. The court reasoned, however, that a good-faith effort to solicit ballots is still necessary on the debtor's part because, absent balloting, the court cannot determine whether the plan should be confirmed under § 1191(a) or (b).

F. Feasibility (§ 1129(a)(11))

SBRA Guide § VIII(B)(5) discusses feasibility issues under § 1191(c)(3), applicable in connection with cramdown confirmation under § 1191(b).

In *Hamilton v. Curiel (In re Curiel),* 651 B.R. 548 (B.A.P. 9th Cir. 2023), *appeal dismissed,* 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023), the court considered feasibility in a subchapter V case under § 1129(a)(11). The bankruptcy court had confirmed the debtor's plan over the objection of a secured creditor that the plan was not feasible. Concluding that the debtor had not established feasibility under the requirement of § 1129(a)(11), the court remanded for further proceedings.

In the course of its opinion, the court summarized the feasibility standard as follows, *id.* at 562-63:

> It is [the debtor's] burden, as the Plan proponent, to present concrete evidence to establish that she has sufficient cash flow to maintain her ongoing personal expenses while funding all Plan payments. *See In re Pizza of Haw., Inc.,* 761 F.2d 1374, 1382 [(9th Cir. 1985)]; 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2023). And while feasibility under § 1129(a) presents a relatively low threshold, it still depends on adequate evidence. *Legal Serv. Bureau, Inc. v. Orange Cnty. Bail Bonds, Inc., (In re Orange Cnty. Bail Bonds, Inc.),* 638 B.R. 137, 148 (9th Cir. BAP 2022) (citing *In re Brotby,* 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003)). To this end, "[f]actual support must be shown for the Debtor's projections." *In re Hobble-Diamond Cattle Co.*, 89 B.R. 856, 858 (Bankr. D. Mont. 1988). "The use of the word 'likely' in Section 1129(a)(11) requires the Court to assess whether the plan offers a reasonable 'probability of success, rather than a mere possibility.' " *In re Sanam Conyers Lodging, LLC,* 619 B.R. 784, 789 (Bankr. N.D. Ga. 2020) (quoting *In re Aspen Vill. at Lost Mountain Memory Care, LLC,* 609 B.R. 536, 543 (Bankr. N.D. Ga. 2019)). Thus, "[t]he mere fact that the bare numbers in the income and expense projections provided in the plan demonstrate an apparent surplus to adequately fund the plan is not

enough to meet the burden on feasibility." *In re Kowalzyk*, 2006 WL 3032145, at *5 (Bankr. D. Minn. 2006).

The court concluded that the debtor had not met her burden, *id.* at 565-66:

> We agree with the bankruptcy court that if one were to accept [the debtor's] projected income and expenses, feasibility would be a very close question. We also understand that we must give due deference to the bankruptcy court's findings. *See Cardenas v. Shannon (In re Shannon)*, 553 B.R. 380, 387 (9th Cir. BAP 2016). But "sheer optimism and hopefulness, without more, is not sufficient to support a finding of feasibility." *In re Om Shivai, Inc.*, 447 B.R. 459, 463 (Bankr. D. S.C. 2011); *see also In re Walker*, 165 B.R. 994, 1004 (E.D. Va. 1994) ("sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are visionary promises" (cleaned up)). [The debtor's monthly operating reports] undermine her projections. They similarly undermine the bankruptcy court's inference based on the projections that Curiel's income was reasonably sufficient to support performance of her Plan. Her calculations suggest that if everything were to go as projected, she initially would have just enough to perform her Plan obligations. However, her monthly reporting cannot be reconciled with the projections or the bankruptcy court's feasibility findings. More specifically, there is no reliable, concrete evidence to support that [her business venture] will be able to fund the necessary income—that [the debtor] will be able to contribute $4,500 in gross monthly income from her wages and receive $3,000 from [a third party]. *See In re Aurora Memory Care, LLC*, 589 B.R. [631,] 642 [(Bankr. N.D. Ill. 2018)] ("Optimistic but hollow declarations from a debtor's principal about hopes for funding do not do the job." (cleaned up)).

The debtor in *In re Saturno Design, LLC*, 2023 WL 5962573 (Bankr. D. Or. 2023), sought cramdown confirmation of a plan that provided for interim monthly payments to the objecting secured creditor and a balloon payment in three years to be made through refinancing. Based on the testimony of the principal who had refinanced other businesses and the debtor's accountant, the court found that the plan was feasible and confirmed it.

The court noted that the feasibility requirement in § 1191(c)(3)(B)(i) (that the court find a "reasonable likelihood" that the debtor will make plan payments) is indistinguishable from the feasibility standard in § 1129(a), which the court defined as a "reasonable probability of success." The court stated, *id.* at * 2 (footnotes in original renumbered):

> The Ninth Circuit Bankruptcy Appellate Panel has held that, when a plan turns on sale or refinancing of collateral, satisfaction of the "reasonable probability" standard requires that the bankruptcy court "determine whether a sufficient refinancing or sale is

> reasonably likely to occur . . . ."[34] The BAP has also held that a debtor need not "prove that success is inevitable."[35]

*See also In re S-Tek 1, LLC,*2023 WL 2529729, at * 3 (Bankr. D.N.M. 2023) (discussing adequacy of financial projections in concluding that the plan was not feasible under § 1129(a)(11) or § 1191(c)(3)).

Based in part on testimony from officers of the objecting creditor and an accountant and forensic accountant who testified as experts in the areas of financial forensics, statistics, and business valuations, the court in *Who Dat?, Inc.,* 2024 WL 13337453 (Bankr. E.D. La. Mar. 27, 2024), concluded that the plan was not feasible and converted the case to chapter 7.

XV. Cramdown Confirmation

A. "Indubitable Equivalent" Treatment of Secured Claim

Section 1191(c) makes the cramdown requirements in § 1129(b)(2)(A) with regard to a secured claim applicable to cramdown confirmation under § 1191(b) in a subchapter V case. *See* SBRA Guide § VIII(B)(2).

In *In re Creason,* 2023 WL 2190623 (Bankr. W.D. Mich. 2023), a creditor held a security interest in personal property, but it was avoidable under § 544(a) because the financing statement did not have the correct name for the debtor. The debtor's plan put the creditor in a separate class and treated the creditor as an unsecured creditor.

The creditor did not vote on the plan. The court held that, because the creditor had not voted, the class had rejected the plan so that consensual confirmation under § 1191(a) was not permissible.

The court concluded that the plan was, however, confirmable under the cramdown provisions of § 1191(b) because the plan provided for the creditor to receive the "indubitable equivalent" of the claim under § 1129(b)(2)(A)(iii). The court reasoned, *id.* at 3:

> Suffice it to say that treating as unsecured the holder of an inevitably avoidable security interest offers the "indubitable equivalent" of its claim, as required for confirmation under § 1191(b). *See* 11 U.S.C. § 1191(c)(1) (incorporating § 1129(b)(2)(A)(iii) as rule of construction). On this point, [the creditor's] failure to participate in the confirmation process certainly backfired. The court finds that the plan is fair and equitable in its treatment of [the creditor], and § 1141(c) permits revesting of [the creditor's] supposed collateral in [the debtor], free and clear of [the creditor's] lien.

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[34] Hamilton v. Curiel (*In re* Curiel), 651 B.R. 548, 567 (9th Cir. B.A.P. 2023),), *appeal dismissed,* 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023).

[35] Comput. Task Grp., Inc. v. Brotby (*In re* Brotby), 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003).

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B. Termination of Trustee's Service After Cramdown Confirmation; Entry of Final Decree

As SBRA Guide IV(D)(I) discusses, the time for termination of the trustee's service depends on whether the court confirms a consensual plan under §1191(a) or under § 1191(b), when one or more impaired classes of creditors have not accepted it.

When the court confirms a consensual plan under §1191(a), the trustee's service terminates upon substantial consummation,[36] which ordinarily occurs when distribution commences. § 1183(c)(1). Subchapter V does not specify when the trustee's service terminates when confirmation of a plan under the cramdown provisions of §1191(b) occurs. The statute contemplates that the trustee continues to serve and makes payments under the plan as §1194(b) ordinarily requires. Thus, the appropriate time for termination of the trustee's service is when the debtor has completed the required payments. See SBRA Guide § IX(B).

Section 1194(b) permits the debtor, rather than the trustee, to make plan payments if the plan or order confirming the plan so provides. See SBRA Guide § IX(B). The practice is common because, in many cases, no one, including the subchapter V trustee, wants the added expense of compensating the trustee for making distributions.

Three bankruptcy courts have concluded that, when the debtor is will make payments under a plan after cramdown confirmation, the court may order the termination of the subchapter V trustee's service upon substantial consummation of the plan and the trustee's filing of a final report shortly after substantial consummation.

In *In re DynoTec Industries, Inc.,* 2024 WL 2003065 (Bankr. D. Minn. 2024), the court confirmed a liquidation plan for the debtor under the cramdown provisions of § 1191(b). After confirmation, the subchapter V trustee sought compensation for postconfirmation services in connection with the collection of accounts receivable and sought to "surcharge" the final plan payment due to the creditor secured by the accounts. After ruling that the trustee was not entitled to compensation because he had no duties to perform after confirmation and because the application was time-barred under the terms of the confirmation order, *id.* at 2-3, the court addressed termination of the subchapter V trustee's services.

The court summarized subchapter V's provisions for termination of a subchapter V trustee's services, *id.* at 3 (footnote omitted):

> If the Plan in this case had been confirmed under § 1191(a), the Trustee's appointment would have terminated automatically, by operation of law, upon substantial

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[36] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

consummation. 11 U.S.C. § 1183(c)(1). Termination is more fluid when a plan is confirmed under § 1191(b). For nonconsensual plans, the "default" role of the trustee is to administer all plan payments for the life of the plan. 11 U.S.C. § 1194(b). The plan commitment period in a nonconsensual plan can vary from 3 to 5 years, due to the rule of construction set forth in § 1191(c). Alternatively, a debtor can opt out of the default and administer its own plan payments after confirmation. 11 U.S.C. § 1194(b). It is quickly apparent why the Code does not include a parallel provision for cases confirmed under § 1191(b): a trustee could have a duty to handle plan payments for 3 years, 5 years, or not at all, depending on the specific terms of the plan and confirmation order in each nonconsensual case.

This is not a drafting error. Flexibility improves success rates in small business cases. A contentious case may justify the ongoing administrative expense of maintaining the trustee's appointment for the entire plan commitment period. By contrast, some Subchapter V cases are confirmed under § 1191(b) solely due to the "apathetic creditor problem.3" Apathetic creditors do not warrant the expense of a trustee for the entire post-confirmation period. Similarly, a cash-strapped debtor may want to administer its own plan payments because it is an inexpensive option permitted by § 1194(b). To eliminate administrative expense entirely, frugal debtors can request a confirmation order that terminates the Trustee's appointment upon substantial consummation of their nonconsensual plan. And, there is scant risk to doing so. The Code permits trustees to be re-appointed in consensual cases, notwithstanding the automatic termination described in § 1183(c) (1). A fortiori, a trustee who is terminated after substantial consummation of a nonconsensual plan can also be reappointed, or the U.S. Trustee can serve as trustee, "as necessary," per § 1183(a). Alternatively, the debtor can reduce the scope of the trustee's post-confirmation duties without actually terminating its appointment, thereby reducing post-confirmation expense. Ultimately, a trustee's role should be "right sized" to suit the needs of each case.

The court speculated that, because the confirmation order "all but eliminated" the trustee's role after confirmation, the trustee's services should have been terminated upon substantial consummation of the plan. *Id.* at 3. The court then ordered termination of the trustee's services because he had filed a final report and had no further duties in the case, subject to reappointment if needed. *Id.*

The court in *In re Florist Atlanta, Inc.,* 2024 WL 3714512 (Bankr. N.D. Ga. 2024), applied the approach of *DynoTec* to terminate the services of the subchapter V trustee upon substantial consummation of a cramdown plan providing for the debtor to make plan payments and the trustee's filing of a final report within 14 days thereafter.

The court observed that, after the debtor made its first payment under the plan, substantial consummation would occur and that, thereafter, the subchapter V trustee would have only four duties: (1) the filing of a final report and account of the administration of the estate; (2) the filing of postconfirmation reports as the court orders; (3) appearance at any hearing concerning

postconfirmation modification or sale of property of the estate; and (4) the performance of certain duties if the court removed the debtor from possession. *Id.* at 2.

The confirmed plan did not contemplate that the trustee perform any duties after its substantial consummation and no one had requested that the trustee file postconfirmation reports. Thus, the court reasoned, *id.* at 2:

> Because the Debtor will make plan payments in this case, the Subchapter V Trustee will have nothing to do after filing the final report, subject to the possible occurrence of future events that would require trustee services.

The court then considered whether, in these circumstances, it was appropriate to terminate the subchapter V trustees services upon substantial consummation and the filing of the trustee's final report. The court concluded that it was. The court explained, *id.* at *3:

> Section 1183(c)(1) of the Bankruptcy Code provides for termination of the service of a subchapter V trustee upon substantial consummation of a consensual plan confirmed under § 1191(a). Subchapter V has no provision for termination of a subchapter V trustee's services after cramdown confirmation under § 1191(b). But nothing in subchapter V limits the court's authority to similarly terminate the services of a trustee upon substantial consummation of a cramdown plan confirmed under § 1191(b) when a subchapter V trustee will not be making payments to creditors and will have no postconfirmation duties to perform. None of the parties at the confirmation hearing objected to such termination of the Subchapter V Trustee's services in this case.
>
> In these circumstances, it is appropriate for the Court to order the termination of the services of the Subchapter V Trustee upon substantial consummation of the plan (which will occur when the debtor commences plan payments) and the filing of the Subchapter V Trustee's final report. *See In re DynoTec Industries, Inc.*, 2024 WL 2003065 (Bankr. D. Minn. 2024).

The *Florist Atlanta* court recognized that the services of a subchapter V trustee would be necessary if the Debtor sought postconfirmation modification of the plan, wanted to sell property of the estate, or was removed from possession. Accordingly, the court ordered that the termination of the trustee's services, be without prejudice to the reappointment of a subchapter V trustee if any of these events occurred. 2024 WL 3714152 at * 3.

The debtors in *In re Lager,* 2024 WL 3928157 (Bankr. N.D. Tex. 2024), sought entry of a final decree after substantial consummation of a cramdown plan providing for the debtor to make plan payments and resolution of the subchapter V trustee's compensation. Bankruptcy Rule 3022 provides for entry of a final decree "after an estate has been fully administered."

The court noted that the Advisory Committee Note to Bankruptcy Rule 3022 identifies that the factors a court should consider in determining whether an estate has been administered include:

(1) whether the order confirming the plan has become final;

(2) whether deposits required by the plan have been distributed;

(3) whether the property proposed by the plan to be transferred has been transferred;

(4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan;

(5) whether payments under the plan have commenced; and

(6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

The *Lager* court explained that the first and sixth factors were satisfied because a final confirmation order had become final, and nothing was pending before the court; the second factor was not applicable because the plan did not require any deposits. The remaining factors, the court explained, all relate to whether the plan has been substantially consummated. *Id.* at 9.

Because substantial consummation had occurred upon the commencement of payments, the court concluded that the case had been fully administered under a traditional analysis. *Id.* at 10.

The subchapter V trustee, however, objected to entry of a final decree because she still had duties to fulfill under the Bankruptcy Code, primarily the duty to file a final report as § 1183(b)(1) (incorporating § 704(a)(9)) requires. In the circumstances of the case, however, the court concluded that it was appropriate to order the termination of the trustee's services after substantial consummation. *Id.* at * 10.

The court reasoned that, if the need for the trustee's services other than the filing of a final report arose, the case could be reopened, and the trustee could be reappointed. Further, the court continued, because the trustee had not administered any assets and was not responsible for making plan payments, leaving the case open for the filing of a final report was not sufficient cause for keeping the case open. *Id.* at *11.

The court nevertheless concluded that entry of a final decree would be inappropriate because the debtor intended to reopen it after completion of play payments to obtain a discharge. A logical alternative, the court concluded, was to administratively close the case, subject to reopening when the case is ripe for discharge.

The court, therefore, ordered that the trustee file a final report within 14 days and that the case be administratively closed after payment of the trustee's compensation for postpetition services, subject to reopening after completion of plan payments in order for the debtors to request a final decree, a discharge order, and the trustee's filing of a final report. *Id.* at * 12.

Although *Florist Atlanta* and *Lager* have the same practical result – effective termination of the trustee's services upon substantial consummation of a cramdown plan where the debtor makes plan payments – they employ different procedures.

The *Florist Atlanta* court terminated the trustee's services but did not address closing of the case. The *Lager* court administratively closed the case, subject to reopening, but did not terminate the trustee's services. Although the *Lager* court stated that termination of the trustee's services would be appropriate, it did not do so, as indicated by the providing of its order for the trustee to file a final report in connection with reopening of the case for entry of a final decree and discharge upon completion of plan payments.

XVI. Eligibility for Subchapter V

A. Debtor must be "engaged in commercial or business activities"

As SBRA Guide § III(C)(2) discusses, a number of courts have broadly interpreted "commercial or business activities" to include "wind-down" activities for a business that has discontinued active business operations. More courts have taken this approach.

In *In re Hillman*, 2023 WL 3804195 (Bankr. N.D.N.Y. June 2, 2023), the debtor held a 50 percent equity interest in two entities. A creditor had filed a lawsuit against one of them and the debtor for defaults under a commercial lease agreement with the company and the debtor's personal guaranty of its obligations. The creditor objected to subchapter V eligibility on the ground that neither of the debtor's two companies was engaged in commercial or business activities at the time of the filing of the petition.

The court agreed that eligibility must be determined based on the existence of activities on the petition date but held that the debtor met the requirement under the "totality of circumstances" approach because both companies were currently engaged in commercial or business activities.

Although the defendant company had closed, the court ruled that the defense of the claim on the guaranty constituted sufficient winding down activity for the debtor to satisfy the "engaged in commercial or business activities" requirement. *Id.* at *4. The court found no "reason to distinguish between pursuing versus defending commercial litigation when determining subchapter V eligibility." *Id.* at * 4 n. 8 (citing *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 237 (Bankr. S.D. Tex. 2021)).

The creditor alleged that the operations of the other entity were not enough to constitute being presently involved in business or commercial activity, characterizing it as a "hobby." The

court rejected the contention that "little or scarce business activity is insufficient for subchapter V eligibility," noting that the company had completed a sale of goods for profit within 60 days of the bankruptcy filing. *Id.* at *4 n. 7.

In *In re Robinson,* 2023 WL 2975630 (Bankr. S.D. Miss. Apr. 17, 2023)**,** the debtor filed the subchapter V case over a year after the closing of a poultry farming operation when its contract for chicken processing terminated. At the time of the filing, the debtor had a job as a loader operator at a lumberyard. The debtor filed the case to liquidate the farm's assets after efforts to find another grower contract were unsuccessful.

The U.S. Trustee objected to the debtor's eligibility, contending that the cessation of farming operations more than a year before the filing was so distant that his current activities could not be characterized as winding down.

The court concluded that, under the "totality of circumstances" approach, the debtor's continued management of farm assets, his efforts to sell the farm or parts of it, and his maintenance and inspection of improvements on the farm were sufficient wind-down activities to satisfy the "engaged in" commercial or business activities requirement. The court reasoned, "[T]he totality of the circumstances standard does not dictate a quantum of activities or time engaged in them." *Id.* at *4.

In *In re Free Speech Systems, LLC,* 649 B.R. 729, 733 n.14 (Bankr. S.D. Tex. 2023), the court noted that the requirement that the debtor be engaged in commercial or business activities is not a continuing one, such that the termination of business operations after filing does not render the debtor ineligible.

In two related cases, the bankruptcy court held that the individual debtors, siblings who each owned 25 percent of a construction and contracting company but had not had any involvement with the company for about seven years, were "engaged in commercial or business activities" because they were appealing a judgment against them on a guaranty of a debt of the business and were pursuing an action against former business associates for taking excessive distributions from the company. *In re Fama-Chiarizia*, 655 B.R. 48 (Bankr. E.D.N.Y. 2023); *In re Fama,* 655 B.R. 648 (Bankr. E.D.N.Y. 2023). (In *Fama-Chiarizia*, the court also found that the debtor's rental of an apartment in her residence satisfied the requirement.)

After an extensive review of the case law, the court agreed "with the substantial majority of courts that have found that a debtor may be eligible to reorganize under Subchapter V when it seeks to address residual business debt, and to marshal residual business assets. And here, the facts and circumstances show that [the debtors seek] to do exactly that with respect to the business debt and assets of [the company]." 655 B.R. at 69 and 2023 WL 6131466 at * 18.

The court further observed, 655 B.R. at 70 and 2023 WL 6131466 at * 18:

> And, for better or worse, courts agree that where – as here – the "business and commercial activities" are, in large part, in the nature of evaluating, asserting, pursuing,

and defending litigation claims, this can still amount to addressing the business' debts and marshaling its assets, and can satisfy Section 1182(1)(A)'s requirement of "commercial or business activities."

B. Debt limit: debts of affiliates

As amended by the Bankruptcy Threshold Adjustments and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022), debts for purposes of the debt limit for subchapter V eligibility include debts of affiliates of the debtor if the affiliate is a debtor in a bankruptcy case. § 1182(a).

When an affiliate of an eligible subchapter V debtor later files its own bankruptcy case, and the combined debts of all affiliates exceed the debt limit, the second debtor is clearly not eligible for subchapter V. The question is whether the second filing affects the eligibility of the debtor in the first case.

Two courts have ruled that, because eligibility is determined as of the filing date, the second filing does not render the first debtor ineligible, even when the total of the debt of the affiliates exceeds the debt limit.

In *In re Free Speech Systems, LLC,* 649 B.R. 729 (Bankr. S.D. Tex. 2023), the debtor filed a subchapter V petition. It was eligible despite the existence of substantial defamation claims against it because the damages had not yet been determined and, therefore, were unliquidated debts excluded from the calculation of debts for purposes of eligibility. After the court lifted the stay to permit the defamation litigation to proceed and a jury awarded substantial damages against the debtor and its jointly liable principal, the principal filed his own chapter 11 case.

Plaintiffs in the defamation action sought revocation of the subchapter V election in the first case based on the fact that the total debt of the affiliates exceeded the debt limit. The court rejected the argument, ruling that determination of eligibility on the effective date was not affected by the affiliate's later filing. The court observed, "If postpetition affiliate filings lead to ineligibility and revocation, it means that debtors could float in and out of Subchapter V at any time." *Id.* at 734.

In *In re Dobson*, 2023 WL 3520546 (Bankr. W.D. Va. 2023), the sole shareholder of a construction company and his spouse filed a joint subchapter V petition. The next day, the corporation filed a chapter 7 case. The U.S. Trustee contested the eligibility of the individuals for subchapter V because the total of their debts and the corporation's debts exceeded the debt limit. The court agreed with *Free Speech* and ruled that the debtors' correct statement of eligibility on the petition date did not become incorrect based on a later event.

The court also rejected the U.S. Trustee's argument that the timing of the filing demonstrated an abuse. The court stated, *id.* at *6:

> The U.S. Trustee asks this Court to consider the strategic decision by [the corporation] to not file a bankruptcy petition until after its sole shareholder filed his petition as if the professional planning is by itself an abuse or an indication of harm. Yet, the U.S. Trustee has failed to show how professional advice and deliberate planning of the timing of a bankruptcy petition is unlawful or abusive.

A debtor desiring to proceed in subchapter V must pay careful attention to the debts of any affiliate in a pending bankruptcy case, even if the debtor has no realizable interest in the affiliated entities in bankruptcy. In *In re Carter,* 2023 WL 9103614 (Bankr. N.D. Ga. 2023), the individual debtor owned 65 percent of one company that had been in bankruptcy for seven years and 99 percent of another that had been in bankruptcy for five years. Both had been pending under chapter 7 for five years, and their cases remained open.

Although the individual's debts were less than the debt limit, inclusion of the debts of the chapter 7 debtors put the debtor over the limit. The court rejected the debtor's contention that the two companies were not his affiliates because they were controlled by the chapter 7 trustees.

A debtor in such a situation might seek to avoid this result through divestment of the worthless ownership interests prior to the filing of a subchapter V case.

C. Debt limit: whether debt is contingent or unliquidated

Debts for purposes of determining the debt limit for subchapter V eligibility do not include contingent or unliquidated debts. § 1182(1)(A).

In *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), the court concluded that claims for damages arising from the rejection of unexpired leases were contingent 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. Excluding those debts from the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In *In re Macedon Consulting, Inc.*, 2023 WL 400484 (Bankr. E.D. Va. 2023), the court ruled that the entire, uncapped liability of the debtor for rent for the remainder of the lease term was noncontingent and liquidated.

The next subsection further discusses a debtor's liability for future rent under a real estate lease for purposes of the debt cap.

In *In re Hall,* 650 B.R. 595 (Bankr. M.D. Fla. 2023), a creditor objected to the eligibility of the debtor and an affiliated corporation on the ground that their debts exceeded the debt limit. The debtors contended that the creditor's debt should be excluded because it was disputed, and therefore unliquidated.

The court concluded that, under *United States v. Verdunn*, 89 F.3d 799 (11th Cir. 1996) ("vigorously disputed" tax penalties are liquidated), the existence of the dispute did not render

the creditor's claim unliquidated. The debtors' pending adversary proceeding contesting the claim based on fraud in the inducement, intentional misrepresentation, negligent misrepresentation, and equitable subordination did not make the claim unliquidated.

The court summarized principles relating to determination of whether a debt is liquidated as follows, *id.* at 599:

> "[C]ourts have generally held that a debt is liquidated if its amount is readily and precisely determinable, where the claim is determinable by reference to an agreement." *United States v. May*, 211 B.R. 991, 996 ([Bankr. M.D. Fla. 1997 (citing Collier on Bankruptcy, 15th Ed. at 1109.06[2][c] (March 1997)]). Ordinarily, debts of a contractual nature are "subject to ready determination and precision in computation of the amount due" and, therefore, are considered liquidated, even if subject to a substantial dispute. *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008, 1014 (B.A.P. 8th Cir. 1997). By contrast, tort claims are generally unliquidated if not reduced to judgment. *Id*. The nature of "the process for determining the claim" dictates whether the claim is liquidated or unliquidated, not the magnitude of the dispute or the length of the trial required to resolve the dispute. *See id.*; *Nicholes v. Johnny Appleseed (In re Nicholes)*, 184 B.R. 82, 91 (B.A.P. 9th Cir. 1995) ("So long as a debt is subject to ready determination and precision in computation of the amount due, then it is considered liquidated and included for eligibility purposes under § 109(e), regardless of any dispute."); *see also In re Robinson*, 535 B.R. 437, 448 (Bankr. N.D. Ga. 2015) ("Generally, when a debt is owed pursuant to a contractual obligation it is liquidated.").

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Another case discussing whether a disputed claim is unliquidated is *In re Burdock and Associates, Inc.*, 2024 WL 3200463 (Bankr. M.D. Fla. 2024). The court held that a disputed claim for lost profits arising from a breach of contract was unliquidated not because it was disputed but because the amount of it was not capable of ready determination.

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D. Debt limit: debtor's liability for future rent under a real estate lease

A debtor often has an unexpired lease for its business premises under which substantial future rent is due. For purposes of determining whether the debtor's debts exceed the debt cap, two questions arise with regard to the obligation for future rent. The first is whether the obligation is contingent or unliquidated. The second is whether the amount for eligibility purposes is the total future rent that is due (*i.e.*, the entire rent reserved under the lease for its remaining term) or the amount that is allowable under § 501(b)(6) (*i.e.*, the greater of future rent for one year or 15 percent of future rent, not to exceed three years).

In *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), the court concluded that claims for damages arising from the rejection of unexpired leases were contingent

because they did not arise unless the debtor rejected the leases. Excluding those debts from the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In *In re Macedon Consulting, Inc.*, 2023 WL 400484 (Bankr. E.D. Va. 2023), the court ruled that the entire, uncapped liability of the debtor for rent for the remainder of the lease term was noncontingent and liquidated. The court reasoned, *id.* at *4:

> In this case, the debt at issue is liability under the Leases, and that liability arose pre-petition, on the dates the Leases were fully executed. For example, it could not be said that if the Debtor vacated the premises on the 31st of one month during the lease term, that it would not still owe the landlord for the next month and the remainder of the lease term. While it may be argued that the timing of payments is the future extrinsic event that may never occur, the Court disagrees. The timing of lease payments is simply that – timing. Absent the end of the world, we know the future date will occur. As a result, liability under the Leases must be considered noncontingent and liquidated, and the Debtor in this case is therefore above the debt limits for subchapter V, which are capped at $7.5 million of aggregate noncontingent liquidated debts.

The court in *In re Zhang Medical P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y. 2023), declined to follow *Macedon Consulting* and concluded that claims for future rent were contingent and unliquidated. The court observed that an executory contract "'represents both an asset (the debtor's right to performance) and a liability (the debtor's own obligation to perform).'"[37] Accordingly, the court continued, § 365(a) gives the debtor the option to assume or reject the executory contract or unexpired lease. *Id.* at *6.

If the debtor assumes the executory contract or unexpired lease, the court reasoned, the debtor's future obligations should not be considered "debts" for purposes of subchapter V eligibility because assumption means that the contract or lease is a net asset, *i.e.*, its benefit to the estate outweighs the debtor's future liability. *Id.* at *6. The court then explained that, until the debtor elects to assume or to reject, the amount and nature of the debtor's obligations are contingent and unliquidated. The court stated, *id.*:

> Because the amount and nature of the debtor's obligations, as well as whether these are even "debts," depend on an uncertain event – the debtor's election to either assume or reject – any eventual debt is both contingent and unliquidated prior to that election.

Although the court thus determined that the debtor's obligations for future rent were not included in determining the amount of the debtor's debts, the court held that the existence of other debts made the debtor ineligible for subchapter V.

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[37] *Zhang Medical*, 655 B.R. 403, 411 (Bankr. S.D.N.Y. 2023), quoting *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S.370, 139 S.Ct. 1652, 1658 (2019).

E. Debt limit: determination of amount of debt

In *In re Zhang Medical P.C.*, 655 B.R. 403, 409 (Bankr. S.D.N.Y. 2023) (citations omitted), the court stated:

> The court may look both to the debtor's schedules and to creditors' proofs of claim. Proofs of claim are *prima facie valid.* Because the debtor bears the ultimate burden of proving its eligibility for subchapter V, proofs of claim that the debtor does not challenge may be deemed to be valid for subchapter V eligibility purposes.

See also In re Heart Heating and Cooling, LLC, 2024 WL 1228370 at *10-11 (Bankr. D. Col. 2024); *In re Hall*, 650 B.R. 595, 600 (Bankr. M.D. Fla. 2023); *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021).

The debtor has the burden of explaining discrepancies between the amounts of debts shown on its schedules when those amounts are less than those stated in proofs of claim, as well as the reasons for the reduction of debts in amended schedules. The failure to do so may cause a court to conclude that the debtor is manipulating the amounts of debts in its schedules in an effort to skirt the debt limitation for eligibility. *See In re Heart Heating and Cooling, LLC*, 2024 WL 1228370 (Bankr. D. Col. 2024).

F. What debts "arise from" commercial or business activities

One of the requirements for subchapter V eligibility is that not less than 50 percent of the debtor's debts arise from the debtor's commercial or business activities.

In *In re Bennion*, 2022 WL 3021675 (Bankr. D. Idaho 2022), the court ruled that medical debts arising from injuries sustained by a debtor engaged in a "tree-felling" business while doing such work for his mother without charge did not arise out of commercial or business activities. The debtor, therefore, was not eligible for subchapter V because those debts exceeded his business debts.

In *In re Reis*, 2023 WL 3215833 (Bankr. D. Idaho 2023), *aff'd Reis v. Garvin (In re Reis)*, 2024 WL 4051674 (D. Idaho 2024), the U.S. Trustee challenged debtor's eligibility because almost all of her debt was for student loans incurred to enable her to go to medical school.

The debtor had graduated from medical school in 2009, completed her residency in 2012, and worked as an employee before creating a limited liability company in 2020 and opening her practice in 2021.

The court agreed with the courts that reject the proposition that working as an employee constitutes "commercial or business activities."[38] The court reasoned, *id.* at * 6:

> Here, the gap between incurring the debt and actually engaging in any sort of commercial or business activity as an owner is simply too great to find that the student loans at issue arose from Debtor's commercial or business activities. While it is clear that Debtor hoped to earn income from the use of her medical degree, it was entirely unclear for a decade whether she had borrowed to follow a career path as an employee working for a hospital, as a business owner, or even in public service.

Accordingly, the court concluded that the student loans did not qualify as business debts and that she was ineligible for subchapter V.

The court observed that its holding did "not foreclose all debt which arises prior to a business opening, as supplies, product, and a space for the business often must be acquired prior to the actual opening, and there is the possibility that a debtor may open more than one business during his or her lifetime and incur debt in doing so." *Id.* at *7.

The court also noted that it was not establishing a *per se* rule that student debt can never qualify as a debt arising from commercial or business activities. Rather, the court stated, "[T]he student loan debt at issue here, incurred over ten years prior to opening the medical practice, is simply too far removed for Debtor to qualify for Sub V relief." *Id.* at *7.

G. "Nexus" between current commercial or business activities and debts arising from previous activities

SBRA Guide § III(E) discusses the debate over whether a nexus must exist between the debtor's current commercial or business activities and debts arising from previous activities.

Other courts addressing the issue have reached opposite conclusions. The court in *In re Reis*, 2023 WL 3215833, at *4-5 (Bankr. D. Idaho 2023), , *aff'd Reis v. Garvin (In re Reis),* 2024 WL 4051674 (D. Idaho 2024), concluded that no nexus is required but found the debtor was ineligible because the debt in question was not a business or commercial debt. The court in *In re Fama-Chiarizia*, 655 B.R. 48 (Bankr. E.D.N.Y. 2023) and *In re Fama*, 655 B.R. 648 (Bankr. E.D.N.Y. 2023) (discussed *supra* § XVII(A)), held that a nexus is not required and that the debtor was eligible.

In re Hillman, 2023 WL 3804195, at *4-5 (Bankr. N.D.N.Y. 2023), concluded that a nexus is required and that it existed in the case.

H. Single asset real estate debtor

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[38] *E.g., In re Rickerson*, 636 B.R. 416, 426 (Bankr. W.D. Pa. 2021); *In re Johnson*, 2021 WL 825156, at *7-8 (Bankr. N.D. Tex. 2021). *But see In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021). SBRA Guide § III(C)(2) discusses the cases.

A debtor is not eligible for subchapter V if its primary activity is the business of owning "single asset real estate." § 1182(1)(A). Section 101(51B) defines "single asset real estate" as "real property constituting a single property or 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."

The court in *In re Evergreen Site Holdings*, 652 B.R. 307 (Bankr. S.D. Ohio 2023), found from the evidence that a debtor who owned two adjacent properties was not using the properties together in a common scheme and that the debtor would likely conduct substantial business on the properties other than leasing them and collecting rent. Accordingly, the court concluded that the debtor had established its eligibility for subchapter V.

In *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023), a single-asset real estate debtor filed a subchapter case shortly after an affiliate filed its own subchapter V case. The debtor argued that, although it was an excluded single asset real estate debtor, it was nevertheless eligible for subchapter V as an affiliate of an eligible subchapter V debtor. The court concluded that the plain language of the statute "expressly excludes SARE debtors, regardless of whether they are affiliates of Subchapter V debtors." *Id*. at *6.

In contrast, the court in *In re Bridle Path Partners, LLC*, 2024 WL 86601 (Bankr. D. Utah 2024), ruled that a debtor was a single asset real estate debtor when its business was the development in four phases of an equestrian community to include residential lots, open space, riding trails, and riding facilities on seven parcels of land acquired at various times with different financing. The court rejected the debtor's contention that the development involved several economic enterprises, concluding that the debtor's "clear intent [was] to create a master-planned recreational development for a mountain-based community" that was a "cohesive, unified project." *Id.* at *4.

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In *In re Celebration Cottage AB, LLC*, 2024 WL 3896464 (Bankr. E.D.N.C. 2024), the debtor owned three adjacent properties that it leased to an affiliate that used the properties as a venue for parties and events. It also owned another parcel some three miles away. The court held that the properties did not constitute a single or unified real estate project and that, therefore, the debtor was not a single asset real estate debtor and could proceed under subchapter V.

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I. Time for objecting to eligibility; authority of court to raise eligibility issue *sua sponte*

In *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445 (Bankr. D. P.R. 2023), discussed in the preceding subsection, the court concluded that it had the authority to raise the

question of the eligibility of a debtor *sua sponte* even after expiration of the deadline for objections to eligibility under Bankruptcy Rule 1020(a).

The court in *In re 2202 East Anderson St., LLC,* 2024 WL 1340655 at * 5 (Bankr. C.D. Cal. 2024), noted that an objecting party may waive an objection to subchapter V eligibility and that the court has the authority to approve a stipulation permitting a case to proceed under subchapter V even when the debtor does not satisfy the requirements for subchapter V eligibility.

J. A determination of ineligibility does not "revoke" the election

In ruling that a debtor is not eligible for subchapter V, some courts have stated that the election is "revoked." *E.g., In re Carter,* 2023 WL 9103614 (Bankr. N.D. 2023); *In re CYMA Cleaning Contractors Inc.,* 2023 WL 7117445 (Bankr. D. P.R. 2023). The terminology is inaccurate.

Interim Bankruptcy Rule 1020(a) provides that the debtor must state on the petition whether it is a debtor as defined in § 1182(1) and whether it elects to proceed under subchapter V. The rule further provides that the case proceeds in accordance with the debtor's statement "unless and until the court enters an order finding that the debtor's statement is incorrect."

Section 103(i) provides that subchapter V applies "only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of chapter 11 shall apply." Official Forms 101 and 201 each require a debtor to state (by checking the appropriate box) that the debtor is a debtor "according to the definition in § 1182(1) of the Bankruptcy Code."

If a court determines that the debtor is incorrect in its statement that the debtor is a debtor as defined in § 1182, therefore, the provisions of subchapter V are inapplicable under § 103(i). As a result, the proper remedy for the debtor's incorrect statement is for the court to determine that the provisions of subchapter V do not apply and that the case will proceed as a non-subchapter V case.

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K. Sunset of $ 7.5 million debt limitation for subchapter V eligibility

SBRA Guide §§ III(A) and III(B) explain, temporary legislation, effective until June 20, 2024, increased the debt limit for subchapter V eligibility to $ 7.5 million and amended § 1182(1) to state the requirements for eligibility for subchapter V. The provisions for subchapter V eligibility in temporary § 1182(1) were the same as the provisions in § 101(51D) that define a "small business debtor" except that the debt limit in § 101(51D) is $ 3,024,725 (as adjusted under § 104 on April 1, 2022).

Under the sunset provisions of the temporary legislation, § 1182(1) reverted to its previous language such that, effective on June 20, 2024, § 1182(1) now defines debtor as a "small business debtor." Section 103(j) provides that subchapter V applies in a chapter 11 case in which a debtor, as defined in § 1182(1), elects its application.

The effect of the sunset is that a debtor must be a "small business debtor" under § 101(51D) to be eligible for subchapter V. The only substantive effect is that the debt limit is $ 3,024,725, but § 101(51D) now states all the requirements for subchapter V eligibility.

L. Finality of order determining eligibility

It is not clear whether a bankruptcy court's order determining that a debtor is eligible is a final order for purposes of appeal under 28 U.S.C. § 158(a)(1). A district court or bankruptcy appellate panel has jurisdiction to hear an appeal from an interlocutory order, with leave of the court, under 28 U.S.C. § 158(a)(3) and § 158(b)(1), respectively.[39] Courts of appeals have discretionary jurisdiction to hear an appeal of an interlocutory order (as well as a final one) of the bankruptcy court under 28 U.S.C. § 158(d)(2) that a bankruptcy court, district court, or bankruptcy appellate panel certifies on various grounds.[40]

In *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC),* 638 B.R. 403 (B.A.P. 9th Cir. 2022), the court reviewed the bankruptcy court's eligibility order in connection with an appeal of the order confirming the subchapter V plan. The court stated, "The interlocutory Subchapter V Order merged into the final Confirmation Order." *Id.* at 408 n. 3.[41] The court cited *United States v. Real Prop. Located at 475 Martin Lane,* 545 F.3d 1134 , 1141 (9th Cir. 2008) (under merger rule, interlocutory orders entered prior to the judgment merge into the judgment and may be challenged on appeal).

The Ninth Circuit Bankruptcy Appellate Panel in an unreported order had previously dismissed an earlier appeal of eligibility, determining that the eligibility order was interlocutory and denying leave to appeal. *NetJets Sales, Inc. v. RS Air, LLC,* Case No. NC-21-1053, Doc. No. 20-1 (B.A.P. 9th Cir. May 26, 2021). There, the court concluded, *id. at* 2:

> "Orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC,* 140 S.Ct. 582, 586 (2020)(citing *Bullard v. Blue Hills Bank,* 525 U.S.C. 496, 501 (2015)). The order on appeal is an interlocutory order since determination of whether a debtor qualifies for subchapter V relief under 11 U.S.C. § 1182(1)(A) is part of the Chapter 11 confirmation process and as such, does not definitively dispose of a

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[39] *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.").

[40] The lower court must certify either: (1) that the order involves a question of law as to which no controlling circuit or Supreme Court authority exists or a matter of public importance; (2) that the order involves a question of law requiring resolution of conflicting decisions; or (3) that an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A)(i)-(iii).

[41] The *RS Air* court cited *United States v. Real Prop. Located at 475 Martin Lane,* 545 F.3d 1134 , 1141 (9th Cir. 2008) (under merger rule, interlocutory orders entered prior to the judgment merge into the judgment and may be challenged on appeal).

discrete issue within the bankruptcy case.

In *Reis v. Garvin (In re Reis),* 2024 WL 4051674 (D. Idaho 2024), the district court disagreed with *RS Air,* ruling that the bankruptcy court's order that the debtor was not eligible for subchapter V was a final order.

The *Reis* court observed that the concept of finality is more "flexible and pragmatic," than finality in ordinary civil litigation and discussed two Supreme Court decisions that guide application of the finality requirement in bankruptcy cases.

One of the cases is *Bullard v. Blue Hills Bank,* 575 U.S. 496 (2015), which held that an order denying confirmation of a chapter 13 plan did not conclusively resolve the relevant proceeding. The *Reis* court noted that the bankruptcy court in *Bullard* had denied confirmation with leave to amend. The court stated, 2024 WL at *3:

> In that context, *Bullard* explained that only plan confirmation, or case dismissal, "alters the status quo and fixes the rights and obligations of the parties." [*Bullard,* 575 U.S. at 502.] "Denial of confirmation with leave to amend, by contrast, . . . " leaves the "parties' rights and obligations . . . unsettled," and therefore could not be deemed "final." [*Bullard,* 575 U.S. at 503].

The other case is *Ritzen Group, Inc. v. Jackson Masonry, LLC,* 589 U.S. 35 (2020). *Ritzen* applied the *Bullard* analysis to a bankruptcy court order denying relief from the automatic stay. The Supreme Court reasoned a motion for relief from the stay triggered "a discrete procedural sequence" and that "a discrete dispute of this kind constitutes an independent 'proceeding' within the meaning of 28 U.S.C. § 158(a)." *Id.* at 43-44. Because the entry of an order conclusively denying the motion "ended the stay-relief adjudication and left nothing more for the Bankruptcy Court to do in that proceeding," the *Ritzen* Court concluded that the order was final and appealable. *Id.* at 47.

The *Reis* court reasoned that *Bullard* and *Ritzen* required two inquiries to determine whether the eligibility order was final and appealable, 2024 WL 4051674 at *3:

> (1) Was the order entered in a distinct procedural unit within the larger bankruptcy case? and (2) Did the order "terminate" that distinct proceeding by completely resolving all substantive litigation within that proceeding?

"More broadly," the *Reis* court continued, "the Court will ask whether the bankruptcy court's order 'alters the status quo and fixes the rights and obligations of the parties . . . [or] alters the legal relationships among the parties.'[42] In a nutshell, a bankruptcy order is final 'if it

[42] The court quoted *Bullard,* 575 U.S. at 502, 506.

is both procedurally complete and determinative of substantive rights.'"[43] 2024 WL 4051674 at *3 (citations omitted and referenced in added footnotes).

Disagreeing with *RS Air,* the *Reis* court concluded that a subchapter V eligibility determination is "a discrete procedural unit that occurs before, and separately from, plan-confirmation proceedings." 2024 WL 4051674 at *4. The court reasoned that the filing of an objection to the debtor's eligibility and the debtor's response resulted in an evidentiary hearing on that discrete issue and a separate decision that definitively disposed of the eligibility issue.

The *Reis* court concluded, "Under the Supreme Court's rationale in *Ritzen,* [the eligibility] proceeding has the hallmarks of a 'discrete procedural unit' that leads to a final, appealable order." 2024 WL 4051674 at *4. The court noted, further, that the eligibility determination affected the entire outcome of the case, given the advantages of subchapter V for the debtor, including plan exclusivity, the ability of the individual to obtain a discharge on the effective date, and the inapplicability of the absolute priority rule. *Id.*

The *Reis* court found "tangential support" for its ruling in cases dealing with conversion orders, because the "upshot" of the denial of eligibility is that the debtor would proceed in a traditional chapter 11 case. The court noted that most courts rule that an order converting a reorganization case *to* chapter 7 are immediately appealable[44] because it finally determines a discrete issue and because conversion to chapter 7, by taking control of the estate out of the hands of the debtor, "seriously affects substantive rights and may lead to irreparable harm to the debtor if immediate review is denied." 2024 WL 4051674 at *5, quoting *Rosson v. Fitzgerald (In re Rosson),* 545 F.3d 764, 770 (9th Cir. 2008), *overruled on other grounds by In re Nichols,* 10 F.4th 956 (9th Cir. 2021). The court noted that courts are divided on whether an order converting a case *from* chapter 7 is final.[45]

The *Reis* court was persuaded by the cases ruling that conversion orders are immediately appealable. The court explained, "If a debtor is going to be vaulted into a different chapter of the bankruptcy code, with all the different rules that will apply, it makes sense to view such as motion as a distinct procedural unit that is finally resolved with the conversion order." 2024 WL 4051674 at *5.

Finally, the court noted that a Ninth Circuit ruling that an order denying a motion to dismiss an individual's chapter 7 case as abusive was a final order[46] also supported its ruling. 2024 WL 4051674 at *5.

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[43] The court quoted *In re Jackson Masonry, LLC,* 906 F.3d 494 (6th Cir. 2018), *aff'd sub nom.* Ritzen Group, Inc., v. Jackson Masonry, LLC, 589 U.S. 35 (2020)

[44] The court cited *Rosson v. Fitzgerald (In re Rosson),* 545 F.3d 764, 770 (9th Cir. 2008), *overruled on other grounds by In re Nichols,* 10 F.4th 956 (9th Cir. 2021); *In re Cal. Palms Addiction Recovery Campus, Inc.,* 87 F.4th 734, 739-40 (6th Cir. 2023).

[45] The court cited *Bannish v. Tighe (In re Bannish),* 311 B.R. 547, 548-49 (C.D. Cal. 2004) (conversion order appealable) and *Mason v. Young (In re Young),* 237 F.3d 1168, 1172-73 (10th Cir. 2001) (order converting case from chapter 7 to chapter 13 is not final until after chapter 13 plan confirmation).

46 *Aspen Skiing Co. v. Cherrett (In re Cherrett),* 873 F.3d 1060, 1066 (9th Cir. 2017).

In *Gregory Funding v. Ventura (In re Ventura),* 638 B.R. 499 (E.D. N.Y. 2022), the court in reversing an order of the bankruptcy court determining that the debtor was eligible for subchapter V, without discussing the finality issue, stated that district courts have appellate jurisdiction over final judgments, orders, and decrees.

The district court's ruling in *Guan v. Ellingsworth Residential Community Association, Inc. (In re Ellingsworth Residential Community Association, Inc.),* 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022), indicates that an eligibility determination is a final order. The creditor filed a notice of appeal after the bankruptcy court issued an order scheduling a hearing on confirmation of the debtor's subchapter V plan after a hearing at which it took the eligibility objection under advisement. The creditor appealed the scheduling order, and the bankruptcy court denied the creditor's motion for a stay pending appeal. In a later order, the bankruptcy court determined that the debtor was eligible. See *In re Ellingsworth Residential Community Association, Inc.,* 619 B.R. 519 (Bankr. M.D. Fla. 2019). The creditor did not seek leave to amend her notice of appeal to include the order denying a stay pending appeal or the eligibility order.

The district court held that the scheduling order was interlocutory and that the order denying the eligibility objections was not properly before the court. *Guan v. Ellingsworth Residential Community Association, Inc. (In re Ellingsworth Residential Community Association, Inc.),* 2021 WL 3908525 at * 2 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022). The implication is that the eligibility order was a final order because it finally resolved the objection to eligibility. The district court nevertheless determined that, even if the creditor had properly raised the issue, the appeal would be denied on the merits. *Id.*

The Eleventh Circuit dismissed the appeal *sua sponte* for lack of jurisdiction because the district court's order affirming the bankruptcy court's interlocutory scheduling order was not a final order of the district court within its appellate jurisdiction under 28 U.S.C. § 158(d)(1). *Guan v. Ellingsworth Residential Community Association, Inc. (In re Ellingsworth Residential Community Association, Inc.),* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022).

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XVII. Conversion of Chapter 12 Case to Subchapter V; Creditor Request for Conversion of Chapter 7 Case

In chapter 12 cases, § 1208 governs conversion or dismissal to another chapter. Section 1208(a) permits the debtor to convert the case to chapter 7, and § 1208(b) provides for dismissal of the case at the request of the debtor, if the case has not previously been converted from chapter 7 or chapter 11. Section 1208(c) permits dismissal for cause, and section 1208(d)

provides for dismissal or conversion to chapter 7 for cause. Section 1208(e) prohibits conversion to another chapter if the debtor may not be a debtor under such chapter.

Section 1208 does not have any provision that permits conversion to chapter 11. Some courts have held that a debtor may not convert from chapter 12 to chapter 11, while others have permitted it. *See, e.g., In re Cardwell,* 2018 WL 4846520 (Bankr. N.D. Tex. 2018) (permitting conversion and collecting cases); *In re Colon,* 2016 WL 35498821 (Bankr. D. P.R. 2016) (not permitting conversion and collecting cases); W. Homer Drake, Jr., and Karen D. Visser, BANKRUPTCY PRACTICE FOR THE GENERAL PRACTITIONER § 14:8 & nn. 9 & 10.

The court in *In re Leonaggeo* 2023 WL 3638053 (Bankr. S.D.N.Y. 2023), denied the chapter 12 debtor's request to convert to subchapter V, which she sought as an alternative to dismissal based on ineligibility for chapter 12. The court reasoned, *id.* at *4:

> In the Second Circuit, when the plain meaning of the statute fails to clarify ambiguity, Courts look to legislative history. *United States v. Jones,* 965 F.3d 190, 195 (2d Cir. 2020). While some Courts read the statute to be permissive, there is nothing in the legislative history suggesting that Congress intended for a chapter 12 debtor to convert to chapter 11. *See In re Orr,* 71 B.R. 639 (Bankr. E.D. N.C. 1987); *Matter of Bird,* 80 B.R. 861 (Bankr. W.D. Mich. 1987); *In re Johnson* 73 B.R. 107 (Bankr. S.D. Ohio 1987). This Court declines to accept the permissive reading and finds that conversion from chapter 12 to chapter 11 subchapter V is not possible under section 1208 of the Bankruptcy Code.

The *Leonaggeo* court noted that the debtor might choose to file a new case under subchapter V and cautioned that the automatic stay would not go into effect under § 362(c)(4) because it would be the debtor's third case within a year.

The court in *In re Powell,* 2022 WL 10189109 (Bankr. M.D. Pa. 2022), noted that it had denied the chapter 12 debtor's motion to convert to subchapter V in connection with its dismissal of the case.

A creditor sought conversion of a corporate debtor's chapter 7 case to subchapter V in *In re Roberson Cartridge Co., LLC,* 2023 WL 2393809 (Bankr. N.D. Tex. 2023). Acknowledging that § 706(b) permits conversion of a chapter 7 case to a chapter 11 case on request of a creditor or other party in interest, the court concluded that it could not order conversion to a case under subchapter V because only the debtor may elect its application.

XVIII. Property of the estate and automatic stay after cramdown confirmation

Section 1186(a) provides that, after cramdown confirmation under § 1191(b), property of the estate includes, in addition to property specified in § 541, postpetition earnings and property that the debtor acquires postpetition. See SBRA Guide Part XI.

In *In re Chesney,* 2023 WL 8855242 (Bankr. W.D.N.C. 2023), the court considered the request of a creditor with a nondischargeable debt for relief from the automatic stay after

confirmation of a cramdown plan to collect its judgment from a substantial commission that the debtor could become entitled to as the personal representative of the estate of a friend who had died about four months after the filing of the subchapter V case. (The court rejected the creditor's contention that the commission was a bequest or devise within six months after the filing of the case that was property of the estate under § 541(a)(1) that the debtor failed to disclose.)

The court noted that the debtor's receipt of a commission during the plan term would be property of the estate under § 1186(a) that she would have to disclose on an amendment to her schedules[47] but that only the debtor may seek postconfirmation modification of a plan and that it was "doubtful" that she would have an obligation to modify her plan to increase plan payments. *Id.* at *4. (The court observed that § 363(b) continued to apply so that "any out of the ordinary uses of estate property" would require notice to creditors and court approval. *Id.* at *6 n. 3.)

Because the commission would be property of the estate and the debtor would not receive her discharge until completion of payments under the plan under § 1192, the court explained, the automatic stay continued to apply to protect the commission. *Id.* at *6. The court declined to lift the stay to permit the creditor to enforce its claim against the commission, concluding that it would be inequitable to do so because it would give the creditor "an unfair advantage over other creditors."

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

> One might reasonably ask why, if the plan cannot be modified to claim the newly received asset, what is the harm in permitting a creditor with a nondischargeable debt to seek it outside of bankruptcy? Certainly, it is not to permit the Debtor a windfall. Rather, it has to do with the success of the Confirmed Plan. For creditors with dischargeable debts, payment is dependent on the success of [the Debtor's] plan. And while these prospective monies were not in prospect at the time of confirmation, before that three-year plan is completed, these monies may be necessary to fund plan payments.
>
> [The Debtor] is currently 71 years old. At her age, one cannot gainsay that she will be able to continue to work for the entire plan term, nor that her employer . . . will continue to be able to pay her. If not, [the Debtor] may need the decedent's estate commission to pay living expenses and to fund plan payments. Many individual debtors fund plan payments out of monies which are exempt and otherwise unreachable by creditors. Given

[47] Courts consistently state that a debtor must file an amendment to disclose postpetition assets or income despite the fact that no such requirement exists in the Bankruptcy Code or Bankruptcy Rules. Bankruptcy Rule 1007(h), which requires a debtor to disclose the postpetition acquisition of an interest in property, applies only to interests in property under § 541(a)(6). *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 16:7 at 362-63.

this possibility, it would be improvident at this point in time to afford one unsecured creditor exclusive rights to these potential funds.

The court stated that its order was without prejudice to renewal of the request for stay relief if and when the Debtor received the commission.

XIX. Modification of Residential Mortgage in Subchapter V Cases

SBRA Guide § VII(B) discusses the provisions of § 1190(3), which provides an exception to the rule of § 1123(b)(5) that a plan in a chapter 11 case may not modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence. Section 1190(3) permits modification if the debtor received new value in connection with the granting of the security interest that was not used primarily to purchase or acquire the real property and the new value was used primarily in connection with the small business of the debtor.

Chapter 13 also contains a prohibition on modification of a residential mortgage in § 1322(b)(2). Section 1322(b)(5), however, permits a chapter 13 plan to provide for the cure of arrearages, maintenance of installment payments during the case, and reinstatement of the maturity of the mortgage.

If § 1190(c)(3) is inapplicable, then the usual rule of § 1123(b)(5) governs. In a non-subchapter V case, the court in *In re Jacobs*, 644 B.R. 883, 894-95 (Bankr. D. N.M. 2022), *motion for reconsideration denied*, 2023 WL 124329 (Bankr. D. N.M. 2023), *aff'd sub nom. Jacobs v. United States Trustee (In re Jacobs)*, 2024 WL 2795800 (D. N.M. 2024), considered whether a chapter 11 plan, like a chapter 13 plan, can provide for the postconfirmation cure of arrearages and reinstatement of maturity. Noting that courts have disagreed on this issue, the court concluded that the only way for a chapter 11 plan to deal with defaults under a residential mortgage subject to § 1123(b)(5) is for the claim to be unimpaired under § 1124, which requires the cure of all arrearages prior to the effective date of the plan. The court discussed and rejected the view of some courts that permit the postconfirmation cure of arrearages under a residential mortgage in a chapter 11 case.

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When the debtor's real property that secures a debt has uses or characteristics other than use as a residence, a question is whether the anti-modification provision is inapplicable because the real property is not solely the debtor's residence. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:42 .

One view is that the debtor must use the real property exclusively as a residence. *E.g.*, . *In re Scarborough*, 461 F.3d 406, 411 (3d Cir. 2006) (claim secured by real property that is, even in part, not the *d*ebtor's principal residence does not fall within the terms of the anti-modification provision.); *Lomas Mortgage, Inc. v. Louis (In re Louis)*, 82 F.3d 1, 4-7 (1st Cir. 1996) (anti-

modification provision does not reach multi-unit real property that is debtor's residential property but has other residential units that are not the debtor's property.).

The Eleventh Circuit rejected this view in *Lee v. U.S. Bank (In re Lee),* 102 F.4th 1177 (11th Cir. 2024). The chapter 11 debtor sought to modify a claim secured by 43 acres. The debtor lived in a small rick house on 2.5 acres and leased the other 41.5 acres to a farming company. The court ruled that the anti-modification statute is unambiguous and applies to any real property that the debtor uses as a residence. The court concluded that real property that *is* the debtor's principal residence does not mean real property that is *only* or *exclusively* the debtor's residence.

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XX. Technical Amendments to Eligibility Requirements (CARES Act and BTATCA)

As originally enacted by SBRA, paragraph (B)(iii) of the eligibility requirement for subchapter V (then § 101(51D), now § 1182(1) until June 20, 2024) excluded any corporation that was subject to the reporting requirements of the Securities and Exchange Act and was an affiliate of the debtor. SBRA § 4(a)(1)(B). Paragraph (B)(ii), however, already excluded a corporation subject to the reporting requirement. For a discussion of the issues relating to this provision, *see* Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankr. Law Letter, no. 10, Oct. 2019, at 7.

It appears the intent of the provision was to exclude from eligibility a public company and any of its affiliates. The CARES Act made a technical correction to (B)(iii) in an effort to accomplish this. The revised (B)(iii) excluded "any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c))."

The Cares Act amendment created problems. Section 3(8) of the Securities Exchange Act defines an "issuer" as "any person who issues or proposes to issue any security." 15 U.S.C. § 78c(a)(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. § 78c(a)(10).

Read broadly, the exclusion for the affiliate of an issuer under the CARES Act version of (B)(iii) 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 subchapter V debtor.

The court in *In re Phenomenon Marketing & Entertainment, LLC,* 2022 WL 1262001 (Bankr. C.D. Cal. 2022), applied this reading of the statute to conclude that a limited liability company was not eligible to be a subchapter V debtor because affiliates of the debtor were

"issuers." One of the affiliates was the sole member of the debtor, and another affiliate was the sole member of the debtor's member.

The court ruled that the affiliates were "issuers" under the Securities Exchange Act even though the securities were not publicly traded. *Id.* at *3-4. The court ruled that the plain meaning of the statute required the result and that it was not absurd. *Id.* at *5.

Congress could not have intended this result. The appropriate interpretation of the CARES Act version of (B)(iii) would limit its application to an affiliate of an issuer that is subject to the reporting requirements specified in (B)(ii). *See* Mark T Power, Joseph Orbach, and Christine Joh, et al., *Not so Technical: A Flaw in the CARES Act's Correction to "Small Business Debtor",* 41-Feb. Amer. Bankr. Inst. J. 32, 33 (2022) ("It is evident that Congress intended to exclude from subchapter V eligibility public companies, including affiliates.").

The Bankruptcy Threshold Adjustments and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) made a further technical amendment to subparagraph (B)(iii). As amended, the statute excludes an affiliate of a public company rather than an affiliate of an issuer. Because the amendment applies retroactively, the *Phenomenon Marketing* court later entered an order, *In re Phenomenon Marketing & Entertainment, LLC,* 2022 WL 3042141 (Bankr. C.D. Cal. 2022), permitting the debtor to proceed under subchapter V, thus replacing its earlier ruling.

BTATCA also amended subparagraph (B)(1) to make it clear that application of the debt limit to the aggregate debts of affiliates applies only to affiliates that are debtors in a bankruptcy case.

XXI. Miscellaneous Matters of Interest

1. Good faith; minimal distributions. A subchapter V plan providing for minimal distributions to unsecured creditors may establish lack of good faith that § 1129(a)(3) requires for confirmation. *In re Hao,* 644 B.R. 339, 348. (Bankr. E.D. Va. 2022).

2. Death of debtor. Death of debtor prior to confirmation may result in conversion to chapter 7. *In re Landau,* 2022 WL 4647473 (Bankr. D. Kan. 2022). The court discusses standards for determining whether a subchapter V case might continue upon the death of the debtor.

3. Plan must provide for prosecution of potentially valuable claims. If potentially valuable avoidance or other claims exist that could be prosecuted for the benefit of the estate, the "best interests of creditors" test of § 1129(a)(7) requires that a plan provide for their prosecution or grant derivative standing to other interested parties to pursue them if the debtor does not. *In re Lapeer Aviation, Inc.,* 2022 WL 7204871 (Bankr. E.D. Mich. 2022).

4. Payment of debtor's counsel upon dismissal. In *In re Bartley*, 2023 WL 1768415 (Bankr. W.D. Okla. 2023)**,** the court allowed attorney's fees to debtor's counsel and "authorized

and directed" the debtor to pay them in connection with the dismissal of the debtor's case. When the debtor did not pay the fees, the lawyer sought to collect the fees by filing a motion for the court to hold the debtor in contempt for failure to pay the fees. The court abstained from considering the motion, concluding that the order was essentially a monetary judgment for which contempt is not an appropriate remedy and that enforcement was more appropriately a matter for the state courts.

5. **Bad faith bankruptcy filing.** The filing of a subchapter V case on the eve of a hearing on damages in state court litigation to stay the litigation and to obtain release of the debtor from jail without complying with the state court's civil contempt orders in a two-party case is a "textbook example" of a bad faith bankruptcy filing, resulting in its conversion to chapter 7. *In re* Roberts, 644 B.R. 220, 229 (Bankr. D. Col. 2022).

6. Adequacy of debtor's financial projections. "Nothing in the Code requires an audit or independent verification of a debtor's financial projections. 'The creation of a liquidation analysis and financial projections is not an exact science, so the Courts typically defer to the debtors' projections, subject to cross-examination and/or a competing set of projections.'" *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), *quoting In re Lost Cajun Enters., LLC,* 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

7. Plan must deal with nondischargeable claims. In *In re Jaramillo,* 2022 WL 4389292, at * 3 (Bankr. D. N.M. 2022), the debtor converted his case from chapter 13 to subchapter V in order to deal with nondischargeable debts, including student loans. In identifying numerous classification problems in the plan, the court noted that a plan cannot lump student loan debt with general unsecured claims and discharge it. If that were not the intent, the court indicated, the failure to separately classify and treat the student loan prevented confirmation. *Id.* at *3.

8. Reported confirmation orders entered after resolution of objections. A number of confirmation orders have been reported that do not resolve objections but address confirmation requirements. Some include other provisions (such as releases and exculpations). ******* *In re PM Management – Kileen I NC LLC,* 2024 WL 1882915 (Bankr. N.D. Tex. 2024) (Plan providing for appointment of liquidation trustee selected in consultation with U.S. Trustee and subchapter V trustee, appointment of liquidation committee to supervise, vesting of all causes of action of debtors and estates in liquidation trustee; plan and Liquidation Trust Agreement attached to order); ### *In re Gilbert,* 2023 WL 5123245 (Bankr. D. Utah 2023) (consensual confirmation; all impaired classes have accepted or did not vote or object to confirmation); *In re Raspberry Creek Fabrics, LLC,* 2023 WL 8606662 (Bankr. D. Utah. 2023) (same); *In re Little Road Co., LLC,* 2023 WL 7008981 (D. Utah 2023) (same); *In re KW Excavation, Inc*., 2023 WL 7381529 (Bankr. D. Utah (same) *In re Gage's Granite LLC,* 2023 WL 5422253 (Bankr. N.D. Tex. 2023) (consensual confirmation); *In re Mulvadi Corp*., 2023 WL 6798625 (Bankr. D. Hawaii 2023) (cramdown confirmation); *In re Matthews,* 2023 WL 6280219 (Bankr. E.D. Wash. 2023); *In re ATH Sports Nutrition, LLC,* 2023 WL 6284544 (Bankr. D. Haw. 2023). *In re Bitter Creek Water Supply Corp*., 2023 WL 2962206 (Bankr. N.D. Tex. 2023) (consensual plan confirmation; order provides that, if case is converted, all property will automatically vest in chapter 7 estate); *In re*

Jess Hall's Serendipity, LLC, 2023 WL 3635068 (Bankr. N.D. Tex. 2023) (consensual plan confirmation order including provisions for third party releases and approval of insider settlement); *In re SRAK Corp*., 2023 WL 2589252 (Bankr. N.D. Tex. 2023) (consensual confirmation); *In re Associated Fixture Manufacturing, Inc.*, 2023 WL 1931301 (Bankr. D. Utah 2023) (consensual confirmation); *In re* Higgins AG, LLC, 2023 WL 3745100 (Bankr. N.D. Tex. 2023) (consensual plan confirmation; includes provisions for third party releases); *In re iVidex,* 2022 WL 5264710 (Bankr. W.D.N.Y. 2022) (cramdown confirmation; trustee to make payments); *In re ActiTech, L.P.,* 2022 WL 6271936 (Bankr. N.D. Tex. 2022) (plan attached to order; order provides for approval of settlement, releases, and exculpation); *In re North Richland Hills Alamo, LLC,* 2022 WL 2975121 (Bankr. N.D. Tex. 2022); *In re Logistics Giving Resources, LLC,* 2022 WL 2760126 (Bankr. D. Utah 2022).

9. Subchapter V's purposes and procedures may be a factor in resolving non-subchapter V issues.

In *Hawkes v. Automated Recovery Systems of New Mexico, Inc. (In re Automated Recovery Systems of New Mexico, Inc.),* 2022 WL 17184548 (Bankr. D. N. Mex. Nov. 2022), the subchapter V debtor removed from the state court a class action that alleged that its filing of collection actions in its own name, even though it did not own the claims, was the unauthorized practice of law. The plaintiffs requested that the bankruptcy court abstain. The court determined that the lawsuit was a core proceeding so that mandatory abstention was not required. The court decided that permissive abstention was not appropriate, in part because of the need for a prompt resolution of the dispute. The court noted that subchapter V cases are intended to proceed expeditiously.

In *In re Major Model Management, Inc.*, 641 B.R. 302 (Bankr. S.D.N.Y. June 21, 2022), the court declined to permit the filing of a proof of claim on behalf of a class under Rule 23 of the Federal Rules of Civil Procedure. The court noted that an independent trustee serves in subchapter V cases to provide "oversight and guidance" to the court and the parties and agreed with the subchapter V trustee's views at the hearing that the most efficient way to deal with the claims of the putative class members was through the claims objection process.

The court in *In re Hal Luftig Company, Inc.*, 655 B.R. 508 (Bankr. S.D.N.Y. 2023), *recommendation rejected*, 657 B.R. 704 (S.D.N.Y. 2024), *certificate of appealability denied,* 2024 WL 1892256 (S.D.N.Y. 2024), *appeal withdrawn sub nom. Hal Luftig Co., Inc. v. United States Trustee,* 2024 WL 3291603 (2d Cir. 2024), discussed *infra,* relied on subchapter V's purposes in approving third-party releases.

10. Debtor as disbursing agent after cramdown confirmation. SBRA Guide § IX(C) notes that some courts permit the debtor to make plan payments after cramdown confirmation under § 1191(b). Section 1194(b) requires the trustee to make disbursements after cramdown confirmation, unless the plan or confirmation order provides otherwise. In *In re Creason,* 2023 WL 2190623 (Bankr. W.D. Mich. 2023), the court permitted the debtor to serve as the disbursing agent after cramdown confirmation.

11. Third-party releases. For a discussion of third-party releases and procedures in a subchapter V context, see *In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. 2023) (discussing procedures for creditors to "opt in" or "opt out" of provisions for third party releases).

Two courts have approved provisions in a subchapter V plan for the release of claims of creditors against principals of the debtor in exchange for a contribution to the plan.

In *In re Kalos Capital, Inc.*, 2023 WL 7179265 (Bankr. N.D. Ga. 2023), the court confirmed a plan providing for the release of claims of certain creditors against the principals when affected creditors overwhelmingly supported the plan.

In *In re Hal Luftig Company, Inc.*, 655 B.R. 508 (Bankr. S.D.N.Y. 2023), *recommendation rejected*, 657 B.R. 704 (S.D.N.Y. 2024), *certificate of appealability denied*, 2024 WL 1892256 (S.D.N.Y. 2024), *appeal withdrawn sub nom. Hal Luftig Co., Inc. v. United States Trustee*, 2024 WL 3291603 (2d Cir. 2024), the bankruptcy court approved third-party releases over the objection of the only creditor covered by the release. The *Luftig* court concluded that the absence of "overwhelming support" for the release by affected creditors was of "little weight" in applying the factors governing third-party releases because subchapter V "itself contemplates the confirmation of a plan without the consent of any creditor" and because the plan was "the best possible means of enabling [the creditor's] recovery. Put differently, [the creditor] has not identified – and the Court has not found – a tangible financial harm that would result from the approval of a third-party release." 655 B.R. at 547.

The bankruptcy court made its ruling as proposed findings of fact and conclusions of law. The district court rejected the bankruptcy court's recommendation for confirmation of the plan with the releases. *In re Hal Luftig Company, Inc.* 657 B.R. 704 (S.D.N.Y. 2024). The district court concluded that the creditor's objection "must be given significant, if not controlling weight." *Id.* at *3.

12. Objection to chapter 7 discharge of individual based on alleged fraudulent conduct as sole member of subchapter V debtor during the subchapter V case prior to plan confirmation. After the court confirmed a subchapter V plan without objection, the sole member of the subchapter V debtor filed a chapter 7 case. Creditors filed a complaint objecting to his discharge based on his allegedly fraudulent conduct during the subchapter V case. The court denied the member's motion to dismiss the complaint. The court held that the confirmation order was not res judicata as to these issues because it dealt with different issues and that the court could not determine at this stage of the case whether collateral estoppel applied based on the finding of good faith in the confirmation order. The court also concluded that the exculpation clause in the plan by its terms did not shield the member from claims based on willful misconduct or gross negligence, as the complaint alleged. *Bleznick v. DePaolo (In re DePaolo)*, 2023 WL 2482723 (Bankr. D. N.J. 2023)**.** *See also In re Keevers*, 2023 WL 4921566 (Bankr. D. N. H. 2023) (Objection to discharge in chapter 7 case of couple, converted from subchapter V, based on improper disclosures and reporting regarding real estate commissions received by entity owned by one of the debtors based on his services).

13. Material default under confirmed plan. The provisions of the debtor's plan, extensively negotiated with the creditor, provided for payments to be made electronically and received by a date certain. The debtor missed the first plan payment, and the creditor declared a default, which the debtor attempted to cure with a check. The subchapter V trustee and the debtor filed a motion for the court to require the creditor to accept the payment. The creditor stated it would agree to accept the payment if it received prompt payment of its attorney's fees. The debtor contended that attorney's fees should not be required because the default was not material.

The court determined that the default was material and awarded attorney's fees. *In re Ace Holding, LLC,* 2023 WL 4412184 (Bankr. N.D.N.Y. 2023**).** The court reasoned:

> Based upon the prior defaulted payment agreements, unending state court litigation and multiple bankruptcy filings, the Debtor should have been ready, willing and able to commence both plan payments as well as maintain the ongoing monthly fees to this Creditor. Moreover, as previously noted, Schedule A's terms are the result of extensive negotiations and their attendant costs. Thus, any default based upon a late payment or a payment not made in the proper manner is material.

14. A subchapter V case is a chapter 11 case. Three cases serve as a reminder that a subchapter V case is a chapter 11 case.

In *In re Ruby-Gordon, Inc.,* 2023 WL 8252356 (Bankr. W.D.N.Y. 2023), the court denied an ex parte application by the debtor for authority to use cash collateral filed seven days after the filing of the case because the request failed "in every respect" to comply with the requirements of Bankruptcy Rule 4001(b)(1)-(3). The court noted that the debtor had filed no "first day motions," which it described as a "troubling situation," and that the debtor's unauthorized use of cash collateral was "cause for much concern."

In *In re Golesis,* 659 B.R. 767 (Bankr. D. Utah 2024), the court declined to authorize compensation for debtor's counsel for services rendered prior to the filing of the application for approval of employment, which occurred almost two weeks after the filing of the petition. The court ruled that retroactive approval of employment for services prior to the filing of the application is permissible only in "the most extraordinary circumstances" and found none.

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A professional must be a "disinterested person" and cannot "hold or represent an interest adverse to the estate" to be qualified to represent a chapter 11 debtor in possession under § 327(a) and must take care to disclose connections with the debtor and the debtor's principal. *In re Doug Gross Construction, Inc.,* 2024 WL 2990298 (Bankr. W.D.N.Y. 2024). The court concluded that the firm did not represent the principal, who had lent $40,000 to the debtor to pay a retainer for the law firm, and that no actual conflict of interest existed, and approved its employment, but noted that counsel should have made better disclosure of the connections in the application for employment.

In re Vistam, 2024 WL 2037846 (Bankr. C.D. Cal. 2024), illustrates the need for debtor's counsel to carefully consider the details of arrangements for a principal of the debtor to fund a retainer for services in the case and to make full disclosure of them,

The principal of the debtor had provided $25,000 as a retainer to debtor's counsel. The court denied the application for approval of the attorney's employment and continued the hearing. Upon request of the principal, the attorney returned the retainer to the principal. The subchapter V trustee moved for a contempt sanction of $25,000 plus the trustee's fees in pursuing the motion against the principal and the attorney.

The principal and the attorney contended that return of the retainer was appropriate because it remained the principal's money. The court, however, concluded that it could find based on the circumstances that the debtor acquired the funds either as an equity contribution or a loan. The court held both in contempt and required payment of $39,892.

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15. An order converting a case to chapter 7 is a final appealable order. *In re California Palms Addiction Recovery Campus, Inc*., 87 F.4th 734 (6th Cir. 2023).

16. Absolute priority rule in traditional case of individual. The court in *In re Joseffy,* 654 B.R. 747 (S.D. Fla. 2023), ruled that the absolute priority rule applies in a traditional chapter 11 case of an individual and explains why the absolute priority rule does not prohibit the individual from retaining exempt property under the plan. "Because a debtor does not retain exempt property under a plan on account of his or her junior claim or interest, an individual chapter 11 debtor does not violate the absolute priority rule by receiving or retaining exempt property." *Id.* at 760-61.

17. Objection to discharge of debtor not engaged in business. In *In re Lucido,* 655 B.R. 355 (Bankr. N.D. Cal. 2023), a creditor objected to the subchapter V discharge of an individual who had proposed a liquidating plan. In a traditional chapter 11 case, § 1141(d)(3) provides for denial of discharge upon confirmation of a plan providing for the liquidation of all or substantially all of the debtor's assets if the debtor does not engage in business after confirmation.

The court stated that § 1141(d)(3) could deprive the debtor of a discharge regardless of whether consensual or cramdown confirmation occurred. The court concluded, however, that the provision was not applicable because the evidence showed that the debtor would have income from employment, consulting, and social security after confirmation. The court ruled that the debtor's business after confirmation did not have to be the same as the debtor's prepetition business and that income from engaging in business did not have to be sole source of funds for a debtor to be engaged in business in order to be engaged in business for purposes of § 1141(d)(3).

It is uncertain whether § 1141(d)(3) applies after cramdown confirmation. See 8 COLLIER ON BANKRUPTCY ¶ 1192.03[3].

18. Subchapter V cases involving cannabis. In *In re Arts District Patients Collective, Inc.*, 2023 WL 5546920 (Bankr. C.D. Cal. 20223), the U.S. Trustee sought dismissal of the subchapter V case because the debtor's business was the sale of cannabis. The debtor did not oppose dismissal of the case because reorganization was not possible. Without addressing whether ownership of cannabis-related assets required dismissal, the court dismissed it.

In *In re Hacienda Company, LLC*, 654 B.R. 155 (Bankr. C.D. Cal. 2023), the debtor had discontinued its own cannabis operations prior to the filing of the petition but retained a 9.4 interest in a Canadian company engaged in the cannabis business, including operations in the United States. The debtor proposed a plan for the liquidation of its interest.

The U.S. Trustee sought dismissal of the case on the ground that the debtor's ownership of an interest in the Canadian company involved the debtor in a conspiracy to violate federal law. The court denied the motion.

The court reasoned, *id.* at 166:

> [T]his Bankruptcy Court does not interpret Congress' mandate that this Bankruptcy Court "shall" dismiss or convert a bankruptcy case for "cause" under § 1112(b) to mean that any violation of criminal law requires dismissal. Rather, this Court interprets the statute as giving discretion to determine whether dismissal is warranted based on all the facts and circumstances.

The court reasoned that it must "exercise its discretion to determine whether, given all of the facts and circumstances, a debtor's connection to cannabis profits and any past or future investment in cannabis enterprises warrants dismissal of this bankruptcy case." *Id.* at 166. The court ruled that the U.S. Trustee had not established sufficient cause for dismissal in view of the facts that (1) the debtor's connection with any violation of the Controlled Substances Act or any other law was indirect; (2) the debtor intended to liquidate its assets and pay creditors; and (3) the bankruptcy case benefitted all parties in interest, including creditors. *Id.*

19. Appointment and compensation of subchapter V trustee. Confirming what appears to be universal practice, the court in *In re Robert J. Ambruster, Inc.*, 653 B.R. 461 (Bankr. E.D. Mo. 2023), in an opinion denying a motion to reconsider various rulings, noted that it had awarded compensation to the subchapter V trustee based on 330(a)(1) and had overruled objections that U.S. Trustee should have appointed a standing trustee under 28 U.S.C. § 586(b) and that § 586(b) limits compensation to five percent of payments under confirmed plan.

20. Obligations under merchant cash advance agreements are noncontingent and liquidated, even when debtor disputes the obligations. *In re Heart Heating and Cooling, LLC*, 2024 WL 1228370 at *10-11 (Bankr. D. Col. 2024), the court concluded that the obligations of the debtor arising from a number of "merchant cash advance" agreements were neither contingent nor unliquidated.

21. Confirmation of plan providing for releases of claims against insiders for fraudulent transfer and claims of debtor against directors for breaches of fiduciary duties over objection of creditor in exchange for $25,000 is appropriate under § 1123(b) (permitting plan to provide for "settlement or adjustment of an claim or interest belonging to the debtor or to the estate") when the release is "a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *In re Alecto Healthcare Services, LLC,* 2024 WL 1208355 at * 6 (Bankr. D. Del. 2024) (interior quote and citation omitted). The Debtor sought confirmation of its plan under the cramdown provisions of § 1191(b) and did not solicit votes on the plan. The court applied the standards applicable to approval of a settlement under *Myers v. Martin,* 91 F.3d 389, 395 (3d Cir. 1996), noting. "Courts generally defer to a trustee's business judgment when there is a legitimate business justification for the trustee's decision." 2024 WL 1208355 at * 6, citing *Martin,* 91 F.3d at 395. In concluding that the proposed settlement fell within a reasonable range of litigation possibility, the *Alection Healthcare* court relied on testimony of the debtor's independent director that, in his business judgment and based on his independent investigation, no actionable claims existed.

22. Automatic stay issues in case filed after dismissal of earlier subchapter V case. Section 362(n) provides that the automatic stay does not apply in the case of a debtor who is in a small business case pending at the time of the filing of the petition or who was a debtor in a small business case that was dismissed, or in which a plan was confirmed, within the previous two years. A subchapter V case, however, is not a small business case. Accordingly, section 362(n) does not apply in the case of a debtor filed after dismissal of a subchapter V case or confirmation of a plan in a subchapter V case.

In *In re Pacific Panorama, LLC,* 2024 WL 696226 (Bankr. D. Nev. 2024), the court granted the creditor's motion in a subchapter V case for so-called *in rem* relief under § 362(c)(4), which provides that the automatic stay does not apply with regard to real property in any case filed within two years after entry of an order finding that the case was filed as part of a scheme to delay, hinder, or defraud a creditor.

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When the debtor's first case is a small business case, however, § 362(n) applies in a second case under subchapter V. *In re Brendan Gowing, Inc.,* 2024 WL 3549199 (Bankr. S.D. Tex. 2024).

23. A federal receiver does not have authority to file a chapter 11 case without express authority in the receivership order. *In re Prime Capital Ventures, LLC,* 2024 WL 3517621 (Bankr. N.D.N.Y. 2024).

24. Stay of order determining interests in debtor or suspension of proceedings under § 305(a) pending appeal of order. In *In re* NS FOA LLC, 2024 WL 4111142 (Bankr. S.D. Fla. 2024), the entered an order determining that one of the members held a fifty percent membership interest in the limited liability company. The other member appealed the order. On motion of the debtor's counsel, the court determined that, because the LLC had no operating agreement and one member held fifty percent of the debtor's membership interests, neither

member held a "majority in interest" of the company that would permit either of them to manage the debtor.

In denying the other member's motion for a stay pending appeal or for suspension of proceedings in the case under § 305(a), the court observed, *id.* at * 5:

> The debtor filed this case under subchapter V of chapter 11. Subchapter V cases are intended to move swiftly to confirmation. Particularly in light of the weakness of Mr. Xu's appeal, it is contrary to the purposes of subchapter V to suspend all activity in this bankruptcy case for an indeterminate time.

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Professionalism
Past, Present, and Beyond

By

Ronald Edward Daniels, Esq.

Daniels Law LLC
P.O. Box 4939
Eastman, Georgia 31023
ron@dlawllc.com

Introduction

You likely have memorized the oft repeated phrase: "Ethics is what you must do. Professionalism is what you should do."[1] But what is professionalism – and more significantly why does it matter? Isn't the practice of law just a business? How do we resolve this great mystery of how we can maintain a law practice as a profession and not just as a business? And, with the rapidly advancing technology we now have, we are faced with professionalism issues we could not imagine even a few years ago. This CLE presentation will seek to examine the intersection of professionalism (through the Lawyer's Creed and aspirational statements) and modern issues faced by practitioners.

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

I. Defining Professionalism

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."[2] 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.[3] Each of these required some level of training and, thus, were considered to be the three "learned professions."[4] 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.

As one former Dean of Harvard Law put it,

> Professionals … are usually distinguished by their specialized knowledge and training as well as by their commitment to provide important services to patients, clients, or consumers. Professions maintain self-regulating organizations that control entry into occupational roles by formally certifying that candidates have acquired the necessary knowledge and skills. In learned professions, such as medicine, nursing, and public health, the professional's background knowledge is partly acquired through closely supervised training, and the professional is committed to providing a service to others.[5]

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[2] https://www.merriam-webster.com/dictionary/profession#learn-more

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

[4] *Id*.

[5] Roscoe Pound, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)

b. Professionalism Today

Georgia's appellate courts have, as of writing, invoked the word "professionalism" less than 100 times.[6] 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 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

[6] Notably, the total number has increased by approximately 3% since 2019.

> 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, Justice LaGrua expressed concern over a footnote in a case where a prosecutor changed substantially positions without notice to opposing counsel or the Supreme Court by stating:

> Litigants may occasionally realize that their position has become tenuous — either because they have retained new counsel or because the law or other circumstances have changed — and they may fail to timely notify the Court and opposing counsel before the commencement of oral argument. But, emphasizing their mistake again in an opinion may discourage future litigants who recognize, too late, that they need to change their position or concede an issue on appeal. Instead, I want to empower litigants to exercise candor and professionalism with the Court when necessity warrants it.

Martinez-Arias v. State, 313 Ga. 276, 293-94 (2022). This concurring opinion seems to suggest there is a concern over potentially chilling professionalism among litigants by

pointing out purported shortcomings in public opinions and orders. Notably, this is the first instance of such a concern being raised in a reported opinion.

And Judge McFadden has 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).

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).

We are ultimately responsible for the lack of professionalism of others under our direction:

> 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)

c. Chief Justice Commission on Professionalism

A proper discussion of professionalism today requires an understanding of the Chief Justice's Commission on Professionalism ("CJCP") and both *how* and *why* it was created. Established in 1989, the CJCP was the first organization of its kind in the nation and was created to enhance professionalism among Georgia's lawyers.[7] The why is no real mystery: in the late 1980s Georgia lawyers and jurists were concerned about a growing lack of civility and whether the profession was devolving to nothing more than a business.[8]

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.[9] 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.[10] The Lawyer's Creed fulfills a role of providing a basic "outline" whereas the aspirational statements go into a greater depth.

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[7] See generally https://cjcpga.org/

[8] See First Annual Georgia Convocation on Professionalism available at https://lj9362.p3cdn1.secureserver.net/wp-content/uploads/2022/06/10-14-1988-EXCERPTS-First-Annual-Georgia-Convocation-on-Professionalism-for-Social-Media-on-06-09-22.pdf

[9] https://www.merriam-webster.com/dictionary/creed

[10] https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm

III. Thinking Critically – Discussion Points

Out of all professionals, lawyers often are the fodder for more jokes than others. Uniquely, we also spend more time with clients and clients have greater access to us. How many clients call a dental office and direct dial the dentist to discuss their tooth? Clients are the reason we have a profession, but they are also a driver of how we may act in an unprofessional manner.

How might client demands affect your business model? Conversely, do these same demand impact your ability to follow the Lawyer's Creed?

In 1989, most lawyers were not using computers. The first text message was sent on December 3, 1992.[11] When you sent a letter to an opposing counsel or party, you generally meant what you wrote. You often had a period to "cool off" before placing it in the mail or on the fax machine. But now, we can communicate almost instantly – and while this has advantages, there are disadvantages.

How does instantaneous communication impact your ability to be a professional?

Additional Questions as Developed During Course of Live Presentation.

[11] https://en.wikipedia.org/wiki/SMS#:~:text=The%20first%20SMS%20message%20was,a%20method%20of%20text%20communication.

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 – Part IV: A Bankruptcy Lawyer's Journey Through Several Common Scenarios

Presented to the Attendees of the Annual Bankruptcy Seminar on Friday, September 27, 2024 in Macon, Georgia

By:

Ishaq Kundawala
Professor of Law & Southeastern Bankruptcy Law Institute and W. Homer Drake Jr. Endowed Chair in Bankruptcy Law
Mercer University School of Law

Hypothetical #1 – Conflicts Are Not Sexy…

Elizabeth Freeman represents an adult entertainment club, Midnight Motion, as the debtor in a hotly contested chapter 11 case before the well-respected Bankruptcy Judge David Jones. Midnight Motion's largest creditors consist of former adult entertainers who claim they are owed millions in back wages. The case has been going on for quite some time and has earned Ms. Freeman's law firm millions in legal fees. The adult entertainers are represented by Greg Greenback. Someone just slipped Mr. Greenback an anonymous note alleging that Ms. Freeman and Judge Jones have been romantically involved for many years. There is no such disclosure by Ms. Freeman in the bankruptcy case. Despite the anonymous nature of the disclosure, Mr. Greenback suspects that the allegation might actually be true. What are the ethical implications if the allegation is true?

Attendee's Notes:

Hypothetical #2 – A Misstep by Millions…

Attorney Alex represents a client, Jane, who is going through a highly contentious divorce with her former husband, John. The couple was married for less than 18 months before separating. Five years after the separation, Jane files for Chapter 7 bankruptcy. During the bankruptcy filing, Alex, who has also been Jane's matrimonial counsel throughout the divorce, submits bankruptcy schedules on Jane's behalf.

In these schedules, Jane lists her total personal property as worth $150 million, including interests in three corporations allegedly valued at $50 million. However, during the divorce proceedings, the divorce court ruled that these corporations were owned by John prior to the marriage and were his separate property, not subject to division.

Jane does not list John as a creditor in her bankruptcy filing and does not notify him about the bankruptcy. John later discovers the bankruptcy filing during ongoing divorce proceedings and notices the discrepancies in the schedules. He contacts Alex to inform him that the schedules are inaccurate, but Alex does not take any action to correct the filings.

John hires a new attorney, who files an adversary proceeding against Jane and Alex in the bankruptcy court, alleging fraud on the court and violations of state law.

What ethical considerations does this raise? What should the bankruptcy court do?

Attendee's Notes:

Hypothetical #3 – Ethical Problems Are Only a Phone Call Away…

In a Chapter 13 bankruptcy case, a debtor, David, is represented by a law firm under a "no look" flat-fee agreement. The court approved a fee of $4,000, of which $3,968.47 was awarded upon the approval of David's Chapter 13 plan.

A few months after the approval of the fee, David becomes increasingly concerned about his case and repeatedly tries to contact his attorneys to discuss ongoing issues. However, despite multiple attempts, none of the attorneys return his calls. Frustrated and anxious, David decides to hire a new attorney, who promptly files a motion to substitute counsel, citing the original attorneys' failure to communicate.

In response, the court issues an order to show cause, questioning whether the original attorneys violated their ethical duties and the terms of the flat-fee agreement by not returning David's calls. The original attorneys argue that they were under no obligation to respond to every inquiry since their flat fee covered only specific legal services until the case closed. They also suggest that David simply wanted to switch lawyers for personal reasons, unrelated to any alleged misconduct.

What ethical considerations does this raise? What should the bankruptcy court do?

Can attorneys exclude certain legal services in their retention agreements?

Attendee's Notes:

Hypothetical #4 – Struggling Solo…

James Wright is a solo practitioner who has built his small law practice from the ground up. He specializes in bankruptcy law and has a loyal client base due to his thorough approach and personal attention to each case. As a solo attorney, James handles everything himself—client meetings, court appearances, document preparation, billing, and administration.

Over the past year, James has been facing increasing personal stress. His spouse was diagnosed with a serious illness, requiring constant care and frequent hospital visits. As a result, James has been juggling his responsibilities at home with his demanding law practice. The stress is overwhelming, and he finds himself struggling to keep up.

James begins to show signs of significant stress and exhaustion. He becomes forgetful, missing key deadlines, and starts to avoid answering client calls because he feels too overwhelmed to deal with them. His once meticulous case preparation has slipped, leading to errors in filings and a noticeable decline in the quality of his work. Some clients have started to express dissatisfaction, and one has even filed a grievance with the state bar, citing poor communication and inadequate representation.

Despite these challenges, James is hesitant to seek help. He feels isolated and worries that admitting his struggles would damage his professional reputation and cause clients to leave. He also fears that reaching out to colleagues or seeking assistance could be perceived as a sign of weakness, undermining his credibility as a competent attorney. Additionally, as a solo practitioner, he has no support staff or partners to lean on for help. James has started drinking alcohol heavily to feel less stressed.

James is now at a crossroads. He realizes that he cannot continue on his current path without risking further damage to his practice and possibly facing disciplinary action. He comes to you seeking advice on how to manage his situation while upholding his ethical obligations to his clients.

What do you advise and why?

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 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer. The maximum penalty for a violation of this rule is disbarment.

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 or a firm, but only if the revealved 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 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 4.1 – TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 .
The maximum penalty for a violation of this Rule is disbarment.

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. § 105 – Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

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.

Sources

Nancy B. Rapoport, Am I My Colleague's Keeper When It Comes to Disclosing Connections?, 40 Emory Bankr. Dev. J. 333 (2024).

In re Reeves, 509 B.R. 35 (Bankr. S.D.N.Y. April 8, 2024).

In re: Dennis Molnar, 19-bk-09525, 2024 WL 190919 (Jan. 17, 2024 N.D. Ill.).

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@corpcareeap.com.

Georgia Lawyers Helping Lawyers - https://georgialhl.org/ - Lawyers Helping Lawyers is a volunteer peer support program created by the Lawyer Assistance Committee of the State Bar of Georgia to give additional tools to members who might benefit from a peer to talk to about the difficulties in their lives.

Speaker Biography

Ishaq Kundawala joined Mercer Law in 2021 as a Professor of Law and as the Southeastern Bankruptcy Law Institute & W. Homer Drake Jr. Endowed Chair in Bankruptcy Law. He began his teaching career in 2008 at Nova Southeastern University's Shepard Broad College of Law in Fort Lauderdale, Florida, where he taught for 13 years. Prior to beginning his teaching career, he was in private practice in Dallas, Texas for over five years working at some of the most respected law firms in the country. 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 (Dallas Division). At Mercer Law, he teaches Bankruptcy, Consumer Bankruptcy Externship, Contracts I and II, Secured Transactions, and Legal Ethics (Law of Lawyering). At Mercer Law, he created an innovative consumer bankruptcy externship program that enables students to gain practical experience representing consumer debtors in bankruptcy proceedings on a pro bono basis. His research interests include Bankruptcy Reform and Legal Ethics. He's licensed to practice law in both Georgia and Texas. He earned his J.D. from Tulane Law School in 2002.

Student Loans

Middle District cases and the DOJ attestation process

Tori Grantham, Barbara Parker, and Will Woodall

Student Loans in the Middle District

Statistics as of 6/30/2024

- 917, or 16%, of cases filed in 2023 had claims by the DOE
- Average Claim: $43,258.67
- Original Amount: $38,688.47
- Interest: $4,299.44
- Average annual income: $50,306.82
- Average time to repay if Debtor paid all net disposable income to payments: 122.38 months or 10 years and 2 ½ months

Objectives of the Guidance

A. Set clear, transparent, and consistent expectations for debtors;

B. Reduce burdens by simplifying the fact-gathering process through a form Attestation; and

C. Identify proceedings where the Government may stipulate to facts demonstrating undue hardship.

The Attestation

- Is designed to make the Guidance easier to apply.
- May be used at any point in the litigation
- Does not limit the United States' ability to seek verification or supporting documentation.
- Has six parts:
  - Personal information
  - Current Income and Expenses
  - Future Inability to Repay Student Loans
  - Prior Efforts to Repay Student Loans
  - Current Assets; and
  - Additional Circumstances

Brunner Factors: Still the Standard

Pre and Post DOJ Announcement Applications

Prong 1: Current inability to pay

Pre DOJ Announcement

Debtor is deemed to have ability to pay with $0 monthly payment with IBR plan.

Post DOJ Announcement

If debtor's current expenses, based on IRS standards, are greater than monthly income, debtor does not have current ability to pay.

Three relevant components of the IRS Standards:

1. National Standards: food, housekeeping supplies, apparel, personal care products and services, and miscellaneous (plus uninsured medical costs)
2. Local Standards: housing and transportation
3. Other Necessary Expenses: taxes, health and life insurance, day care, and other expenses

- IRS Standards impose no formal caps, but these should be necessary and reasonable.
- Most require some form of explanation on the Attestation

Prong 2: Future ability to pay

Pre DOJ Announcement

Debtor must have a minimal standard of living. Shelter, basic utilities, food and personal hygiene products, vehicle, health insurance, small source or recreation (watching tv or a pet)

Post DOJ Announcement

The Guidance allows such expenses if they are:

a. Consistent with IRS National and Local Standards, or
b. They are IRS Other Necessary Expenses and are necessary and reasonable for a minimal standard of living.

After the debtor's allowed expenses are calculated, they are compared to the debtor's gross income

a. If income does not exceed expenses, the debtor satisfies Prong One.
b. If income exceeds allowed expenses by enough to make the regular student loan payment, the debtor fails Prong One.

Presumptions for Future Ability Repay

The Guidance creates **presumptions** that the inability to repay will persist if:

1. The debtor is 65 or older;
2. The debtor has a disability or injury impacting income potential; 3. The debtor has been unemployed for at least 5 of last 10 years; 4. The debtor failed to obtain degree for which loan was procured; 5. The debtor's loan has been in repayment status for 10 years.

NOTE: Presumptions are rebuttable if there is concrete evidence that the debtor would have the future ability to pay.

Prong 3: Good Faith Efforts to Repay

Pre DOJ Announcement

Moving target that must be tested in light of the particular circumstances of the party under review, characterization of that effort must reflect not only a party's objective conduct, but the environment in which that conduct occurs

Post DOJ Announcement Good Faith Considerations:

- Whether the debtor made any payments, applied for deferment or forbearance, applied for IDR plans, responded to outeach from servicers or, engaging meaningfully with creditor about payment options.
- Whether the Debtor's debt management/income and employment/expenses were reasonable given their circumstances
- Whether the debtor was denied access, was unaware of, or misunderstood IDR Plan

Note: A debtor's failure to make payments is not dispositive of good faith.

Debtor's Information Required for Attestation / Complaint

1) Dependents' names and ages

2) All schools debtor attended. For each school, dates attended and degrees obtained.

3) Current income and expenses.

4) Any medical information that hinders debtor's ability to earn income.

5) Current assets - Value and debt

Documents Required for Complaint / Attestation

1) All tax returns from bankruptcy filing to present.
2) Check stub with year to date information for present year
3) Any medical records which support allegation on inability to earn income.
4) Previous 6 months checking account statements (self employed debtors)
5) NSLDS file

Factors to Consider When Choosing Proper Plaintiff

1) Chapter 13 pay history
2) Payment amount
3) Efficiency in providing documents / information
4) Length of time remaining in plan
5) Good facts (illnesses, family situation, permanent disability, income potential for current employment)

2024 Allowable Living Expenses Housing Standards

County	State Name	2024 Published ALE Housing Expense for a Family of 1	2024 Published ALE Housing Expense for a Family of 2	2024 Published ALE Housing Expense for a Family of 3	2024 Published ALE Housing Expense for a Family of 4	2024 Published ALE Housing Expense for a Family of 5
Baker County	Georgia	$1,370	$1,610	$1,696	$1,891	$1,922
Baldwin County	Georgia	$1,492	$1,753	$1,847	$2,059	$2,093
Banks County	Georgia	$1,513	$1,777	$1,872	$2,087	$2,121
Barrow County	Georgia	$1,587	$1,864	$1,964	$2,190	$2,225
Bartow County	Georgia	$1,635	$1,921	$2,024	$2,257	$2,293
Ben Hill County	Georgia	$1,302	$1,529	$1,611	$1,796	$1,825
Berrien County	Georgia	$1,318	$1,548	$1,631	$1,819	$1,848
Bibb County	Georgia	$1,511	$1,775	$1,870	$2,085	$2,119
Bleckley County	Georgia	$1,500	$1,762	$1,857	$2,071	$2,104
Brantley County	Georgia	$1,332	$1,565	$1,649	$1,839	$1,868
Brooks County	Georgia	$1,351	$1,587	$1,672	$1,864	$1,894
Bryan County	Georgia	$1,970	$2,314	$2,438	$2,718	$2,762
Bulloch County	Georgia	$1,508	$1,771	$1,866	$2,081	$2,114
Burke County	Georgia	$1,451	$1,704	$1,796	$2,003	$2,035
Butts County	Georgia	$1,479	$1,738	$1,831	$2,042	$2,075
Calhoun County	Georgia	$1,349	$1,585	$1,670	$1,862	$1,892
Camden County	Georgia	$1,550	$1,820	$1,918	$2,139	$2,173
Candler County	Georgia	$1,322	$1,553	$1,636	$1,824	$1,854
Carroll County	Georgia	$1,497	$1,758	$1,853	$2,066	$2,099
Catoosa County	Georgia	$1,460	$1,715	$1,807	$2,015	$2,047
Charlton County	Georgia	$1,351	$1,587	$1,672	$1,864	$1,894
Chatham County	Georgia	$1,795	$2,109	$2,222	$2,478	$2,518
Chattahoochee County	Georgia	$1,668	$1,959	$2,064	$2,301	$2,339
Chattooga County	Georgia	$1,268	$1,489	$1,569	$1,749	$1,778
Cherokee County	Georgia	$1,964	$2,307	$2,431	$2,711	$2,754
Clarke County	Georgia	$1,603	$1,883	$1,984	$2,212	$2,248
Clay County	Georgia	$1,357	$1,594	$1,680	$1,873	$1,903
Clayton County	Georgia	$1,497	$1,758	$1,853	$2,066	$2,099

2024 Allowable Living Expenses National Standards

Expense	One Person	Two Persons	Three Person	$ Four Persons
Food	$458	$820	977	$1,143
Housekeeping supplies	$44	$75	83	$82
Apparel & services	$87	$157	187	$300
Personal care products & services	$48	$80	87	$97
Miscellaneous	$171	$279	343	$405
Total	**$808**	**$1,411**	**1,677**	**$2,027**

More than four persons	Additional Persons Amount
For each additional person, add to fo ur-person total allowance:	**$386**

Allowable Transportation Expenses		
Public Transportation		
National	$215	
Ownership Costs		
	One Car	**Two Cars**
National	$619	$1,238
Operating Costs		
	One Car	**Two Cars**
Northeast Region	$285	$570
Boston	$310	$620
New York	$377	$754
Philadelphia	$307	$614
Midwest Region	$239	$478
Chicago	$266	$532
Cleveland	$239	$478
Detroit	$299	$598
Minneapolis-St. Paul	$243	$486
St. Louis	$220	$440
South Region	$260	$520
Atlanta	$304	$608
Baltimore	$272	$544
Dallas-Ft. Worth	$292	$584
Houston	$332	$664
Miami	$355	$710
Tampa	$305	$610
Washington, D.C.	$301	$602
West Region	$273	$546
Anchorage	$200	$400
Denver	$321	$642
Honolulu	$254	$508
Los Angeles	$331	$662
Phoenix	$300	$600
San Diego	$310	$620
San Francisco	$348	$696
Seattle	$271	$542

2024 Allowable Living Expenses Health Care Standards

	Out of Pocket Costs
Under 65	$83
65 and Older	$158

[Updated May 2024]

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
_____DISTRICT OF

In re:	)	
	)	
	)	Case No. _____
	)	Chapter [7]
Debtors.	)	
	)	
_____	)	
	)	
	)	
	)	
Plaintiff,	)	Adversary Pro. _____
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF EDUCATION, [et al.],	)	
	)	
Defendant[s].	)	
_____	)	

ATTESTATION OF [_____] IN SUPPORT OF REQUEST FOR STIPULATION CONCEDING DISCHARGEABILITY OF STUDENT LOANS

PLEASE NOTE: This Attestation should be submitted to the Assistant United States Attorney handling the case. It should not be filed with the court unless such a filing is directed by the court or an attorney.

I, [_____], make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an "undue hardship" to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.

2. I reside at _____ [address], in _____ County, _____[state].

3. My household includes the following persons (including myself):

_____ [full name] _____[age] _____[self]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

Questions four through eight request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney ("AUSA") handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than <u>one</u> student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct and complete: YES☐ NO☐ No Information Provided☐

[If you answered anything other than "YES," you must answer questions five through eight].

5. The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is $_____.

6. The current monthly payment on such loan[s] is _____. The loan[s] are scheduled to be repaid in _____[month and year] **[OR]** ☐ My student loan[s] went into default in _____[month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending _____, where I was pursuing a _____degree with a specialization in _____.

8. In _____[month and year], I completed my course of study and received a _____degree. **[OR]** In _____[month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a _____. My employer's name and address is _____ **[OR]** ☐ I am not currently employed.

II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

A. Household Gross Income

11. My current monthly household ***gross*** income from all sources is $_____.[1] This amount includes the following monthly amounts:

[1] "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy case , including Form B 106I, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information.

_____ my ***gross*** income from employment (if any)
_____ my unemployment benefits
_____ my Social Security Benefits
_____ my _____
_____ my _____
_____ my _____
_____ ***gross*** income from employment of other members of household
_____ unemployment benefits received by other members of household
_____ Social Security benefits received by other members of household
_____ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

_☐__ Includes a monthly average of the gross income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

_☐__ Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

_☐__ My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members:

_____

13. In addition, I have submitted _____ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

B. Monthly Expenses

14. My current monthly household expenses do/do not exceed the amounts listed below based on the number of people in my household for the following categories:

(a) Living Expenses[2]

i. My expenses for food — do exceed ☐ do not exceed ☐
$458 (one person)
$820 (two persons)
$977 (three persons)
$1143 (four persons)

ii. My expenses for housekeeping supplies — do exceed ☐ do not exceed ☐
$44 (one person)
$75 (two persons)
$83 (three persons)
$82 (four persons)

iii. My expenses for apparel & services — do exceed ☐ do not exceed ☐
$87 (one person)
$157(two persons)
$187 (three persons)
$300 (four persons)

iv. My expenses for (non-medical) personal care products and services — do exceed ☐ do not exceed ☐
$48 (one person)
$80 (two persons)
$87 (three persons)
$97 (four persons)

v. My miscellaneous expenses (not included elsewhere on this Attestation) — do exceed ☐ do not exceed ☐
$171 (one person)
$279 (two persons)
$343 (three persons)
$405 (four persons)

vi. My total expenses in these categories — do exceed ☐ do not exceed ☐
$808 (one person)

[2] The living expenses listed in Question 14 and 15 have been adopted from the Internal Revenue

Service Collection Financial Standards “National Standards” and “Local Standards” for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

$1411 (two persons)
$1677 (three persons)
$2027 (four persons in household)
Add $386 per each additional member if more than four in household.

If you answered that your total expenses for any of the categories (i) through (v) exceed the applicable amount listed in those categories, and you would like the AUSA to consider your additional expenses for any such categories as necessary, you may list the total expenses for any such categories and explain the need for such expenses here. (You do not need to provide any additional information if you answered that your total expenses did not exceed the applicable amount listed in subsection (vi)).

(b) Uninsured medical costs:

My uninsured, out of pocket medical costs do exceed ☐ do not exceed ☐

$83 (per household member under 65)
$158 (per household member 65 or older)

If you answered that your uninsured, out of pocket medical costs exceed the listed amounts for any household member, and you would like the AUSA to consider such additional expenses as necessary, you may list the household member's total expenses and explain the need for such expenses here.

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.][3]

[3] Forms 122A-2 and 122C-2 are referred to collectively here as the "Means Test." If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in

15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

i. Taxes, Medicare and Social Security $_____
[You may refer to line 16 of the Means Test or Schedule I, line 5]

ii. Contributions to retirement accounts $_____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required as a condition of your employment? YES☐ / NO☐

iii. Union dues $_____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

iv. Life insurance $_____
[You may refer to line 18 of the Means Test or Schedule I, line 5]

Are the payments for a term policy covering your life? YES☐ / NO☐

v. Court-ordered alimony and child support $_____
[You may refer to line 19 of the Means Test or Schedule I, line 5]

vi. Health insurance $_____
[You may refer to line 25 of the Means Test or Schedule I, line 5]

Does the policy cover any persons other than yourself and your family members? YES☐ / NO☐

vii. Other payroll deductions

_____ $_____
_____ $_____
_____ $_____

other expense categories below. If you did not file a Means Test, you may refer to your Schedule I and Form 106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

(b) Housing Costs[4]

i.	Mortgage or rent payments	$_____
ii.	Property taxes (if paid separately)	$_____
iii.	Homeowners or renters insurance (if paid separately)	$_____
iv.	Home maintenance and repair (average last 12 months' amounts)	$_____
v.	Utilities (include monthly gas, electric water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service)	$_____

(c) Transportation Costs

i.	Vehicle payments (itemize per vehicle)	$_____
ii.	Monthly average costs of operating vehicles (including gas, routine maintenance, monthly insurance cost)	$_____
iii.	Public transportation costs	$_____

(d) Other Necessary Expenses

i. Court-ordered alimony and child support payments (if not deducted from pay) $_____
[You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule J, line 18]

ii. Babysitting, day care, nursery and preschool costs $_____
[You may refer to line 21 of Form 122A-2 or 122C-2 or Schedule J, line 8][5]

Explain the circumstances making it necessary for you to expend this amount:

[4] You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c and 17).

[5] Line 8 of Schedule J allows listing of expenses for "childcare and children's education costs." You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

iii. Health insurance $_____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than yourself and your family members? YES ☐ / NO ☐

iv. Life insurance $_____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy ☐ covering your life? YES ☐ / NO

v. Dependent care (for elderly or disabled family members) $_____
[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary for you to expend this amount:

vi. Payments on delinquent federal, state or local tax debt $_____
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant to an agreement with the taxing authority? YES ☐ / NO ☐

vii. Payments on other student loans I am not seeking to discharge $_____

viii. Other expenses I believe necessary for a minimal standard of living. $_____

Explain the circumstances making it necessary for you to expend this amount:

16. After deducting the foregoing monthly expenses from my household gross income, I have _____[no, or amount] remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs that are currently not met.[6] These include the following:

III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐ I am age 65 or older.

☐ The student loans I am seeking to discharge have been in repayment status for at least 10 years (excluding any period during which I was enrolled as a student).

☐ I did not complete the degree for which I incurred the student loan[s].

Describe how not completing your degree has inhibited your future earning capacity:

☐ I have a disability or chronic injury impacting my income potential.

[6] If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses.

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

☐ I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐ I incurred the student loans I am seeking to discharge in pursuit of a degree from an institution that is now closed.

Describe how the school closure inhibited your future earnings capacity:

☐ I am not currently employed.

☐ I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:

☐ I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

☐ Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances:

IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of $_____ in payments on the loans, including the following:

___ regular monthly payments of $_____ each.

___ additional payments, including $_____, $_____, and $_____.

22. I have applied for ____ forbearances or deferments. I spent a period totaling ___ months in forbearance or deferment.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education regarding payment options, forbearance and deferment options, or loan consolidation at least _____ times.

24. I have sought to enroll in one or more "Income Driven Repayment Programs" or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

25. [If you did not enroll in such a program]. I have not enrolled in an "Income Driven Repayment Program" or similar repayment program offered by the Department of Education for the following reasons:

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the student loan(s) you are seeking to discharge. These may include efforts to obtain employment, maximize your income, or minimize your expenses. They also may include any efforts you made to apply for a federal loan consolidation, respond to outreach from a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.

V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: _____

_____

_____

Owners:[7] _____

_____

Fair market value: _____

Total balance of mortgages and other liens. _____

28. I own the following motor vehicles:

Make and model: _____

Fair market value: _____

Total balance of Vehicle loans And other liens _____

29. I hold a total of _____ in retirement assets, held in 401k, IRA and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company, partnership, or other entity:

[7] List by name all owners of record (self and spouse, for example)

Name of entity	State incorporated[8]	Type[9] and %age Interest
_____	_____	_____
_____	_____	_____
_____	_____	_____

31. I currently am anticipating receiving a tax refund totaling $_____.

VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to discharge my student loans as an "undue hardship" under 11 U.S.C. §523(a)(8):

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

_____
Signature:

_____
Name:

_____
Date:

[8] The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other business entities might not be incorporated.

[9] For example, shares, membership interest, partnership interest.

Chapter 13 Case Updates

Trustee's Note: COVID has resulted in a decline in cases and a decline in litigation. Consequently, there are very few new cases with written opinions. I am touching on a few cases that might be of interest to practitioners in our area.

1. Middle District of Georgia

- ***In re Lee,* 19-1337**– Judge Laney – This case was a Chapter 11 but should be of some interest to Chapter 13 practioners because it deals with the anti-modification clause section 1322 (b)(2) which prohibits Chapter 13 debtors from modifying long term mortgages secured solely by residential real estate. Debtor wanted to sell part of a parcel and his home was on the same parcel. Judge Laney found that the anti-modification rule applies. The debtor is not required to use the real estate of their residence exclusively as a residence.
    - Trustee's Note: This case helps creditors not debtors in my view. But also allows debtors to be protected and do other things on their land without worry.

- ***In re Farnham*, 23-30610** – Judge Carter – On the debtor's request, the Court dismissed his chapter 13 case while a motion to convert was pending. The court heard a motion to vacate by the creditor who argued that the debtor did not have the right to dismiss his case without creditors having the chance to oppose the dismissal by arguing bad faith, misconduct, and ineligibility for Chapter 13. However, the Court ruled in favor of the debtor finding that the debtor has an absolute right to dismiss a Chapter 13 case if it has not been previously converted.

2. Northern District of Georgia

(*Trustee's Note: There are multiple other reported cases relevant to Chapter 13 which were reported in the Northern District, but all relate to one attorney's conduct resulting in numerous sanctions*.)

- ***Green Prairies, LLC v. Waters* (*In re Waters*), 23-59554-PMB** (Bankr. N.D. Ga. Dec 11, 2023) – Judge Bonapfel - The debtor, a school administrator, filed a pro se petition for bankruptcy under Chapter 13 not naming the school as the debtor, but alleges he did so in his capacity as school administrator to prevent foreclosure of the school. He retained counsel post-filing who argued under Rule 1009(a) the debtor can amend his filing deficiencies to substitute in the school for bankruptcy protection. The Court found that he cannot as the school would not qualify for Chapter 13 relief as it is not an individual, the school is its own separate legal entity, and the school would not be allowed to file a pro se petition.

- ***Hines v. Susan Prop. Mgmt.* (*In re Hines*), 23-56736-PWB** (Bankr. N.D. Ga. Nov 21, 2023) – Judge Bonapfel - The Debtor filed an emergency motion for relief from writ of possession and order to show cause for contempt against the creditor in this case. The writ of possession in this case was decided by the superior court as the debtor who was a tenant-at-sufferance failed to pay the court-ordered rent into the registry of the court while his appeal was pending. The bankruptcy court determined that the debtor was not entitled to relief as the superior court's requirement "that the Debtor pay rent into the registry of the court pending the litigation and challenge to the dispossessory is not a money judgment" and so the creditor's "request for issuance of a writ of possession for the debtor's alleged failure to pay said funds, therefore, is not an enforcement of a money judgment that violates the automatic stay."

(*The following section was written by Edward Safir, Standing Chapter 13 Trustee from the Northern District reproduced with express permission from his materials presented at the Region 21 meeting of Chapter 13 Trustees. Special thanks to him for his work.)*

- ***In re Shaw-Freeman*, 19-66278** – Judge Sacca– We all know that debtors who are not eligible for a discharge under Section 1328(f) face many perils in proposing Chapter 13 plans, with interest continuing to accrue on unsecured debt, to trying to get liens released when the plan is completed. However, the facts of this case starkly put this into reality.

  Debtor filed Chapter 13 case on 10/10/19. Under 11 USC Section 1328(f) she was not eligible for a discharge because she had received a discharge in a Chapter 7 case filed 9/30/16. Debtor's plan is confirmed, provides for a 100% to general unsecured creditors. More pertinently, it treated the $35,892.57 claim of Exeter Finance secured by a car, as a secured claim, excluded from 11 USC Section 506 (not valued) $35,892.57 (note that POC reflected a secured amount of only $28,075.00) at 25.2% interest with pre-conf AP payments at $50/month, continuing post-conf. until 8/20, when payments increased to $1376/month. Plan confirmed 3/12/20.

  Debtor completed plan, and Trustee Whaley filed Notice of Plan Completion on 2/5/24. Trustee Whaley paid a total of $50,373.55, comprised of $35,892.57 principal and interest of $14,480.98, to Exeter. Debtor contacted creditor about getting her title and was told that contractually she still owed over $11,000.

  The Debtor's attorney did nothing. Trustee Whaley filed a Motion to Reopen the Case for the Limited Purpose of Determining the Remaining Debt or to Require Turnover of the Title, arguing that Exeter had accepted the Plan and that while the claim had been paid in full under the Plan as of April 2023, and between then and completion of the plan, the creditor had done or said nothing. Exeter, through counsel, filed a response, arguing that under the language in our form plan, absent a discharge, the creditor retains their lien until payment of the underlying debt under non-bankruptcy law. In this case, the contract provided for a per diem interest calculation, resulting in the over $11,000 balance still owed. Had the Debtor included special language in the Plan stating otherwise, the result might have been very different.

  Trustee Whaley's motion to reopen was denied.

3. **Southern District of Georgia**

(*The following section was written by Edward Safir, Standing Chapter 13 Trustee from the Northern District reproduced with express permission from his materials presented at the Region 21 meeting of Chapter 13 Trustees. Special thanks to him for his work.)*

- ***In re Williams*, 23-10189;** 2023 Bankr. LEXIS 2063 – Judge Barrett

  Following Marrama, the Supreme Court's case that debtors do not have an absolute right to convert, the Court denied Debtor's motion to covert her Chapter 7 case to Chapter 13 because she had engaged in bad faith conduct and was not the "honest but unfortunate debtor" even though she proposed to pay everyone in full in the proposed Chapter 13 plan. In her Chapter 7 schedules, the Debtor disclosed no interest in real property and made a somewhat vague disclosure of the fact that her father had recently died testate and that she and her brothers might be beneficiaries of his estate.

  At the 341 meeting, she then disclosed two life insurance policies and under further questioning by the trustee finally disclosed that before he died her father had actually transferred to her real property valued at approximately $125,000 in January 2023, well before she filed the Chapter 7.

Less than a week after the 341, the Debtor filed the motion to convert to 13 and amended schedules, which disclosed the real property and other previously undisclosed assets, including $100,000 in life insurance, a couple of vehicles and money in a bank account. Sometime later, she filed additional amendments disclosing even more money in bank accounts. In all, with these amendments, the value of her assets increased from about $36,000 to almost $260,000.

In coming to its decision, the Court considered the Debtor's relative sophistication compared to the average debtor.

- ***Townson v. Sheppard (Recovery Law Group),* 21-40749**, 658 BR 706– Chapter 7 - Judge Coleman.
    - Recovery Law Group, aka Wadja & Associates "National Bankruptcy Law Firm" like UpRight Law, Deighan Law, etc.

      Background: Stephanie Sheppard worked as a part-time contract attorney for Recovery Law Group, handling bankruptcy cases. She operated under her own practice, Sheppard Legal Services, LLC, but was contracted by Recovery Law Group for specific tasks, including preparing and filing Chapter 7 and Chapter 13 bankruptcy petitions.

      Ms. Sheppard was compensated on a per-case basis, with specific fees outlined for different types of cases and tasks.

      Client Engagement: The Debtors, Rodney and Debora Gibson, hired Recovery Law Group in June 2021 for a Chapter 7 bankruptcy. They paid a total of $1,838.00, including attorney fees and the filing fee. Recovery Law Group prepared their documents, and communication was managed primarily via email. Recovery had the Debtors sign, but not date, the documents electronically. While Sheppard is, no attorney actually employed by Recovery / Wadja was actually admitted to practice law in Georgia.

      Case Handling: After receiving their final payment, Ms. Sheppard contacted the Debtors in November 2021, reviewed their case details, and filed the bankruptcy petition on November 14, 2021. However, discrepancies were found in the financial disclosures and the compensation documentation.

      Issues and Sanctions:

      - **Allegations:** The U.S. Trustee filed a motion for sanctions against Ms. Sheppard and Recovery Law Group, citing violations including improper disclosure of compensation, unauthorized fee-sharing, and unauthorized practice of law.
      - **Court Findings:** The court found that Ms. Sheppard and Recovery Law Group had violated several provisions of the Bankruptcy Code and rules, including failing to properly disclose fees and engaging in unauthorized practices. The court ruled that the retainer agreement was void and ordered the return of the $1,838.00 paid by the Debtors, although this was reduced to $1500 upon reconsideration.
      - **Court Order:** On August 15, 2023, the court ordered Ms. Sheppard and Recovery Law Group to refund the full amount paid by the Debtors and addressed the violations found.

      In a footnote, the Court seemed to indicate it would have been amenable to further sanctions, including an injunction against Recovery Law Group from representing debtors in the district.

4. **New Issue in Chapter 13**

- Issue: Must the over median debtor pay Interest on unsecured claims when the over median debtor does not propose to pay the Monthly disposable income to the unsecured creditors and the Trustee objects to the lack of interest.

    - Trustee's Note: Judge Smith had answered that question in the affirmative *In re McKenzie,* 14-51374 JPS. My office had considered the matter settled and we have been objecting in every case where the above median debtor is not paying the MDI to the unsecured creditors and has not proposed to pay interest to those creditors in the Plan. Below is a summary of the cases we have found on this issue from which one can conclude it is not settled law. Therefore, if you wish to bring the issue up before either Judge Carter or Judge Matson, my office will be willing to argue that interest is required.

- Relevant Statute & Case Law:

  11 U.S.C. § 1325(b)(1) provides:

  > If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-
  >
  > (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
  > (B) the plan provides that all of debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payment

  There is a split. The split turns on the interpretation of the words "the effective date of the plan" when placed before the word "value", instead of after it.

  - Northern District and some other courts conclude interest is not required.
    - Quick summary:
      - These courts interpret the phrase "as of the effective date of the plan" in § 1325(b)(1) as "simply a reference to when the Court determines what is being paid to allowed unsecured claims, i.e., either (A) the amount of such claim, or (b) the debtor's projected disposable income in the applicable commitment period." *Eubanks*, 581 B.R. at 592 (quoting *In re Edward*, 560 B.R. at 800) (emphasis in original); see also 8 Collier on Bankruptcy, 1325.11[3] at 1325-57 (16th ed. 2021) ("It seems more likely that the words "as of the effective date of the plan" in subsection 1325(b) refer only to the timing of the court's analysis under that subsection."). Essentially, § 1325(b)(1) does not require the payment of interest to unsecured creditors. If Congress had intended to require the payment of interest on allowed unsecured claims, it could have simply drafted § 1325(b)(1) to match the other subsections of § 1325 with present value requirements. The placement of the phrase "as of the effective date of the plan" prior to the word "value" should be regarded as a purposeful policy decision by Congress requiring a different interpretation than the phrase's meaning in § 1325(a)(4) and (a)(5)(B)(ii).5.
    - Notable cases:
      - *In re Stewart-Harrel*, 443 B.R. 219 (Bankr. N.D. Georgia 2011) finding that the better interpretation of the phrase "as of the effective date of the plan" in § 1325(b)(1) "refers to the date as of which the court is to make the determination of either (A) (payment in full) or (B) (payment of all projected disposable income)." Id. at 222.

- *In re Moore*, 635 B.R. 451 (Bankr. S.C. 2021). The court held that, if Congress intended debtors to pay interest to unsecured creditors in order to comply with § 1325(b)(1)(B), it could have simply drafted § 1325(b)(1) to match the other subsections of § 1325 with present value requirements and more particularly that the placement of the phrase "as of the effective date of the plan" prior to the word "value" should be regarded as a purposeful policy decision by Congress requiring a different interpretation than the phrase's meaning in § 1325(a)(4)

- Middle District and Southern District cases say interest is required after objection from the Trustee or an unsecured creditor.

  - Quick Summary:
    - The word placement is different in § 1325(b)(1)(A) where the phrase "as of the effective date" appears before the words "the value," rather than after it. *In re Stewart–Harrel*, 443 B.R. at 222. The *Stewart–Harrel* court concluded the only interpretation of "as of the effective date of plan" which would make sense in both § 1325(a)(1)(A) and § 1325(b)(1)(B) is for it to mean the date that the court is to make the applicable determinations for subsections (A) and (B). Id. at 223. But the Middle and Southern Districts have found, requiring interest is the price a debtor pays for choosing to devote less than all of his projected disposable income into the plan. *In re Hight–Goodspeed*, 486 B.R. at 465 ("[I]f a debtor would prefer to have a more flexible or less rigorous budget it may choose to devote less than all of its disposable income to the plan; but the price for doing so, and thereby paying unsecured creditors over a longer period of time, is that they must be paid in full with interest."). "Much like barnacles on the bottom of a boat, that disparity seems to be the consequence of the accretions that have grown up on the Bankruptcy Code since 1978, spoiling the clean lines and carefully crafted features it originally had. The resulting distortion suggests that Congress was so focused on solving one problem—the degree of effort that could reasonably be expected of a debtor—that it neglected to smoothly integrate the new provisions of the statute with those that were already there." I*n re Hight–Goodspeed* , 486 B.R. at 465 ; see also *Olden v. LaFarge Corp* ., 383 F.3d 495, 506 (6th Cir.2004).

  - Notable cases:
    - *In re Matthews*, 623 B.R. 818 (Bankr. S.D. Ga. 2020). Interest at the Till rate is required to satisfy the valuation requirement of § 1325(b)(1)(A) when an above median debtor opts to pay his unsecured claims in full over time without devoting all of his disposable income to his chapter 13 plan.
    - *In re Barnes*, 528 B.R. 501 (Bankr. S.D. Ga. 2015). "Debtor must pay interest to his unsecured creditors when his plan proposes to pay a 100% dividend to his unsecured creditors over five years, but he fails to contribute all of his projected disposable income into the plan." *In re Barnes*, 528 B.R. 501 (Bankr. S.D. Ga. 2015). "There is 'nothing untoward in such a result, as interest represents the time value of money and the risk of default. As to the difference between priority and nonpriority unsecured claims, the court attributes the disparate effect on successive amendments to the Bankruptcy Code which have created certain distortions.'
    - *In re McKenzie*, 14-51374-JPS. The court held that, if the trustee or an unsecured creditor objects to confirmation, a Chapter 13 debtor must pay interest to unsecured creditors in order to comply with § 1325(b)(1)(A) when the debtor is not paying all of his projected disposable income to unsecured creditors pursuant to § 1325(b)(1)(B).

"TALES FROM THE CRYPTO"

Presented by Neil Gordon

Middle District of Georgia Bankruptcy Law Institute September 26-27, 2024

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NEIL GORDON

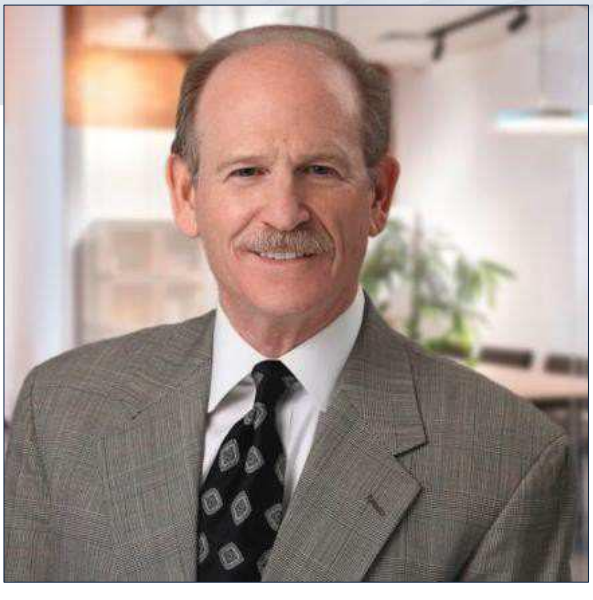
Partner, Atlanta 404.640.5917

ngordon@tayloreglish.com

Neil C. Gordon is a partner in the Atlanta office of Taylor English Duma LLP. He served for two years as a law clerk in Atlanta for United States District Court Judge Robert L. Vining, Jr. followed by 43 years in private practice, with the last 40 years being exclusively in the areas of bankruptcy, business reorganization, fraud investigations, and creditors' rights. Mr. Gordon represents trustees and receivers throughout the country, including in Delaware litigation that recently settled for approximately $40 million.

Mr. Gordon chaired the Bankruptcy Law Section of the Atlanta Bar Association from 1992 to 1993, and has been a panel trustee since 1994, and also serves as an SEC Receiver. Mr. Gordon was first elected to the Board of the National Association of Bankruptcy Trustees in 2000. He held every office including President (2011-2012) and for eight years chaired its Amicus Committee.

For 2021 -2023, Mr. Gordon has been named as one of the Lawdragon 500 Leading Bankruptcy & Restructuring Lawyers in the country. Mr. Gordon has authored or co-authored over 80 scholarly articles and book chapters on bankruptcy law related topics and is making his 200th seminar presentation. He served for three years ending in April 2015 as the Co-Chair of the ABI's Legislation Committee and served on the Chapter 7 Sub-committee for the ABI Commission for the Reform of Consumer Bankruptcy Law in 2017-2018. He also served on the Steering Committee for Professor Lois Lupica's published study on the Costs of BAPCPA commissioned by ABI and NCBJ. He is a Lifetime Member of the ABI, a Master of the Bench in the W. Homer Drake, Jr., Georgia Bankruptcy American Inns of Court, a Full Member of the National Association of Federal Equity Receivers, and a Fellow of the American College of Bankruptcy.



2

JAMES ZHONG: A UGA CRYPTO STORY

- The process of creating new bitcoins is by solving extremely complicated math problems that verify transactions in the currency. When successfully mined, the miner receives a pre-determined amount of bitcoin.
- 2009 Zhong is a crypto currency pioneer mining hundreds of bitcoins per day
- They are not yet worth much
- By the time he enters college at UGA less than two years later, he converts some of his digital wealth into $700,000 in cash

3

JAMES ZHONG: A UGA CRYPTO STORY

- In December 2012, (not quite 12 years ago) Zhong is now a 22-year-old UGA computer science student
- He wants to buy cocaine using his account at Silk Road: an online market-place used to hide criminal dealings behind the anonymity of blockchain transactions and the dark web.
- Silk Road is a financial haven for drug dealers, terrorists, and cyber criminals
- He needs to withdraw some bitcoin to buy the cocaine

4

JAMES ZHONG: A UGA CRYPTO STORY

- In doing so, he accidentally double-clicks the withdrawal button and discovers a software bug ---
- It is allowing him to withdraw double the amount of bitcoin he had deposited

JAMES ZHONG: A UGA CRYPTO STORY

- Zhong feverishly begins creating a multitude of new accounts.
- After a few hours, he has stolen 50,000 bitcoins then worth about $600,000

JAMES ZHONG: A UGA CRYPTO STORY

- Feds close Silk Road a year later and seize computers holding the transaction records
- Feds have not yet mastered how to track people and groups hidden behind blockchain wallet addresses
- So, Zhong's theft is not revealed at first
- Seems like the perfect crime

JAMES ZHONG: A UGA CRYPTO STORY

- For 5 years, Zhong sits on his digital stash (moving it from one account to another to cover his tracks)
- In 2017, he spends $16 Million to "buy" some friends by treating them to various trips on chartered boats and planes, attending exclusive sporting events, etc.
- He buys a home at Lake Lanier and keeps a Lamborghini and Tesla there but continues to live in his small Athens home and dress in t-shirts and shorts

JAMES ZHONG: A UGA CRYPTO STORY

- 12/16/20, Zhong combines crypto funds the IRS had linked to the Silk Road theft with legitimate funds he kept in a cryptocurrency exchange
- This enables the IRS to connect him to the theft (IRS investigators are the top law enforcement agents in this area)
- IRS goes to the bitcoin exchange and gets an IP address, which Zhong's ISP confirms Zhong has been using since 2016

JAMES ZHONG: A UGA CRYPTO STORY

- 11/20/21, Feds get a search warrant and conduct a surprise raid at the home
- They discover the digital keys to the crypto stash in a basement floor safe and in a popcorn tin in his bathroom
- Same 50,000 bitcoin stolen 9 years earlier are seized: Now worth about $3.4 BILLION
- Zhong pleads guilty to mail and wire fraud
- 2-year prison sentence

TALES FROM THE CRYPTO

- Private and government investigators can now identify wallet addresses (earlier thought to be anonymous)

  associated with: o

  terrorists

  - drug traffickers
  - money launderers o

    cyber criminals

TALES FROM THE CRYPTO

- They work with crypto exchanges and block chain analytics companies to map the flow of crypto transactions across

  criminal networks worldwide
- Past 3 years, the U.S. has seized over $10 Billion of digital currency through successful prosecutions – by following the $$$$$
- Investigators look to the blockchain for an instant snapshot of the money trail

TALES FROM THE CRYPTO

- Government investigators look at the blockchain's on-line ledger – open to anyone to see
- Chainalysis, based in New York, says it has mapped more than a billion wallet addresses, separating out the legitimate from questionable holdings and identifying the exchanges where cryptocurrencies are converted to cash
- Blockchain apparently preserves evidence perfectly

13

TALES FROM THE CRYPTO

- USDOJ executed a financial seizure and retrieval of $3.6 Billion from a New York couple: The proceeds of a 2016 hack of the Bitfinex exchange
- As it is getting harder for criminals to convert their spoils to cash, SOME OF THEM WILL BECOME OUR DEBTORS (and not disclose their crypto holdings)

TALES FROM THE CRYPTO

- Once government officials publish wallet addresses connected to criminal activity, legitimate exchanges won't do business with them fearing legal consequences
- In 2/23, FBI published a list of wallet addresses linked to the $100 Million Horizon Bridge theft, effectively stonewalling hackers from withdrawing cash through legitimate exchanges

TALES FROM THE CRYPTO

- The founders of Chainalysis were brought in to investigate the 2014 collapse of Mt.Gox, once one of the most popular crypto exchanges
- It took 3 months to learn Mt.Gox held fewer bitcoin in reserve than believed
- Today, that kind of investigation would take 30 seconds

TALES FROM THE CRYPTO

- Chainalysis has today over 200 clients, including the IRS, FBI, DEA, crypto exchanges, large banks, etc. flagging mostly risky sources of funds
- Many other block chain-analytics companies have formed such as Elliptoc and CipherTrace (owned by MasterCard)
- Bankruptcy trustees and SEC receivers will also become clients in larger cases

TALES FROM THE CRYPTO

- Blockchain analytics can now map the flow of crypto belonging to specific people and groups
- And the exchanges have become more responsive to law enforcement inquiries

TALES FROM THE CRYPTO

- In 2022, $457 Million was paid by ransomware victims, like hospitals and business, to criminally controlled bitcoin addresses
- Feds are recovering more and more of the stolen funds leading to a slow down in such payments

TALES FROM THE CRYPTO

- A Santa Clara County, California prosecutor uncovered over $2 Million in stolen funds last year in an online scam
- Off-shore criminals were befriending victims via text and persuading them to put $$$ into phony crypto investments
- **FBI: Over $5.6 Billion of crypto was stolen in 2023 just from Americans**

THE ROMANCE SCAM IS BACK

- The old Romance Scam is back !!
- Recall the Dateline special on this about 15 years ago where lonely men were sending presents and wiring money to a girlfriend who they had never met –just on-line photos
- Dateline tracked the source to some men in Lagos, Nigeria

THE ROMANCE SCAM

- BBC Podcast: Love Jenessa – has exposed it again.
- The scam has been updated to the cryptocurrency world
- Lonely men think they are engaged to a woman they have never met named Jenessa (or any # of other names)
- Last 12 months Neil has gotten one of these plus other scams as trustee or attorney for the trustee

THE ROMANCE SCAM

CASE No. 1

- Debtor (73) thinks he is engaged to a woman he has not met: Angela Richards
- At the direction of his "fiancé" in 1/2023 he:

1. Claims to have deposited $400K from his 401(k) into a new Coinbase acct. "she" had set up
2. Gives "her" (or "she" already has) the IP address and digital key for the wallet

- Later that same day, bitcoin for the full amount is withdrawn

A TRUSTEE'S TALES FROM THE CRYPTO

- Claims he never heard from her again
- Files chapter 7 after demand letters from other victims
- They demand millions from debtor not knowing he was just another victim of "Angela Richards" whose account they traced to debtor
- **Good luck making any recovery!!**

THE ROMANCE SCAM

But wait! Debtor was lying.

- **Over $550,000 was transferred through his Chase account to the scammer in the three weeks before and after the 341 meeting.**
- **Discharge denied earlier this year.**
- **UST complaint attached to the written materials**

THE ROMANCE SCAM

TEN RED FLAGS

1. Casual introduction. First contact can be a dating site or social media platform. Or even a seemingly innocent wrong # text message that leads to a light conversation.

2. Daily check-Ins. Showing a personal interest in the lives of their targets to build trust and intimacy

3. Super Attractive. Invariably the photos are attractive and the fraudsters described as hardworking, successful business people with hard to verify jobs supported by a fake LinkedIn profile.

4. Frequent Pictures of Everyday Life. Cooking dinner, walking down the street—all staged or stolen from social media profiles

THE ROMANCE SCAM

5. Always available. Hosts work in teams across multiple shifts so they can be immediately responsive. Sound the same because they work from the same script

6. Full of compliments. Praising the intelligence and wit of their newfound friend.

7. Daring you to dream big. Lots of aspirational declarations. Encourage victim to aim higher and embrace bigger ambitions to normalize risk- taking and weaken prudence and restraint.

8. The come-on. Gradually the host appears to develop romantic interests. Now calling you "honey" or "dear," and wanting to meet in person in the distant future.

THE ROMANCE SCAM

At the same time, portraying a lifestyle of wealth and luxury, dismissing petty concerns about money to give the impression that any romantic partner should be well-off.

9. The rich uncle. Eventually, the host will start to discuss "her" success and passion for crypto and claim to have learned secret trading strategies from a rich uncle or family member.

10. Finally, the pitch. Proposing to teach these secret investment strategies and making the romantic connections seem attainable.

THE BROKER SCAM

- **CASE No. 2**
  - Debtor is a surgeon
  - Wants to invest in cryptocurrency
  - Finds a "broker" through LinkedIn
  - Checks him out, speaks with him, and checks with several listed references
  - But broker and references were all part of the scam

THE BROKER SCAM

- Turns over to broker $415,225 to open a Coinbase account
- Broker opens it for himself and steals the funds
- Debtor pays another $15K to an SLC/Private investigation firm (plus 20% contingency)
- They hire a law firm in, yep, Lagos, Nigeria
- **Good luck!!**

THE FLIPPING SCAM

- **CASE No. 3**
  - Debtor made millions in a Michigan real estate flipping scam – never accounting for the $$
  - Files CHAPTER 7 pro se
  - Trustee bluffs saying he sees Debtor has crypto investments purchased through PayPal
  - Debtor is afraid to deny it, so admits he DID--but says "not any longer."
  - BINGO!! Hire an expert to trace the transactions

LAW FIRM SCAMS

6/24/24: FBI issues warning to attorneys and law firms:

- Cybercriminals are posing as lawyers to offer crypto recovery services to victims of investment scams but instead steal their money and personal information
- Includes fake websites mimicking a legitimate law firm

LAW FIRM SCAMS

- A potential victim could receive a phone call from a spoofed law enforcement number notifying them that a criminal investigation is pending against them for failure to report possession of crypto to an anti-money laundering regulator
- The "emotionally paralyzed victim" is then offered a settlement to avoid a conviction

LAW FIRM SCAMS

- Within an hour, the shocked victim receives a payment link from a trust-worthy looking domain
- Sometimes this is accompanied by a long legal document explaining the rights and consequences of payment/non- payment
- Most will pay the "fine" without consulting or discussing it with anyone to avoid acknowledging having broken the law

LAW FIRM SCAMS

- To further the recovery scam, the ”lawyer” may request that the victims verify their identities by providing personal or banking information to get their money back from the initial fraudster
- Fictitious lawyers might also direct victims to pay back taxes and other fees to recover their funds and reference actual financial institutions and money exchanges to build credibility and further the scheme

FAKE INVESTOR SCAMS

- This is the most common form of crypto scam
- Fake investments and trading platforms
- Phony portfolio—every element of the fake trading websites is controlled by the fraudsters, including the online portfolios
- The profits are fictitious. There is NO actual trading activity – simply a digital simulation

FAKE INVESTOR SCAMS

- All investor money is immediately misappropriated by the fraudsters as soon as it is first received
- Every victim is given a crypto wallet address to make "deposits" to their personal "account." But the same address is used and reused for multiple parties. Co-mingling is not an issue because the funds are removed immediately
- The key is the way it starts. trust is built with the victim (just like the romance scam) over a period of time without necessarily a hard sell

FAKE INVESTOR SCAMS

- This will be a phony website controlled by the fraudsters designed to resemble a legitimate exchange where they claim to have made a fortune
- The victim is instructed to establish an account at a legitimate commercial crypto exchange such as Coinbase with low stakes initially
- The victim is provided with a crypto "deposit" address and instructed to send crypto/tokens to fund their personal account with the option of sending money by wire transfer

FAKE INVESTOR SCAMS

- After the transfer, the victim notifies the host, and then the "deposit" appears in the victim's online portfolio on the fraud website
- Once the initial "transaction" is complete, fake profits will post to the victim's online portfolio
- The victim will be allowed to withdraw some of the "profits", which feeds an appetite for more investment and fools the victim into believing money can be freely withdrawn

FAKE INVESTOR SCAMS

- The host now coaxes the victim into larger and larger investment sums with purported profits increasing exponentially
- Victims are pushed to tap other sources for funds, such as a mortgage on their homes or borrowing from family
- But when the victim exhausts all financial resources, the tactics change dramatically

FAKE INVESTOR SCAMS

- Now, as soon as victims are out of money or attempt to make a substantial withdrawal from the online portfolio, demands are made for taxes, commissions, audit fees, compliance fines, insurance premiums, etc.
- The victim may be accused of a crime and told the account was frozen for tax evasion
- Or the host confesses the profits were based on insider trading and encourages the victim to pay quickly to avoid criminal prosecution

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CHAPTER 7
JOSEPH THOMAS FILIPAK,	:	CASE NO. 23-54101-LRC
DEBTOR.	:	
MARY IDA TOWNSON, UNITED STATES TRUSTEE,	:	
PLAINTIFF.	:	
-vs-	:	
JOSEPH THOMAS FILIPAK,	:	ADVERSARY PROCEEDING NO. _____
DEFENDANT.	:	

COMPLAINT OBJECTING TO DEBTOR'S DISCHARGE

Pursuant to 11 U.S.C. § 727(a), Mary Ida Townson, United States Trustee for Region 21 (the "United States Trustee"), files this Complaint seeking denial of discharge as to Joseph Thomas Filipak.

Jurisdiction

1.

This adversary proceeding arises out of and relates to the chapter 7 case of JOSEPH THOMAS FILIPAK ("Defendant" or "Filipak"), case number 23-54101-LRC, filed in the United States Bankruptcy Court, Northern District of Georgia ("Bankruptcy Case").

2.

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 157(b)(1), 11 U.S.C. § 727 and Federal Rule of Bankruptcy Procedure 4004.

3.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

4.

This Court has jurisdiction over the parties in that Defendant is the debtor in the underlying bankruptcy case pending before this Court (case number 23-54101-LRC) and the Plaintiff is an Executive Branch official who is responsible for "protecting the public interest and ensuring that bankruptcy cases are conducted according to the law." H.R. Rep. Np. 95-595, 95th Cong., 2nd Sess. 109 (1978), reprinted 1978 U.S.C.C.A.N 5963, 6070. See, 28 U.S.C. § 586, 11 U.S.C. § 307.

5.

The Court has jurisdiction over all property of Defendant pursuant to 28 U.S.C. § 1334(d).

6.

Venue is proper in this Court under 28 U.S.C. § 1409(a).

7.

Pursuant to the Consent Order Granting the United States Trustee's Second Motion for Extension of Time entered on November 21, 2023, the deadline to file a complaint objecting to discharge was extended to January 12, 2024. (Doc. No. 23).

8.

Defendant is subject to the jurisdiction and venue of this Court and may be served at his current address, 1342 Crossing Way, Wayne, New Jersey 07470. (Doc. No. 25)

Overview

9.

Joseph Filipak began a relationship with an individual he believes is named Angela Richards ("Richards") in November, 2019. Filipak never met Richards; Filipak communicated with Richards solely through written correspondence. Beginning in January, 2021 and continuing until June 13, 2023, Filipak transferred at least $5,623,270.00 to Richards through electronic bank transfers, wire transfers, and the purchase and subsequent assignment of bitcoin. Filipak obtained a small portion of the funds transferred to Richards from his retirement accounts and debt he incurred from various creditors. However, Filipak obtained the majority of the funds he transferred to Richards from other individuals, who sent Filipak funds at Richards's request. Of the funds Filipak transferred to Richards, at least $4,849,705.00 were transferred within one year of filing the petition, and at least $539,965.00 were transferred after Filipak filed the bankruptcy petition. In his statement of financial affairs, Filipak failed to disclose the transfer of any funds within a year of filing the petition. In addition, Filipak failed to disclose the post-petition transfers to the Chapter 7 Trustee. While Filipak asserted at the meeting of creditors that he transferred the funds to Richards because he was a victim of a "romance scam", Filipak transferred substantial funds to Richards just one day before, and seven days after, the

meeting of creditors.

I. Defendant's Pre-Petition Conduct

A. Defendant's Transfer of His Personal Funds to Richards

10.

Filipak began a relationship with an individual he believes is named Angela Richards in November, 2019. Filipak communicated with Richards solely through written correspondence, but over time developed an intimate relationship with Richards.

11.

In January, 2021, Filipak transferred approximately $5,000.00 to Richards through two electronic fund transfers through the digital payment network named Zelle.

12.

In June, 2021, Filipak transferred approximately $25,000.00 to Richards through a wire transfer.

13.

In June or July, 2021, Filipak transferred approximately $20,000.00 to a third party at Richards's request through a wire transfer.

14.

On February 18, 2022, Filipak transferred $81,500.00 to Richards from his Fidelity account ending xxxx2158 to Richards through the purchase and subsequent assignment of bitcoin using a cryptocurrency exchange platform called Coinbase. The funds in Filipak's Fidelity account ending xxxx2158 were derived from Filipak's saving and subsequent investment of wages he earned prior to his retirement.

15.

In March, 2022, Filipak transferred $97,600.00 to Richards through four transactions from his Fidelity account ending xxxx2158, through the purchase and subsequent assignment of bitcoin using Coinbase.

16.

In May, 2022, Filipak transferred $78,010.00 to Richards from his account with TD Bank ending xxxx3074, through the purchase and subsequent assignment of bitcoin using Coinbase. The funds transferred were derived from debts incurred by Filipak.

17.

In total, during the period January, 2021, through May, 2022, Filipak transferred at least $311,610.00, derived from his prior savings or from the incurrence of debt, to Richards.

B. Defendant's Transfer of Funds Received from Others to Richards

18.

On August 16, 2022, Filipak incorporated RJPAK, LLC in the State of New Jersey. Filipak is the sole owner of RJPAK, LLC. Filipak created RJPAK, LLC to collect certain business income Filipak and Richards expected to receive from Richards's business activities. To facilitate its business activities, RJPAK, LLC opened an account with TD Bank, account ending xxxx8763 on August 17, 2022, and an account with Chase Bank, account ending xxxx1992, in approximately December, 2022.

19.

In August, 2022, Filipak received $2,225,040.00 through six wire transfers from

Randy Vorhies ("Vorhies") into RJPAK, LLC's TD Bank account ending xxxx1992 and Filipak's TD Bank account ending xxx8663. In addition, Filipak received $199,961.55 in wire transfers from Louise Brunnekreeft ("Brunnekreeft") into Filipak's TD Bank account ending xxxx8663. All funds received by RJPAK, LLC were transferred into Filipak's TD Bank account ending xxxx8663. In total, Filipak received $2,425,001.55 from Vorhies and Brunnekreeft in August, 2022.

20.

In August, 2022, Filipak transferred $2,425,070.00 to Richards from his TD Bank account ending xxxx8663, through the purchase and subsequent assignment of bitcoin using Coinbase.

21.

In September, 2022, Filipak received $967,000.00 through five wire transfers from Vorhies into RJPAK, LLC's Chase Bank account ending xxxx1992 and Filipak's TD Bank account ending xxxx8663. All funds received by RJPAK, LLC were transferred into Filipak's TD Bank account ending xxxx8663.

22.

In September, 2022, Filipak transferred $339,010.00 to Richards from his TD Bank account ending xxxx8663, through the purchase and subsequent assignment of bitcoin using Coinbase. Filipak retained the remaining $627,990.00 he received through wire transfers in September, 2022, until the following month.

23.

In October, 2022, Filipak received $515,000.00 through two wire transfers from

Vorhies into Filipak's TD Bank account ending xxxx8663.

24.

In October, 2022, Filipak transferred $1,021,020.00 to Richards from his TD Bank account ending xxxx8663, through the purchase and subsequent assignment of bitcoin using Coinbase.

25.

In November, 2022, Filipak received $511,000.00 through a wire transfer from an indeterminate source to Filipak's TD Bank account ending xxxx8663.

26.

In November, 2022, Filipak transferred $626,000.00 to Richards from his TD Bank account ending xxxx8663, through the purchase and subsequent assignment of bitcoin using Coinbase. As a result, by the end of November, 2022, Filipak had transferred all but $6,901.55 of the funds he had received from other individuals during the period August, 2022 to November, 2022 to Richards. Filipak retained the remaining $6,901.55 to pay bank fees and to pay other personal expenses.

27.

On March 16, 2023, Filipak received $300,000.00 in a single deposit from an indeterminate source into RJPAK, LLC's Chase Bank account ending xxxx1992. Filipak transferred these funds into his Chase Bank account ending xxxx3818.

28.

In March, 2023, Filipak transferred $291,940.00 to Richards from his account with Chase Account ending xxx3818 through a wire transfer. Filipak retained the remaining

$8,060.00 he received from the unidentified deposit in March, 2023.

29.

Filipak, with Richards's consent, used the remaining $8,060.00 to pay the fees for the attorneys who assisted Filipak in the filing of his bankruptcy petition, and for other personal expenses.

30.

On April 5, 2023, Filipak received $69,690.00 in a single deposit from an indeterminate source into RJPAK, LLC's Chase Bank account ending xxxx1992. Filipak transferred these funds to his Chase Bank account ending xxxx3818.

31.

On April 10, 2023, Filipak transferred $68,655.00 to Richards from his Chase Bank account ending xxxx3818, through a wire transfer. Filipak retained the remaining $1,035.00 he received from the unidentified deposit on April 5, 2023.

32.

Accordingly, during the period August, 1, 2022 through April 10, 2023, Filipak received $4,787,691.55 from other individuals. Filipak transferred $4,771,695.00 of the funds he received from other individuals to Richards and retained the remaining $15,996.55 for bank fees and his personal use. In total, Filipak transferred $5,083,305.00 to Richards prior to May 1, 2023, the date Filipak filed his chapter 7 bankruptcy petition. Of the total transfers, $4,849,705.00 were transferred during the period May 2, 2022 through May 1, 2023.

33.

On May 1, 2023, the date Filipak filed his chapter 7 bankruptcy petition, Filipak's Chase Bank account ending xxxx3818, had a balance of $16,840.29.

II. Defendant's Post-Petition Conduct

34.

Filipak initiated this case by filing a voluntary chapter 7 petition (the "Petition") in the Bankruptcy Court for the Northern District of Georgia, Atlanta Division, on May 1, 2023. (Doc. No. 1, pp. 1-7).

35.

After the Petition was filed, Neil C. Gordon was appointed interim chapter 7 Trustee. ("Trustee Gordon") The meeting of creditors pursuant to 11 U.S.C. § 341 was scheduled for June 6, 2023. (the "Meeting of Creditors")

A. Defendant's False Written Oaths and Accounts

36.

Filipak declared under penalty of perjury that the answers in his May 1, 2023 schedules and statement of financial affairs were true and correct. (Doc. No. 1, pp. 36, 43).

37.

In his schedule A/B, Part 4, Paragraph 17.3, Filipak falsely indicated that his checking account with Chase Bank had a balance of $135.71. (Doc. No. 1, p. 12).

38.

At paragraph 18 of the Statement of Financial Affairs, Filipak falsely checked the box "No" in response to the question "Within 2 years before you filed for bankruptcy, did

you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?" (Doc. No. 1, p. 40).

B. Defendant's Undisclosed Post-Petition Receipts and Transfers

39.

On May 18, 2023, eighteen days after Filipak filed the Petition, Filipak received a deposit from an indeterminate source in the amount of $10,000.00 into RJPAK, LLC's Chase Bank account ending xxxx1992. Filipak did not disclose this deposit to Trustee Gordon.

40.

On May 19, 2023, nineteen days after Filipak filed the Petition, Filipak received a deposit from an indeterminate source in the amount of $10,000.00 into RJPAK, LLC's Chase Bank account ending xxxx1992. Filipak did not disclose this deposit to Trustee Gordon.

41.

On May 23, 2023, twenty-three days after Filipak filed the Petition, Filipak received two deposits from indeterminate sources, in the combined amount of $95,000.00, into RJPAK, LLC's Chase Bank account ending xxxx1992. Filipak did not disclose this deposit to Trustee Gordon.

42.

On May 24, 2023, twenty-four days after Filipak filed the Petition, Filipak transferred $115,000.00 from RJPAK, LLC's Chase Bank account ending xxxx1992 into Filipak's Chase Bank account ending xxxx3818. That same day, Filipak wired Richards

$113,965.00 from his Chase Bank account ending xxxx3818. Filipak did not disclose these transactions to Trustee Gordon.

43.

On May 26, 2023, twenty-six days after Filipak filed the Petition, Filipak received a deposit from an indeterminate source in the amount of $100,000.00 into RJPAK, LLC's Chase Bank account ending xxxx1992. Filipak did not disclose this deposit to Trustee Gordon.

44.

On May 31, 2023, thirty-one days after Filipak filed the Petition and seven days before the Meeting of Creditors. Filipak transferred $100,000.00 from RJPAK, LLC's Chase Bank account ending xxxx1992 into Filipak's Chase Bank account ending xxxx3818. Filipak did not disclose this transaction to Trustee Gordon.

45.

On June 5, 2023, the day before the Meeting of Creditors, Filipak wired $100,000.00 to Richards from his Chase Bank account ending xxxx3818. Filipak did not disclose these transactions to Trustee Gordon.

46.

On June 13, 2023, seven days after the Meeting of Creditors, Filipak received a deposit from an indeterminate source in the amount of $326,035.00 to his Chase Bank account ending xxxx3818. That same day, Filipak wired $326,000.00 to Richards from his Chase Bank account ending xxxx3818. Filipak did not disclose these transactions to Trustee Gordon.

47.

Accordingly, Filipak received $541,035.00 from other individuals after the Petition was filed. Filipak transferred $539,965.00 of the funds he received from other individuals to Richards and retained the remaining $1,070.00 for bank fees and personal expenses.

C. Defendant's False Oral Oaths and Accounts

48.

On June 6, 2023, Trustee Gordon placed Filipak under oath and conducted the Meeting of Creditors.

49.

At the Meeting of Creditors, Filipak testified under the penalty of perjury that he had read and signed all of his bankruptcy documents that were filed on his behalf by his attorney.

50.

At the Meeting of Creditors, Filipak further testified under the penalty of perjury that the information disclosed in his bankruptcy documents was accurate.

51.

At the Meeting of Creditors, Filipak further testified under the penalty of perjury that he had disclosed all of his assets in his bankruptcy documents.

52.

At the Meeting of Creditors, Filipak further testified that he transferred funds to Richards because he had been a victim of a scheme by Richards to defraud him. Filipak

further testified that, over time, Richards had developed an intimate relationship with him, which induced him to send money to Richards.

53.

At the Meeting of Creditors, Filipak did not inform Trustee Gordon that he had transferred $113,965.00 to Richards thirteen days prior to the Meeting of Creditors, or that he had transferred $100,000.00 to Richards the day prior to the Meeting of Creditors.

D. Defendant's Failure to Provide Requested Documents

54.

On October 4, 2023, the United States Trustee filed a Motion for Order Authorizing Bankruptcy Rule 2004 Examination. (Doc. No. 18). That same day, the Court entered an Order, granting the United States Trustee's Motion for Rule 2004 Examination. (Doc. No. 19).

55.

The United States Trustee conducted the Rule 2004 Examination on October 18, 2023. After questioning Filipak at the Rule 2004 Examination, the United States Trustee requested documentation regarding Filipak's transfers to Richards in 2021 and requested a copy of Filipak's correspondence with Richards.

56.

To date, Filipak has failed to provide the United States Trustee with the requested documentation regarding his transfers to Richards in 2021, depriving the United States Trustee of a full view of the transfers from Filipak to Richards. In addition, Filipak has

failed to provide his written correspondence with Richards, which annotates both the relationship and the extensive transfers between Filipak and Richards.

Count I -- Defendant, With The Intent To Hinder, Delay, or Defraud A Creditor, Has Transferred, Removed, Destroyed, Mutilated or Concealed, or Has Permitted To Be Transferred, Removed, Destroyed, Mutilated, or Concealed, Property of the Defendant, Within One Year Before The Date of The Filing of The Petition

57.

The United States Trustee re-alleges and incorporates herein the allegations contained in paragraphs 1 through 56.

58.

Title 11 U.S.C. § 727(a)(2)(A) reads in pertinent part:

> (a) The court shall grant the debtor a discharge, unless–
>
> …
>
> > (2) the debtor, with the intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-
> >
> > > (A) property of the debtor, within one year before the date of the filing of the petition…

59.

Based on Defendant's undisclosed transfer of at least $4,849,705.00 to Richards from May 2, 2022 through May 1, 2023, the United States Trustee believes and alleges that the Defendant knowingly and fraudulently concealed and transferred his property within

one year before the date of the filing of the petition, with the intent to hinder, delay, or defraud a creditor, chapter 7 Trustee Neil C. Gordon, and the United States Trustee.

60.

Based on Defendant's failure to accurately disclose that Defendant's Chase Bank account ending xxxx3818 held a balance of $16,840.29 on May 1, 2023, not $135.71, on Schedule A/B, the United States Trustee believes and alleges that the Defendant knowingly and fraudulently concealed his property within one year before the date of the filing of the petition, with the intent to hinder, delay, or defraud a creditor, chapter 7 Trustee Neil C. Gordon, and the United States Trustee.

Count II – Defendant, With The Intent To Hinder, Delay, or Defraud A Creditor, Has Transferred, Removed, Destroyed, Mutilated or Concealed, or Has Permitted To Be Transferred, Removed, Destroyed, Mutilated, or Concealed, Property of the Estate, After The Date of The Filing of The Petition

61.

The United States Trustee re-alleges and incorporates herein the allegations contained in paragraphs 1 through 60.

62.

Title 11 U.S.C. § 727(a)(2)(B) reads in pertinent part:

> (a) The court shall grant the debtor a discharge, unless–
>
> . . .
>
> (2) the debtor, with the intent to hinder, delay, or defraud a creditor or an officer charged with custody of property under this title, has transferred, removed, destroyed, mutilated or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-

> (B) property of the estate, after the date of the filing of the petition…

63.

Based on Defendant's undisclosed transfers of $539,965.00 to Richards after filing the Petition, the United States Trustee believes and alleges that the Defendant knowingly and fraudulently concealed and transferred property of the estate after the date of the filing of the petition, with the intent to hinder, delay, or defraud a creditor, chapter 7 Trustee Neil C. Gordon, and the United States Trustee.

Count III - The Defendant Has Concealed, Destroyed, Mutilated, Falsified or Failed to Keep or Preserve Any Recorded Information, From Which the Defendant's Financial Condition or Business Transactions Might Be Ascertained

64.

The United States Trustee re-alleges and incorporates herein the allegations contained in paragraphs 1 through 63.

65.

Title 11 U.S.C. § 727(a)(3) reads in pertinent part:

> (a) The court shall grant the debtor a discharge, unless-
>
> …
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case…

66.

Based upon the Defendant's failure to provide documentation or information regarding the Defendant's transfers to Richards during the year 2021, and Defendant's failure to provide his written correspondence with Richards, the United States Trustee believes and alleges that the Defendant concealed, destroyed, mutilated, falsified, or failed to keep or preserve recorded information including books, records and papers from which a creditor, chapter 7 Trustee Neil C. Gordon, and the United States Trustee might ascertain the Defendant's financial condition or business transactions.

Count IV -- The Defendant Knowingly And Fraudulently, In Or In Connection With The Case, Made A False Oath Or Account

67.

The United States Trustee re-alleges and incorporates herein the allegations contained in paragraphs 1 through 66.

68.

Title 11 U.S.C. § 727(a)(4)(A) reads in pertinent part:

> (a) The court shall grant the debtor a discharge, unless–
>
> . . .
>
> > (4) the debtor knowingly and fraudulently, in or in connection with the case—
> >
> > > (A) made a false oath or account . . .

69.

The United States Trustee believes and alleges that the Defendant, knowingly and fraudulently, made material false oaths and accounts in his May 1, 2023 sworn written schedules and statement of financial affairs including, but not limited to, his failure to disclose the transfer of at least $4,849,705.00 to Richards from May 2, 2022 through May 1, 2023 in his statement of financial affairs, and his failure to disclose that his Chase Bank account ending xxxx3818 held a balance of $16,840.29, not $135.71, in his schedule A/B.

70.

The United States Trustee further believes and alleges that the Defendant, knowingly and fraudulently, made material false oaths and accounts in his sworn oral testimony at the June 6, 2023 Section 341 meeting of creditors including, but not limited to, his testimony that the information disclosed in his bankruptcy case was accurate, his testimony that he had disclosed all of his assets in his bankruptcy documents, and his testimony that he transferred funds to Richards because he had been a victim of a scheme by Richards to defraud him.

Count V- The Defendant has Failed to Explain Satisfactorily the Loss of Assets or Deficiency of Assets to Meet the Defendant's Liabilities

71.

The United States Trustee re-alleges and incorporates herein the allegations contained in paragraphs 1 through 70.

72.

Title 11 U.S.C. § 727(a)(5) reads in pertinent part:

> (a) The court shall grant the debtor a discharge, unless–
>
> . . .
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

73.

Based upon Defendant's failure to provide information and documentation regarding Defendant's transfers to Richards during the year 2021, and Defendant's failure to provide his written correspondence with Richards, the United States Trustee believes and alleges that Defendant has failed to explain satisfactorily, before determination of denial of discharge, a loss of assets or deficiency of assets to meet the Defendant's liabilities to a creditor, Chapter 7 trustee Neil C. Gordon, and the United States Trustee.

WHEREFORE, the United States Trustee respectfully asks the Court for the following relief:

1. for an order and judgment denying debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(A);

2. for an order and judgment denying debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(B)

3. for an order and judgment denying debtor's discharge pursuant to 11 U.S.C. § 727(a)(3);

4. for an order and judgment denying debtor's discharge pursuant to 11 U.S.C. § 727(a)(4)(A);

5. for an order and judgment denying debtor's discharge pursuant to 11 U.S.C. § 727(a)(5); and

6. for such other relief as is just and proper.

MARY IDA TOWNSON
UNITED STATES TRUSTEE
REGION 21

s/ Jonathan S. Adams
Jonathan S. Adams
Trial Attorney
Georgia Bar No. 979073

United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Ted Turner Drive, SW
Atlanta, Georgia, 30303
404-331-4438
Jonathan.S.Adams@usdoj.gov