UPDATE TO A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

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This Update supplements *A Guide to the Small Business Reorganization Act of 2019* (June 2022 rev. ed.), which this Update cites as the "*SBRA Guide*." The Update contains new material since publication of the *SBRA Guide* and includes material contained in previous updates.

The materials in the Update are organized with the same headings and subheadings as the *SBRA Guide*, together with additional subheadings. An asterisk following a heading or subheading indicates that the section is a new one or includes additional material to supplement the original text. The absence of text after a heading or subheading means that the Update does not supplement that section.

The *SBRA Guide* is available at:

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

This Update is available at:

https://www.ganb.uscourts.gov/sites/default/files/sub_v_update_january_2026_2-1-26.pdf

UPDATE TO A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

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This Update follows the organization of the *SBRA Guide.*
New or updated sections are marked with an asterisk

UPDATE TO A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

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I. Introduction

Amendments to Bankruptcy Rules*

Effective December 1, 2022, provisions of the Interim Rules adopted after enactment of SBRA and summarized in Appendix B of the *SBRA Guide* were incorporated as amendments to the Federal Rules of Bankruptcy Procedure. A revised Appendix B that references the amendments is attached.

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.

The *SBRA Guide* noted an empirical study by Bankruptcy Judge (and former bankruptcy professor) Michelle Harner and her staff of 438 cases filed in 2020 that 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 showed that confirmation occurred in more than half of all the cases and in over 62 percent of those that were not dismissed.[2]

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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

These early 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. The report notes that, compared to non-subchapter V small business cases historically, subchapter V cases "have had approximately double the confirmed plan percentage and a 20 percent lower dismissal percentage, as well as a shorter time to confirmation. [3]

Anecdotal evidence indicates that most lawyers and judges agree that subchapter V is working well.[4] 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 Subchapter V Task Force of the American Bankruptcy Institute, after a year of study of subchapter V, issued the *ABI Subchapter V Task Force Final Repor*t that concluded:[5]

> After extensive study, the Task Force has concluded that the overwhelming consensus of bankruptcy professionals, bankruptcy judges, and academics is that Subchapter V is functioning as Congress intended. Many have commented that Subchapter V is the most effective and useful bankruptcy legislation passed since enactment of the Bankruptcy Code in 1978.
>
> The data show that confirmation in Subchapter V cases occurs more often, more quickly, and at lower cost than in non-Subchapter V small business cases and standard Chapter 11 cases, and that creditors are receiving more money in Subchapter V.

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. .

The American Bankruptcy Institute is continuing its study of Subchapter V. ABI is particularly interested in learning more about the real-world impact of Subchapter V.

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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 December 31, 2024,* available at https://www.justice.gov/ust/subchapter-v (last visited Jan. 31, 2026). The data includes only cases filed in United States Trustee Program districts, which thus excludes Alabama and North Carolina.

For subchapter V cases through the end of fiscal year 2023, the report shows that confirmation occurred in 52 percent of them and that confirmation was consensual in 68 percent of them. Conversion occurred in 13 percent of the cases, and 32 percent were dismissed. The remaining three percent were pending without a confirmed plan. It reports the median months to confirmation as 6.6 and the median months to dismissal as 4.9.

[4] The author has presented more than 40 continuing legal education programs on subchapter V since its enactment. Although some participants 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.

[5] American Bankruptcy Institute, *Final Report of the American Bankruptcy Institute Subchapter V Task Force* at 5 (2024) [hereinafter "*ABI Subchapter V Task Force Final Report*"]. A free copy is available at https://subvtaskforce.abi.org/.

Accordingly, ABI is asking for bankruptcy professionals to submit stories about a distressed business or creditor who has used or benefited from the subchapter and comments about whether that case could still happen under the lower debt cap for Subchapter V debtors. The link for submissions is https://www.abi.org/subvstories.

II. Overview of Subchapter V

A. Changes in Confirmation Requirements

B. Subchapter V Trustee and the Debtor in Possession

C. Case Administration and Procedures

D. Discharge and Property of the Estate

1. Discharge – consensual plan

2. Discharge – cramdown plan

3. Property of the estate

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

A. Debtor's Election of Subchapter V*

Shortly after entry of an order for relief on an involuntary petition, the debtor in *In re Zarifian Enterprises, LLC,* 2024 WL 5165920 (Bankr. N.D. Ill. 2024), moved to convert the chapter 7 case to subchapter V to "actively engage in liquidating its assets to pay its creditors" through a subchapter V liquidating plan. *Id.* at *1. The court held that the debtor was engaged in commercial and business activities because it maintained significant assets, a bank account, a commercial lease, and a claim against its landlord for wrongful lockout. *Id.* at 3. The court permitted conversion to allow the debtor to liquidate its assets.

Courts continue to conclude that the burden of proof on the issue of the debtor's eligibility for subchapter V is on the debtor when an objection is filed. *E.g., In re Joiner,* 2025 WL 281053 at * 8 (Bankr. W.D.N.C. 2025); *In re Evergreen Site Holdings, Inc.,* 652 B.R. 307, 316 (Bankr. S.D. Ohio 2023).

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

As *SBRA Guide* § III(B) explains, 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.

As adjusted on April 1, 2025, under § 104, the debt limit is $ 3,424,000.

C. Debtor Must Be "Engaged in Commercial or Business Activities"*

The Eleventh Circuit in *Guan v. Ellingsworth Residential Community Association, Inc., (In re Ellingsworth Residential Community Association, Inc.),* 125 F.4th 1365 (11th Cir. 2025), held that a debtor need not have a profit motive to be "engaged in commercial or business activities."

The debtor was a homeowner's association that state law characterized as a not-for profit corporation. But that status, the court explained, did not preclude it from engaging in business-like activities. "To the contrary," the court said, "HOAs can collect assessments, manage budgets, enforce rules, and maintain common areas. In practice, an HOA operates much like a small business – overseeing the maintenance of shared properties, contracting with service providers, and negotiating with third parties on behalf of its members." *Id.* at 1379 (citations and footnote omitted). Accordingly, the court affirmed the bankruptcy court's order determining that the debtor was eligible for subchapter V.[6]

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

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

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. 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.

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[6] The court noted that the bankruptcy court had determined eligibility in a non-final order but that the interlocutory order had merged into her appeal from the Bankruptcy Court's final order confirming the reorganization plan. 125 F.4th at 1378 n. 7 (11th Cir. 2025).

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, a 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 caselaw, 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; 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."

An individual's involvement in the prosecution of an appeal from a judgment against him and his solely-owned limited liability company, whose debt he had personally guaranteed, was not sufficient engagement in commercial or business activities to establish subchapter V eligibility in *In re Bohman,* 663 B.R. 831 (Bankr. D Utah 2024). The court agreed that under some circumstances the prosecution of litigation might qualify as a commercial or business activity but concluded that the Debtor was not "presently or actively" involved in the appeal. *Id.* at 843.

The court rejected the debtor's arguments that other activities established that he was engaged in commercial or business activities. The debtor, a retired anesthesiologist whose primary income was social security, was not directly engaged in any commercial or business activities, and his limited liability company was no longer operating. The court ruled that he was not engaged in any activities on behalf of the LLC, and that he had not established any intent to restart the business prior to the petition date. *Id.* at 841-43. The court ruled that his work for entities owned by his family, in which he had no ownership interest, on a volunteer basis was not business or commercial activity because it did not involve the buying and selling of commodities and was not a means of livelihood, employment, or gain for the debtor. *Id.* at 840.

An insurance producer working as a W-2 employee on a commission basis also owned a ten percent interest in the employer, was an officer, and had managerial responsibilities, including serving as a mentor to younger insurance producers. The court in *In re Wilson,* 666 B.R. 828 (Bankr. M.D. Ga. 2024), declined to follow the broad approach suggested in *In re Ikalowych,* 629 B.R. 261, 286 (Bankr. D. Colo. 2021),[7] that a W-2 employee could be engaged in business, but concluded that all his duties and responsibilities established that he was engaged in commercial or business activities. 666 B.R. at 837-88 The court ruled, however, that the only debt that could qualify as debt arising from commercial or business activities had to be excluded in determining eligibility because it was unliquidated and, therefore, that the debtor did not meet the requirement that not less than 50% of his debts arise from commercial or business activities. Section III(F) *infra* discusses this aspect of the court's ruling.

[7] *SBRA Guide* § III(E) discusses this aspect of the *Ikalowych* decision.

A company is engaged in commercial or business activities when, although it has not yet generated any business, it has raised capital from investors, leases a facility, maintains bank accounts, employs attorneys to protect its intellectual property rights, is continuing its attempts to generate business, and is providing marketing materials to potential investors. *In re GCPS Holdings, LLC,* 2024 WL 4847831 (Bankr. S.D. Tex. 2024). The court rejected the argument of the creditors who had filed an involuntary petition against the debtor and wanted to propose their own chapter 11 plan that the debtor was not engaged in commercial or business activity because it had never generated any business or income.

Shortly after entry of an order for relief on an involuntary petition, the debtor in *In re Zarifian Enterprises, LLC,* 2024 WL 5165920 (Bankr. N.D. Ill. 2024), moved to convert the chapter 7 case to subchapter V to "actively engage in liquidating its assets to pay its creditors" through a subchapter V liquidating plan. *Id.* at *1. The court held that the debtor was engaged in commercial and business activities because it maintained significant assets, a bank account, a commercial lease, and a claim against its landlord for wrongful lockout. *Id.* at 3. The court permitted conversion to permit the debtor to liquidate its assets.

D. What Debts Arise From 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 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."[8] 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.

[8] *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.

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.

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

F. What Debts Are Included in Determination of Debt Limit*

A debtor is not eligible for subchapter V if the "aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief" exceed the applicable debt limit. § 101(51D)(A). In addition, a debtor is ineligible if the debtor is a member of a group of affiliated debtors when the aggregate of all such debts of all the affiliates exceeds the debt limit. § 101(51D)(B)(i). Only the debts of affiliates who are debtors in a bankruptcy case are included.

The calculation of the debt limit is determined as of the date of the filing of the petition or the order for relief. § 101(51(D)(A). *In re Hub City Home Health, Inc.,* 667 B.R. 822, 830 (Bankr. S.D. Tex. 2025). Debts entitled to priority under § 507(a) are included in the calculation of the debt limit, including prepetition wages that the court authorized the debtor to pay postpetition. *In re Hub City Home Health, Inc.,* 667 B.R. 822, 830-32 (Bankr. S.D. Tex. 2025).

In determining the amount of a debtor's debts for purposes of the debt limit, courts have considered both the debtor's schedules and creditors' proofs of claim. As the court explained 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 McPhillips Flying Service, Inc., 2025 WL 3030284 at *6-8 (Bankr. W.D. Mich. 2025);*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). *Accord, e.g., In re Power Block Coin, LLC,* 2024 WL 4456657 at *2 (Bankr. C.D. Cal. 2024).

In *In re Wilson,* 666 B.R. 828 (Bankr. M.D. Ga. 2024), the debtor scheduled a claim he disputed in pending litigation as partially contingent and unliquidated. Exclusion of the contingent and unliquidated portion was necessary for the debtor's debts to be within the debt cap; inclusion of the portion of the claim scheduled as noncontingent and liquidated was necessary for the debtor to have 50 percent of his debts arising from commercial or business activities.

The court agreed that the disputed claim was contingent and unliquidated for debt limit purposes but declined to accept the scheduled amount as a judicial admission that the scheduled amount was liquidated and noncontingent. "The Debtor's bankruptcy schedules are not the only source of information to determine the amount of debt and whether the debt is unliquidated," the court observed. *Id.* at 839. Because the amount of the debt was subject to the trial court's later determination, the court concluded, the debt was unliquidated. The fact that the debtor's trial attorney had provided the number the debtor used in the schedules, the court explained, was not sufficient to support a conclusion that it was liquidated in that amount.

1. 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. § 101(51D)(A). The requirement that debts be

"liquidated" and "noncontingent" for inclusion in the debt limit also appears in the eligibility requirements for relief under chapters 12[9] and 13.[10]

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

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

[10] § 109(e). For a discussion of what debts are "liquidated" and "noncontingent" for purposes of the debt limitation in chapter 13 cases, *see generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE [hereinafter "CHAPTER 13 PRACTICE AND PROCEDURE"] §§ 12:8, 12:9.

(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.").

Another case discussing whether a disputed claim is unliquidated is *In re Burdock and Associates, Inc.,* 622 B.R. 16 (Bankr. M.D. Fla. 2024). The debtor asserted that a claim for lost profits arising from a breach of contract was unliquidated because it was disputed. Although the dispute did not make the claim unliquidated, the court ruled, it was nevertheless unliquidated because its amount was not capable of ready determination.

The court applied the same analysis to determination of whether a debt is contingent or unliquidated in in *In re Power Block Coin, LLC,* 2024 WL 4456657 at * 2-3 (Bankr. C.D. Cal. 2024). The case involved four groups of claims that the debtor contended did not count toward the debt limit because they were unliquidated or contingent.

The parties agreed that claims arising from the debtor's obligations for SMTF token buyback guarantees that customers had exercised prepetition were noncontingent and liquidated. The claims of customers with such guarantees who had not exercised their options before the filing, however, were unliquidated and contingent because the evidence had not shown whether several conditions for payment of the claims had occurred. *Id.* at *3.

A third group of claims involved a type of account that the debtor's counsel characterized as a "demand account with a big asterisk" for an "absolute obligation" that was not absolute in time. *Id.* at *3. The court concluded that, regardless of when the debtor would be obligated to return the cryptocurrency in the account, its underlying obligation to do so was determinable by simple mathematical computation, so it was liquidated, and debtor's obligation was not contingent or any contractual restriction or requirement other than its ability and willingness to return the cryptocurrency, so the claims were noncontingent. *Id.* at *4.

The fourth set of claims included 16 crypto-backed loans to borrowers, who were entitled to their cryptocurrency upon payment of their loans. The court concluded that, like the "demand accounts," the loan repayment condition did not make the obligation unliquidated (because it was readily capable of mathematical computation). With regard to at least one claimant holding 83% of the claims, the court continued, the obligation was not contingent because the borrower could set off the amount of the loan against the value of the cryptocurrency – an issue that a district court in pending litigation had already decided. This amount alone was sufficient to put the debtor over the debt limit. *Id.* at *4-5.

It is usually the debtor who claims that a debt is contingent or unliquidated so that a debt is excluded from the calculation of the total amount of noncontingent and liquidated debts. In some instances, a creditor may assert that a debt is contingent or unliquidated to establish that the amount of debt arising from commercial or business activities is not enough to establish eligibility.

In *In re Wilson,* 666 B.R. 828 (Bankr. M.D. Ga. 2024), the debtor's former employer asserting claims against him arising from the fact that many of the former employer's clients took their business to the debtor's new employer. The new employer had a claim against the debtor for advances of litigation expenses. The debtor had no other debts arising from commercial or business activities.

The former employer objected to the debtor's eligibility for subchapter V on the grounds that the debtor as an employee was not engaged in commercial or business activities and that less than 50 percent of his debts arose from commercial or business activities. As § IV(A) *supra* discusses, the court concluded that the debtor was engaged in commercial or business activities. The court ruled, however, that the debtor did not have any debt arising from commercial or business activities.

The court noted that the debt to the current employer did not count because the debt limit calculation excludes debts owed to insiders. 666 B.R. at 838. The debt to the former employer did not count because it was unliquidated. *Id.* at 838-39. The court concluded that contract claims ordinarily are liquidated because the contract usually determines the basis for determining the amount of damages for breach. Because the contract with the former employer had no language providing "for ready determination and precision in computation of the amount due" but would be determined in the pending litigation, the court concluded, the debt was unliquidated. *Id.* Because the debtor thus had no debt arising from commercial or business activities for purposes of the eligibility determination, therefore, the court ruled that the debtor was not eligible for subchapter V.

The court in *In re McKenzie Contracting, LLC,* 2024 WL 3508375 (Bankr. M.D. Fla. 2024), held that claims arising under merchant cash advance contracts were contingent and unliquidated because the claims were purchases of receivables, not loans where the creditor assumed the risk of non-payment.

In *The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (In re Alecto Healthcare Services, LLC)*, 2025 WL 961482 at * 10-11 (D. Del. 2025), the court held that a debt was contingent because the debtor's obligation to pay did not arise until demand for payment, which had not occurred prepetition. The court also concluded that the debt was unliquidated because the amount of the obligation was uncertain until the demand was made. *Id.* at * 12.

In *Articon Hotel Services LLC,* 2025 WL 3714787 (Bankr. E.D. Ill. 2025), the debtor filed a subchapter case after entry of a final judgment of over $10 million against it in a state court but before the state court had ruled on the debtor's post-trial motion to vacate it. The court concluded that the debt was liquidated and noncontingent based on the judgment, *id.* at *4 and that the fact that it remained disputed did not matter. *Id.* at *5.

In *McPhillips Flying Service, Inc.,* 2025 WL 3030284 (Bankr. W.D. Mich.), a wrongful death plaintiff during pre-trial discovery retained a forensic accountant who concluded that the debtor had made material misrepresentations about its eligibility for four loans in the total principal amount of $ 980,000 it obtained from the Small Business Administration under the

Economic Injury Disaster Loan ("EIDL") program during the Covid pandemic and that the debtor had misapplied the loan proceeds by using them for purposes other than working capital and by purchasing assets not manufactured, contrary to the terms of the loans.

The plaintiff filed a *qui tam* complaint alleging that the Debtor violated the False Claims Act, 31 U.S.C. § 3729 *et seq*., and misapplied loan proceeds, triggering liability for civil penalties under 15 U.S.C. § 636(b). As of the date of the filing of the subchapter V petition, the complaint remained sealed, had not been served on the debtor, and the United States Department of Justice had initiated an investigation but had not yet decided whether to intervene. The debtor in its schedules listed (1) a secured claim of the SBA in the amount of $ 965,789 for principal and interest on the EIDL loans; (2) a contingent, unliquidated, and disputed unsecured claim of the plaintiff in the amount of $1.00; and (3) the name of the Assistant U.S. Attorney assigned to the *qui tam* action in the amount of $ 0, "for notice only" (to disclose the claim asserted in the then sealed *qui tame* proceeding)without the plaintiff's claim.

After the filing of the case, the United States elected to intervene for purposes of settlement and the district court unsealed the *qui tam* action. The SBA filed two proofs of claim, one for the amounts due under the EIDL loans and a second for the civil penalty under 15 U.S.C. § 636(b) for misuse of loan proceeds in the amount of 1,470,000, the statutory amount of the penalty, the original principal amount of the loans multiplied by 1.5. The United States filed a proof of claim for False Claims Act liability in the approximate amount of $ 3,054,476 that included treble damages (three times the principal amount of the loans, or $ 2,940,000) and a misrepresentation penalty in the maximum amount of $ 28,619 for each of the four loans.

The debtor's schedules showed total secured and unsecured debts to non-insiders, including the amount of the EIDL loans, of $ 2,204,006.22 but did not include the amounts asserted in the *qui tam* complaint and reflected in the claims of the SBA for a civil penalty or the United States for liability under the False Claims Act.

The plaintiff objected to the debtor's eligibility for subchapter V because the inclusion of the SBA civil penalty claim and the False Claim Act claims of the United States put the debtor over the debt limit of $3,424,000. The debtor contended that the debts were properly excluded from calculation of the debt limit because they were contingent and unliquidated.

Because inclusion of either claim in the debt limit calculation made the debtor ineligible, the court considered whether each was either contingent or unliquidated.

A contingent debt, the court explained, "is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor," and that "a debt is not automatically rendered 'contingent' solely by virtue of its being disputed." 2025 WL at *9 (collecting cases; quotations and emphasis omitted).

The court quoted the Sixth Circuit's summary of the caselaw on the definition of liquidated debt, *id.* at *10, *quoting Comprehensive Accounting Corp. v. Pearson (In re Pearson),* 773 F.2d 751, 754 (6th Cir. 1985):

> The common thread through the cases . . . has been ready determination and precision in computation of the amount due . . . . [A] liquidated debt [is] one that can be determined by mathematical computation. Some cases have stated the test as whether the amount due is capable of ascertainment by reference to an agreement or by simple computation.

Applying these standards, the court concluded that the civil penalty claim of the SBA, although liquidated, was excluded from the debt calculation because it was contingent, 2025 WL at * 10-13, and that the False Claim Act claims were both unliquidated and contingent. *Id.* at 13-16.

The *McPhillips Flying Service* court reviewed regulatory provisions implementing the civil penalty in 15 U.S.C. § 636(b) that define "wrongful misapplication" and prescribe the procedure for determination a wrongful misapplication.[11] As of the date of the petition, the court found, the debtor's evidence supported the conclusion that "the SBA had not taken any of the actions the regulation states will occur upon a finding of a wrongful application: it had not called the loan, had not informed the Debtor that the Section 636(b) Penalty had been assessed or was due and owing, and had not taken any action to collect or enforce the civil penalty." *Id.* at *11. The court concluded, therefore, that the debtor's liability for the penalty "had not been triggered as of the petition date and therefore is a contingent debt." *Id.* at * 11. The debt was liquidated, however, because the amount of the liability was readily determinable. *Id.* at 13.

Liability under the False Claims Act, the court observed, requires a showing that the debtor made false claims or statements "knowingly" and "involves an inquiry into the subjective knowledge and state of mind of the Debtor and its representatives, a standard akin to the one applied to common law fraud claims." *Id.* at 14. Applying the traditional view that claims sounding in tort are contingent as to liability until a judicial determination occurs, the court concluded that they were contingent. *Id.* The claims were also unliquidated, the court concluded, because damages and penalties under the False Claims Act are not determined by a simple mathematical formula. *Id.* at 15.

Because the civil penalty was contingent and the False Claim Act claims were both contingent and unliquidated, the claims were excluded from calculation of the debt limit, and the debtor was eligible for subchapter V.

2. Debt Limit: Whether debtor's liability for future rent under a real estate lease is contingent or unliquidated and amount of debt*

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).

[11] 13 C.F.R. § 123.9(a), and (b).

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).'"[12] 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 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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[12] *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).

3. 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). Entities under common control are affiliates of the controlling person and of each other. *In re Village Oaks Senior Care, LLC,* 664 B.R. 170 (Bankr. E.D. Cal. 2024).

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 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 their total debt 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.

Without considering the timing of the filings, the court in *In re 305 Petroleum, Inc.,* 622 B.R. 209 (Bankr. S.D. Miss. 2020), concluded that none of four affiliated debtors were eligible for subchapter V because their collective debts exceeded the debt limit. The debtors argued that the debts of one of the debtors should be excluded because it was ineligible for subchapter V because it was a single asset real estate debtor. *SBRA Guide* § III(F) and footnote 91 discuss the analysis in more detail.

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

H. Ineligibility of Single Asset Real Estate Debtor*

A debtor is not eligible for subchapter V if its primary activity is the business of owning "single asset real estate." § 101(51D). 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 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.

In *In re Celebration Cottage AB, LLC,* 663 B.R. 846 (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.

The debtor in *In re Amerivest, LLC*, 2025 WL 1210562 (Bankr. E.D. Va. 2025) similarly owned three parcels of real estate but they were contiguous, the debtor had purchased the lots simultaneously, and they were all subject to a single deed of trust and assignment of rents. Finding that the debtor had treated the three lots as one economic unit with a common purpose of acting as a commercial landlord for the three parcels, the court concluded that the three parcels constituted a single project and that the debtor as a single asset real estate debtor. *Id.* at *5-7.

In re 255 North Front Street Condos, Inc., 2025 WL 1068714 (Bankr. E.D.N.C. 2025), ruled that a unit owners' association is not a single asset real estate debtor because its income is from services it provides to unit owners, not from the property.

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.

I. Procedures For Determination of Eligibility*

1. Time for objecting to eligibility; authority of court to raise eligibility issue *sua sponte;* waiver of eligibility objection*

Bankruptcy Rule 1020(b) requires the filing of an objection to a debtor's subchapter V election within 30 days after the later of the conclusion of the § 341(a) meeting or an amendment to the petition that makes the election. Under Rule 1020(c), the objection is a contested matter that Rule 9013 governs and must be served on the debtor, the debtor's attorney, the U.S. trustee, the subchapter V trustee, and the 20 largest unsecured creditors or a creditor's committee if one has been appointed.

A court may hear an untimely objection if the delay in filing is due to excusable neglect under Bankruptcy Rule 9006(b)(1). *In re Hub City Home Health, Inc.,* 667 B.R. 822, 830-32 (Bankr. S.D. Tex. 2025).

In *In re CYMA Cleaning Contractors Inc.,* 2023 WL 7117445 (Bankr. D. P.R. 2023), 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.

In *In re Village Oaks Senior Care, LLC,* 664 B.R. 170 (Bankr. E.D. Cal. 2024), an objecting creditor timely objected to the eligibility of three affiliated debtors on the ground that their aggregate debts exceeded the debt limit. In response, the debtors asserted that the creditor had waived the objection. [13]

The court first resolved confusion among the parties concerning the difference between "forfeiture" – the failure to timely assert a right – and "waiver" – the intentional relinquishment or abandonment of a known right or privilege. Because the timely objection did not result in forfeiture, the court considered whether waiver had occurred, observing that eligibility is not jurisdictional and that a party can waive the objection. *Id.* at 175.

Applying chapter 13 caselaw involving waiver of an objection to a debtor's eligibility,[14] the court concluded, *id.* at 176:

> [A]n eligibility objection waiver may arise from the objecting party's litigation conduct which, in turn, requires a factual examination of the extent to which an objecting party knew it could object, failed to assert its objection, proceeded in the case, and raised the objection only after participating substantially in the case.

The court found that the creditor, from the time of appearance at the outset of the case, had known about the eligibility issue but "over a period of several months [the creditor] engaged the debtors, invoked the Code, and prevailed on a number of issues." *Id.* at 177. From these circumstances, the court observed, it could hold that the objection had been waiver. *Id.*

Nevertheless, the court continued, "waiver is an equitable doctrine" that should not be applied to produce an inequitable result." *Id.* The court found that the debtors had intentionally used knowingly false schedules in an effort to manufacture subchapter V eligibility or make it more likely. *Id.* at 178. The court declined to apply the waiver doctrine in these circumstances, explaining, *id.* at 178.

> [I]t would encourage – if not reward – the knowing and intentional use of false schedules in which debt is manipulated to achieve subchapter V eligibility or at least make it more

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[13] Two limited liability companies, each owned and controlled 100 percent by an individual, filed their cases one day before the individual filed his. 664 B.R. at 174. The objecting creditor was the former wife of the individual debtor, who had obtained "significant sanctions" in the divorce court, affirmed by the California Court of Appeal abased on his litigation and discovery tactic. *Id.* at 172 n. 1, 174 n. 5.

[14] The court cited *Mission Hen, LLC v. Lee (In re Lee),* 655 B.R. 340, 352 & n. 7 (B.A.P. 9th Cir. 2023). The chapter 13 eligibility provision is 11 U.S.C. § 109(e). The court noted that the Supreme Court recognized implied waiver in its ruling in *Wellness International Network, Ltd., v. Sharif,* 575 U.S. 665 (2015), that a party by its conduct in a case may impliedly waive a constitutional objection to the bankruptcy court's authority to enter a final judgment. *See generally* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 12:2.

likely. It would also allow the debtor entities here to proceed under subchapter V when the debtors knew – or at least anticipated – that they were not – or that they may not be – eligible subchapter V debtors in the first instance.

The court "de-designated" the three debtors for them to proceed as traditional chapter 11 cases.

As § III(F)(3) discusses, some courts have held that the first of affiliated debtors to file a subchapter V case is eligible because the other debtors at the exact time of filing are not in bankruptcy cases and, therefore, the debts of those affiliates are not included in the calculation of the debt cap. The *Village Oaks* court dismissed all three cases without addressing this issue.

2. 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.

Bankruptcy Rule 1020(a) provides that the debtor must state on the petition whether it is a small business debtor 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." Section 1182(1) defines "debtor" as a "small business debtor." Official Forms 101 and 201 each require a debtor to state (by checking the appropriate boxes) that the debtor is a small business debtor and whether the debtor elects application of subchapter V.

If a court determines that the debtor is incorrect in its statement that the debtor is a small business debtor, 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. The court in *In re Village Oaks Senior Care, LLC,* 664 B.R. 170, 178 (Bankr. E.D. Cal. 2024), ruled that the cases of ineligible debtors be "de-designated as subchapter V cases."

3. 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.[15] 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.[16]

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.[17] 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 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. The court 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

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[15] *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.").

[16] 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).

[17] 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).

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.'[18] In a nutshell, a bankruptcy order is final 'if it is both procedurally complete and determinative of substantive rights.'"[19] 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.*

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

[19] 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)

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[20] 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.[21]

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[22] also supported its ruling. 2024 WL 4051674 at *5.

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.

In addressing the debtor's eligibility for subchapter V in the context of an appeal from the confirmation of the debtor's plan, the Eleventh Circuit noted, "[The creditor's] challenge to the Bankruptcy Court's non-final order determining [the debtor's] subchapter V eligibility is properly before us because that interlocutory order merged into her appeal from the Bankruptcy Court's final order confirming the reorganization plan." *Guan v. Ellingsworth Residential Community Association, Inc., (In re Ellingsworth Residential Community Association, Inc.),* 125 F.4th 1378 n. 7 (11th Cir. 2025).[23]

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[20] 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).

[21] 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).

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

[23] For a discussion of earlier rulings in the case on the interlocutory nature of the eligibility determination, see *SBRA Guide* § III(A) n. 34.

J. Revocation of Subchapter V Election*

A subchapter V debtor has the exclusive right to file a plan. § 1189(a). If the court removes the debtor from possession under § 1185(a), the subchapter V trustee takes over the assets and management of the business, but only the debtor can file a plan. If reorganization of the debtor after removal is advantageous for creditors, but the debtor is unwilling or unable to propose a confirmable plan, the inability of the trustee or creditors to file a plan may leave conversion or dismissal as the only alternatives for conclusion of the case. Section V(E) of this Update discusses alternative exit strategies.

This section considers whether a court has the authority to address the problem 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 and creditors have 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.[24]

Although nothing in the Code explicitly 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 Bankruptcy Code permits 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.

[24] "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)

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

In re CYMA Cleaning Contractors, Inc., 2023 WL 7117445 at *2-3 (Bankr. D.P.R. 2023), the court concluded that it had authority to revoke the subchapter V election of an ineligible debtor *sua sponte* even after expiration of the time for objection to the election based on the analysis in *National Small Business Alliance*.

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.[25]

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[26] implies that the debtor's subchapter V designation controls unless the court finds the debtor statutorily ineligible. *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

[25] 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

[26] "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).

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.

Some courts in declining to revoke the subchapter V election based on the circumstances of the case have expressed doubt that a court has the authority to do so in view of the fact that § 103(i) provides for the debtor to control the subchapter V election.[27]

A creditor in *In re USA Cricket,* 2025 WL 3635717 (Bankr. D. Colo. 2025), requested that the court revoke the debtor's subchapter V election and appoint a chapter 11 trustee because of dysfunctional corporate governance that made the debtor incapable of proposing a confirmable plan of reorganization. Another creditor and four members of the board of directors supported the request; the debtor, the U.S. Trustee, and the other five members of the board opposed it.

After reviewing the rulings in *National Small Business Alliance* and *ComedyMX,* the court concluded that a bankruptcy court has authority to revoke a debtor's subchapter V election in narrow circumstances. *Id.* at *2-3. Whether such circumstances existed, the court continued, "turns on whether the Debtor's case and prospects for reorganization are so hopeless and counter to the goals of Subchapter V that the only viable option for the debtor to reorganize is to de-designate it and appoint a Chapter 11 trustee." *Id.* at 3.

The U.S. Trustee argued that the provisions in subchapter V for removal of the debtor from possession and expansion of the powers of the trustee made it unnecessary to revoke the debtor's designation. The court concluded, however, that such a remedy would not resolve the governance issues because, even after removal from possession, the debtor would retain the sole power to file a plan. *Id.*

The court reasoned that whether it was "entirely implausible" for the debtor to reorganize under subchapter V was a close question and that the standards for revocation of the election are high. *Id.* at 3. The debtor had complied with most of the deadlines and requirements of the Bankruptcy Code, and the 90-day deadline for the filing of a plan had not yet occurred.

Because the deadline had not passed, the court concluded, the Debtor has not yet demonstrated that it is truly incapable of successfully reorganizing under Subchapter V." *Id.* at 4. Accordingly, the court ruled that it could not "at this time, find that cause exists to revoke the Debtor's designation." *Id.*

The court denied the request without prejudice and cautioned the debtor that if it "fails to comply with the obligations of Subchapter V, including filing a timely plan, the Court will likely grant any future motion to revoke the Debtor's designation and appoint a Chapter 11 trustee." *Id.* The court noted that it would not extend the plan deadline.

After the plan deadline expired without the filing of a plan, the creditor renewed its motion, which the court considered in a later order. *In re USA Cricket,* 2026 WL 88217 (Bankr.

[27] *In re* Pinnacle Foods of California, LLC, 2024 WL 3873478 at *5 (Bankr. E.D. Cal. 2024); *In re* Free Speech Systems, LLC, 649 B.R. 729, 734-35 (Bankr. S.D. Tex. 2023).

D. Colo. 2026). Incorporating its prior ruling, *id.* at * 1, the court concluded that cause existed to revoke the subchapter V election and to require the debtor to proceed in a traditional chapter 11 case, *id*, at * 3:

> The Debtor's failure to comply with the requirements of Subchapter V by filing a plan by the 90-day deadline coupled with repeated disputes among its board members and questions regarding its management lead the Court to believe that the Debtor is incapable of succeeding in Subchapter V. Therefore, the Court finds cause exists to revoke the Debtor's designation and require it to proceed under the provisions of a regular Chapter 11.

The court then concluded that cause existed for appointment of a trustee in the traditional chapter 11 case based on "the Debtor's failure to file a plan by the deadline, mismanaged operations, acrimonious relationship with creditors, and demonstrated inability to function." *Id.* at 3.

K. 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.

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

B. Role and Duties of Subchapter V Trustee

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

Several cases illustrate how subchapter V trustees have participated in subchapter V cases and assisted in their administration and confirmation of plans.

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.*

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 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 VIII(D)(12) 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 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.[28]

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

[28] See Update § IV(B)(5).

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.).

2. **Other duties of the trustee**

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

4. Expansion of trustee's duties to include investigative duties*

A subchapter V trustee's duties do not include the broad investigative duties of a trustee in a traditional chapter 11 case under § 1106(a)(3)[29] and the duty under § 1106(a)(4) to file a statement of any investigation.

Section 1183(b)(2) authorizes the court to expand the trustee's duties to include investigative duties for "cause," but it does not define "cause."

Courts have not formulated a specific definition of "cause" to expand the trustee's duties. Rather, they have identified circumstances that provide appropriate reasons for the trustee to undertake an investigation. Thus, a court may expand the trustee's duties when the case involves potential claims against insiders or affiliates or significant questions such as the debtor's true financial condition, what property is property of the estate, the debtor's management of the estate as debtor in possession, or the accuracy and completeness of the debtor's disclosures and reports.[30] The court may consider whether the subchapter V trustee is satisfied with the debtor's disclosures and administration of the case and whether the asserted need for the trustee to investigate justifies the additional fees of the trustee in conducting it.[31]

The decision is a discretionary one; § 1183(b)(2) requires the trustee to perform investigative duties if the court "so orders," but does not require the court to do so. The court may limit the scope of the trustee's investigation to specified issues of concern.[32]

A court may remove a debtor from possession or expand the trustee's powers *sua sponte. In re Coeptis Equity Fund, LLC,* 2022 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 Ozcelebi,* 639 B.R. 365, 425 (Bankr. S.D. Tex. 2022).

5. Authority of subchapter V trustee to exercise trustee powers; management of conflicts of interest*

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.

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[29] Under § 1104(a)(3), a chapter 11 trustee has the duty to investigate the "acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan."

[30] *In re* Velsicol Chemical LLC, 2024 WL 4879960 at *3 (Bankr. N.D. Ill. 2024); *In re* Corinthian Communications, Inc., 642 B.R. 224, 233 (Bankr. S.D.N.Y. 2022); *In re* Ozcelebi, 639 B.R. 365, 383 (Bankr. S.D. Tex. 2022); *In re* AJEM Hosp., LLC, 2020 WL 3125276 at *2 (Bankr. M.D.N.C. 2020).

[31] *In re* Velsicol Chemical LLC, 2024 WL 4879960 at * 3 (Bankr. N.D. Ill. 2024).

[32] *In re* AJEM Hosp., LLC, 2020 WL 3125276 at *2 (Bankr. M.D.N.C. 2020).

A question is whether the subchapter V trustee has the authority to exercise the powers that a trustee has in a chapter 11 case. A chapter 11 trustee's powers 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.

One theory is 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. *In re Roe,* 2024 WL 206678 at * 2 (Bankr. D. Ore. 2024). In *Roe,* the subchapter V trustee filed a motion under § 363(b) to require the debtor to post a retainer for the trustee's fees and expenses. The court ruled that the trustee had authority to seek the use of estate property outside the ordinary course of business, concluding, *id.*:

> [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. Section IV(E)(4) discusses deposits for payment of the trustee's compensation.

Other cases conclude that § 1184 vests trustee powers exclusively in the debtor in possession.

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.

In *Ghatanfard v. Zivkovic (In re Ghatanfard),* 666 B.R. 14 (S.D.N.Y. 2024), the district court affirmed conversion of the subchapter V case to chapter 7 because of conflicts of interest

between the debtor arising from substantial prepetition transfers to his "life partner." The debtor had acknowledged the conflict of interest and proposed that the subchapter V trustee's powers be expanded to permit the trustee to take over the fraudulent transfer claims. The bankruptcy court, however, determined that it could not order such relief over the opposition of a creditor and the subchapter V trustee. *Id.* at 20.

The district court affirmed the bankruptcy court's ruling that the conflict of interest was cause for conversion to chapter 7 and ruled that the bankruptcy court had not "abused its discretion in determining that it did not have the authority, over the objection of a creditor, to expand the Subchapter V Trustee's powers to include litigation of the fraudulent conveyance claims on behalf of the estate." *Id.* at 27. In its analysis, the district court observed that the debtor had provided no authority for the proposition that a subchapter V trustee can be empowered to pursue avoidance actions and that *Singh v. Price (In re Turkey Leg Hut & Co., LLC),* 659 B.R. 539 (Bankr. S.D. Tex. 2024), discussed above, held to the contrary. *Id.* at 26. (The court did not cite *In re Roe,* 2024 WL 206678 at *2 (Bankr. D. Ore. 2024), which states that the subchapter V trustee has concurrent authority with the debtor to exercise trustee powers "to fulfill the statutory duties given to subchapter V trustees in section 1183.")

Careful analysis of the issue shows that a bankruptcy court has the discretion to expand the trustee's powers and that expansion of trustee's powers may be a useful tool in a subchapter V case.

The Bankruptcy Code vests avoidance powers[33] and authority over assets (including their sale[34] and assumption or rejection of executory contracts[35]) and other matters in the trustee. Section 1184, however, provides that a debtor in possession in a subchapter V case has all the rights of a chapter 11 trustee, other than the right to compensation. This vesting of rights in the debtor in possession is not unconditional. Importantly, § 1184 begins with the limitation that the debtor's trustee powers are "subject to such limitations or conditions as the court may prescribe."

Because § 1184 permits the court to condition or limit the trustee's powers, it provides authority for the court to remove specified trustee powers from the debtor in possession, thereby necessarily vesting them in the trustee.

The fact that § 1182(b) does not impose a *duty* on the subchapter V trustee to pursue avoidance actions or exercise other trustee powers does not mean that the trustee does not have the *power* to exercise trustee powers that the court removes from the debtor in possession.

Indeed, a trustee's authority in a traditional chapter 11 case to pursue such matters does not arise from the trustee's duties under § 1106(a), which do not include any duty to pursue claims of the estate or liquidate its assets. The trustee's authority instead derives from § 323,

[33] 11 U.S.C. §§ 544 -- 549, 553(b).
[34] 11 U.S.C. §§ 363, 542, 543.
[35] 11 U.S.C. § 365.

which makes the trustee the representative of the estate, § 323(a), and gives the trustee the capacity to sue and be sued, § 323(b).[36]

The ability of the bankruptcy court to exercise its discretion to authorize a subchapter V trustee to exercise certain trustee powers instead of the debtor is important. Conflicts of interest in subchapter V cases are not uncommon, and the enlistment of the trustee to handle such matters on an independent, fiduciary basis permits the other aspects of the reorganization of the debtor to continue under the debtor in possession. A subchapter V debtor who candidly discloses potential claims involving a conflict of interest at the outset of the case should not face conversion or dismissal if the conflict can be managed by putting the trustee in charge of matters involving the conflict.

Ghatanfard and *Turkey Leg* do not require a different conclusion. The district court's ruling in *Ghatanfard* is correct to the extent of its holding that a bankruptcy court has discretion to determine whether a conflict of interest requires conversion as opposed to expansion of the subchapter V trustee's powers to handle litigation that the conflict involves. The *Turkey Leg* decision, likewise, is correct to the extent that it holds that a subchapter V trustee cannot pursue estate claims in the specific context of that case, where the debtor was in possession and the court had not entered any order regarding the subchapter V trustee's pursuit of estate claims.

Turkey Leg does not address whether a bankruptcy court may exercise its discretion to authorize a subchapter V trustee to pursue claims where a conflict of interest exists or, more generally, to authorize a trustee to exercise other estate powers (such as liquidation of the debtor's assets) in appropriate circumstances.

Ghatanfard does not hold that a court may not do so. The recitation of the bankruptcy judge's oral ruling in the district court's opinion in *Ghatanfard* indicates that the bankruptcy judge may have preferred expansion of the trustee's powers to permit the trustee to prosecute the claim, but it does not discuss the bankruptcy judge's reasoning for the conclusion that the statute did not authorize such expansion. *Id.* at 19-20.

It is arguable that, having concluded that the conflict of interest was cause for conversion, the bankruptcy court in *Ghatanfard* had no option to expand the trustee's powers rather than convert the case because § 1112(b)(1) mandates conversion if cause exists. But if a conflict of interest is manageable through expansion of the trustee's powers, that alternative should be an alternative to conversion for one of two reasons.

First, a court could conclude that "cause" does not include a conflict of interest that is manageable.

Second, a court could decide that managing the conflict of interest by expansion of the trustee's powers satisfies the requirements of § 1112(b)(2) that prelude conversion if "unusual circumstances" establish that conversion is not in the best interests of creditors and the estate,[37] a

[36] *See* Thomas T. McClendon, *Is It In the Name? A Sub V Trustee's Pursuit of Avoidance Actions*, XLIV ABI JOURNAL 5, 16-17, 56-57, May 2025.
[37] 11 U.S.C. § 1112(b)(2).

reasonable likelihood exists that a plan will be confirmed within a reasonable time,[38] a reasonable justification for act or omission that constitutes grounds for conversion exists,[39] and cure of the rounds for conversion will occur with a reasonable time fixed by the court.[40]

Where the cause for conversion is a conflict of interest, the conflict is manageable, a plan is confirmable within a reasonable time, and creditors are better off under a plan than in a chapter 7 case, unusual circumstances establish that conversion is not in the best interests of creditors and the estate.

The conflict of interest exists because of prepetition events that the debtor cannot change. The cause for conversion is the need to investigate and prosecute the potential claims, not the existence of the claims themselves. As such, cause for conversion based on a conflict of interest does not involve an "act or omission" for which the debtor could provide a "reasonable justification." Nevertheless, the fact that the conflict of interest arises from prepetition events that the debtor cannot change provides a "reasonable justification" for the grounds for conversion. Management of the conflict by permitting the trustee to investigate and prosecute the claims that give rise to the conflict of interest provides an immediate cure of the problem.

In *In re Edgewood Food Mart, Inc.,* 666 B.R. 418 (Bankr. N.D. Ga. 2024), the court confirmed a plan over the objection of a creditor who contended that it did not adequately take account of various claims against the principal and affiliates. Without addressing the conflict of interest issue, the court analyzed each potential claim and determined that none of them were viable.

In *The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (In re Alecto Healthcare Services, LLC),* 2025 WL 961482 at * 10-11 (D. Del. 2025), the court affirmed the bankruptcy court's confirmation of a plan that included the settlement of potential fraudulent conveyance and breach of fiduciary duty claims against the debtor's insiders. Evidence before the bankruptcy court included testimony of the debtor's independent director that supported the bankruptcy court's determination that the proposed settlement fell above the lowest point in the range of reasonableness. The court did not address conflict of interest issues.

C. Trustee's Disbursement of Payments to Creditors

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

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."

[38] 11 U.S.C. § 1112(b)(2)(A). The applicable time is a "reasonable period of time" because a subchapter V case is not a small business case in which 11 U.S.C. §§ 1121(e) and 1129(e) apply.
[39] 11 U.S.C. § 1112(b)(2)(B)(i).
[40] 11 U.S.C. § 1112(b)(2)(B)(ii).

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 IV(E)(4) 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 IV(B)(4)), § 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.

2. Disbursement of plan payments by the trustee

D. Termination of Service of the Trustee and Reappointment

1. Termination of service of the trustee*

Section IX(D) of this Update discusses termination of service of the subchapter V trustee after cramdown confirmation when the debtor makes payments under the plan.

2. Reappointment of trustee

E. Compensation of Subchapter V Trustee

1. Compensation of standing subchapter V trustee

2. Compensation of non-standing 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.

Section IV(E)(5) of this Update discusses additional caselaw dealing with conditioning dismissal of a case on payment of the subchapter V trustee's compensation.

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

4. Deposits and postpetition retainers for payment of compensation and expenses of 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."[41] 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 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.

Courts have stated that a postpetition retainer for debtor's counsel is permissible in appropriate circumstances.

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 § IV(B)(4) of this Update.

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 on a pro rata basis for 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.

The court in *In re Golden Fleece Beverages, Inc.,* 2021 WL 6015422 (Bankr. N.D. Ill. 2021), approved a postpetition retainer for the subchapter V debtor's replacement counsel. The *Golden Fleece Beverages* court looked to the four factors identified in *In re Knudsen Corp*., 84 B.R. 668, 672-73 (B.A.P. 9th Cir. 1988), for consideration when reviewing compensation arrangements that depart from typical ones: (1) whether the case is an unusually large one in which an exceptionally large amount of fees accrue each month; (2) whether waiting an extended

[41] *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).

period for payment would place an undue hardship on counsel; (3) whether counsel can respond to reassessment of fees if reduction occurs upon application for approval; and (4) the fee retainer procedure is the subject of a noticed hearing before any payment occurs.

The *Golden Fleece Beverages* court also noted that other relevant factors could include "whether debtors would prefer monthly rather than quarterly payments, the effect of the proposal on the court's ability to adequately review fee applications, the economic impact of the payment arrangement on the debtor, the debtor's ability to reorganize, and the reputation of proposed counsel." 2021 WL at 6, *citing In re* Mariner Post-Acute Network, Inc., 257 B.R. 723, 731 (Bankr. D. Del. 2000).

The court in *In re Raocore Tech, LLC,* 2025 WL 82880 (Bankr. D.D.C. 2025), declined to approve an "evergreen retainer" whereby the debtor would make postpetition payments as an additional retainer as counsel submitted statements for services during the case. The court noted that evergreen retainers are permissible in appropriate circumstances and discussed factors for consideration in making the determination, *id.* at *5 (footnote omitted):

> [R]easonable evergreen retainers are permissible in certain chapter 11 cases with: (i) appropriate notice; (ii) specific disclosure of the existence of an evergreen retainer in any employment application filed with the Court; (iii) the inclusion of any retention agreement with any employment application; (iv) terms in the applicable retention agreement making clear that any amounts paid shall be held in trust until a final fee application is approved (or other time period as agreed by the parties and approved by the Court); and (v) ultimate approval of any employment application by the Court prior to any payments made by any entity thereunder. In addition to the foregoing notice and disclosure requirements, before approving an evergreen retainer provision, the Court must consider the reasonableness of the employment application and underlying evergreen retainer, especially whether they are tailored to both the requirements of the Bankruptcy Code and the particular circumstances of the individual chapter 11 proceeding. *See* [*In re Insilco Techs., Inc.* 291 B.R. 628, 634 (Bankr. D. Del. 2003)].
>
> Although no one factor is determinative, factors to be considered in determining whether the terms of a proposed retention are reasonable include (i) the relationship between the Debtor and the applicant, including whether the parties have equal bargaining power engaging in an arms-length negotiation; (ii) whether the proposed terms of retention are in the best interests of the estate; (iii) whether there is creditor opposition to the retention or retainer provisions; and (iv) whether given the size and circumstances of the case, the amount and terms of the retainer are reasonable, including whether the terms provide an appropriate level of risk minimization taking into consideration any other risk minimization factors such as an administrative order or carve-outs. See *id.*; see also *In re Knudsen*, 84 B.R. 668, 672–73 (B.A.P. 9th Cir. 1988) (holding that an applicant seeking approval of an evergreen retainer agreement bears the burden of establishing that the case is one in which such agreement is necessary, such as a case where exceptionally large fees will accrue each month or that waiting an extended period of time for payment would place an undue hardship on counsel). Additionally, if an applicant seeks approval of an evergreen retainer, the terms of the evergreen retainer

must be clearly disclosed in the applicable employment application and the retention agreement outlining the terms and conditions of the evergreen retainer must be attached to the application. *See Insilco*, 291 B.R. at 636.

In re Soul Wellness LLC, 669 B.R. 848 (Bankr. S.D. Fla. 2025), involved the debtor's request for approval of postpetition retainers for both its counsel and the subchapter V trustee. Although the debtor had enough cash to post a larger prepetition retainer, the debtor's lawyers had agreed to take a smaller one so that the debtor would have sufficient cash to address the imminent eviction from its business premises, which had precipitated the filing.

The debtor's application for approval of employment of the law firm also sought approval of the agreement in the engagement letter for the debtor, subject to court approval, to set aside money every month to pay a portion of the law firm's fees and expenses and the subchapter V trustee's fees and expenses as postpetition retainers, to be held in the lawyer's trust fund account for payment to the lawyers and the subchapter V trustee only upon application by each and the court's approval. *Id*. at 851.

The United States Trustee did not object to employment of the law firm or the holding of funds in the lawyer's trust account as the debtor proposed but objected to approval of the payments to the lawyers as a postpetition retainer. The United States Trustee did not object to treating the funds deposited for the benefit of the subchapter V as a postpetition retainer. *Id.* at 851-52. The United States Trustee noted that, unlike debtor's counsel, a subchapter V trustee does not have an opportunity to obtain a retainer, and some assurance of payment, before the case is filed. *Id.* at n. 6.

The court had earlier approved retention of counsel but deferred ruling on "whether the post-petition payments will be characterized as a post-petition retainer available only to pay Debtor's counsel or money held in trust, and subject to the claims of all administrative claimants should the Debtor's bankruptcy case be administratively insolvent." 669 B.R. at 850.

The court sustained the objection with regard to the postpetition retainer but approved the monthly deposit of funds. Any transferred funds, the court ruled, would remain property of the estate. Although the court's order addressed only the propriety of the proposed postpetition retainer for the lawyers, and the United States Trustee had not objected to a postpetition retainer for the subchapter V trustee, the language of the court's ruling indicates that it did not approve either retainer.[42]

The court began its analysis by observing, "The law is clear that the Court has discretion to authorize a post-petition retainer under 11 U.S.C. § 328(a)." 669 B.R. at 852. The court then reviewed the factors that courts had considered in cases that permitted periodic postpetition

[42] The decretal language at the end of the Order is, "The Application is DENIED in part with respect to the Post-petition Retainer incorporated into the Retainer Agreement attached to the Application." 669 B.R. at 857. The court earlier referred to payments to the trust account for both the law firm and the subchapter V trustee as the "Post-petition Retainer." *Id.* at 850. The decretal language also orders that "Any funds transferred to Counsel's trust account post-petition remain property of the estate." *Id.* at 857. The issue became moot in view of the fact that the court confirmed the debtor's plan less than a month after entry of the order on the retainers. *In re* Soul Wellness, *Order Confirming Debtor's Plan of Reorganization,* Case No. 24-233658, Docket No. 113 (May 20, 2025).

payments to professionals without prior court approval,[43] that approved a postpetition retainer for replacement counsel for a subchapter V debtor,[44] and that concluded that an "evergreen retainer" procedure is permissible in certain cases.[45]

Addressing some of the factors identified in the caselaw, the court concluded that the case was not of a "size or exceptional nature" to warrant a postpetition retainer. 669 B.R. at 857. Specifically, the court noted that (1) the prepetition relationship of the lawyers and the debtors played a role in the decision to take the case on a small retainer; (2) the lawyers brought "nothing unique" to the case that would support approval of the postpetition retainer as in the best interest of the estate; (3) nothing about the size and circumstances of the case warranted a postpetition retainer; and (4) failure to treat the escrowed funds as a retainer would not create an undue hardship on the law firm. 669 B.R. at 854-57.

5. Payment of trustee's fees as condition of dismissal*

SBRA Guide § IV(E)(2) discusses the issue of conditioning dismissal of a subchapter V case on payment of the trustee's fees.

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.

[43] *In re* Knudsen Corp., 84 B.R. 668 (B.A.P. 9th Cir. 1988) (factors noted in earlier text discussing *Golden Fleece Beverages*).
[44] *In re* Golden Fleece Beverages, Inc., 2021 WL 6015422 (Bankr. N.D. Ill. 2021) (discussed in earlier text).
[45] *In re* Raocore Tech, LLC, 2025 WL 828880 (Bankr. D.D.C. 2025) (discussed in earlier text).

F. Trustee's Employment of Attorneys and Other Professionals

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

B. Duties of Debtor in Possession*

In *In re TLC Medical Group,* 2024 WL 4283801 (Bankr. S.D. Fla. 2024), the court in dismissing the case due to the debtor's failure to provide information to the U.S. Trustee (among other reasons) discussed the usual practices of the U.S. Trustee with regard to requiring information and initial debtor interviews.

In *In re Absolute Dimensions, LLC,* 2026 WL 93834 (Bankr. D. 2026), the court concluded that inaccuracies in the debtor's monthly operating reports could demonstrate gross mismanagement that could constitute cause for dismissal or conversion under § 1112(b)(4)(B) but that the filing of inaccurate reports was not a failure to timely file them that is cause under § 1112(b)(4)(F). Because the trustee's motion sought conversion or dismissal only under subparagraph (F), the court denied the motion.

C. Removal of Debtor in Possession*

Section V(D)(1) of this Update discusses issues concerning the choice of conversion, dismissal, or removal of the debtor from possession when cause for such remedies exists. Section V(D)(2) considers the alternative remedy of expansion of the subchapter V trustee's powers when cause arises from conflicts of interest between the debtor's principals and the estate.

Section V(E) deals with issues that arise when removal of the debtor from possession occurs, including alternative exit strategies after removal (§ V(E)(1)), compensation of debtor's professionals after removal (§ V(E)(2)), and alternative theories for compensation of debtor's professionals. (§ V(E)(3)).

D. Dismissal, Conversion, Removal of Debtor From Possession, or Expansion of Powers of Subchapter V Trustee*

Subchapter V,[46] like traditional chapter 11,[47] contemplates that the debtor, as debtor in possession, remains in charge of property of the estate, the debtor's business, and administration of the case. In addition, the debtor in possession in a subchapter V case under § 1184 has all the rights and powers of the trustee (except the right to compensation). The debtor in possession's duties do not include any investigative duties,[48] and the subchapter V trustee does not have them, either, unless the court orders otherwise.[49]

In some cases, however, circumstances may require a departure from this norm.

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[46] § 1184.
[47] § 1107.
[48] § 1184 requires the debtor in possession to perform all of the trustee's duties in a traditional chapter 11 case except the trustee's investigative duties under § 1106(a)(3) and (4) and the duty to file schedules and other papers if the debtor has not done so under § 1106(a)(2).
[49] § 1183(b)(2). *See* § IV(B)(4).

One set of circumstances involves problems (often many problems) in the administration of the case or operation of the business, including things like debtor misconduct, continuing losses from business operations, or lack of any reasonable prospects for confirmation of a feasible plan. The misconduct may be, among other things, the failure to file required papers (often the monthly operating reports), failure to make proper disclosures (or worse, intentional concealment or misstatement of information required to be disclosed), and improper use of estate assets (such as improper transfers of money or property to insiders).

When these circumstances arise, the court may dismiss or convert the case under § 1112 or remove the debtor from possession under § 1185(a). The court may also expand the trustee's duties to require an investigation of such matters under § 1183(b)(2).

A second set of circumstances involves a conflict of interest between the debtor's principals and the estate. For example, the estate may have potential claims against insiders for the avoidance of prepetition transfers to insiders. A conflict of interest is cause for conversion, dismissal, or removal of the debtor from possession. An alternative possibility is expansion of the trustee's powers to authorize the trustee to investigate, and prosecute if appropriate, claims that involve a conflict of interest.

Section V(D)(1) discusses the alternatives of conversion, dismissal, or removal of the debtor from possession (Section IV(A)). Section V(D)(2) then deals with expansion of the trustee's powers to include authority to prosecute claims of the estate as a way to manage conflicts of interest in a subchapter V case as an alternative to conversion, dismissal, or removal.

1. The alternatives of conversion, dismissal, or removal of debtor from possession*

In a traditional chapter 11 case, § 1112 provides for dismissal or conversion to chapter 7 for "cause," § 1104(a) authorizes appointment of a trustee for cause or in the best interests of the estate, and § 1104(b) provides for the appointment of an examiner if it is in the interests of creditors, equity security holders or the estate or if fixed, liquidated, unsecured debts other than for goods, services, taxes, or owing to insiders exceed $ 5,000,000.

Section 1112 applies in a subchapter V case. Because § 1112 applies in both traditional and subchapter V cases, the issues of whether "cause" for conversion or dismissal exists under § 1112(c)(4)[50] and whether "unusual circumstances" nevertheless preclude dismissal or conversion despite such cause under § 1112(b)(2)[51] are the same.

[50] § 1112(c)(4) defines "cause" as including 16 separate circumstances.

[51] § 1112(b)(2) provides that the court may not dismiss or convert a case if it "finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate" if the debtor or other party establishes a reasonable likelihood that a plan will be confirmed within a reasonable time (or within the time required by §§ 1121(e) and 1129(e) in a small business case) and the grounds for conversion or dismissal include an act or omission of the debtor (1) for which a reasonable justification exists and (2) cure will occur within a reasonable period of time that the court fixes.

The provisions in § 1104 for the appointment of a trustee or examiner, however, do not apply in a subchapter V case.[52] Instead, subchapter V has different remedies that serve similar purposes as appointment of a trustee or examiner.

A subchapter V trustee already exists, so the substitute for appointment of a trustee is the removal of the debtor from possession under § 1185(a). Chapter 12 has a similar provision.[53] The effect of removal of the debtor from possession in a subchapter V case is the same as appointment of a trustee in a traditional case, except that a subchapter V trustee cannot file a plan.[54]

An examiner's duties are to perform the trustee's investigative duties under § 1104(a)(3) and (4) and "any other duties of the trustee that the court orders the debtor in possession not to perform."[55] As Section IV(B)(4) of this Update explains, § 1183(b)(2) permits the court in a subchapter V case, for cause, to expand the trustee's duties to include these investigatory duties,[56] and § 1184 permits the court to limit the rights, powers, and duties of the debtor in possession, thereby transferring them to the subchapter V trustee.[57]

The statutory language in § 1185(a) for removal of a debtor from possession in a subchapter V case is materially the same as the statutory language in § 1104(a)(1) that describes "cause" for appointment of a trustee in a traditional case: the court must appoint a trustee in a traditional case or remove the debtor from possession in a subchapter V case "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case."[58]

Because § 1185(a) states that "cause" for removal *includes* the specified circumstances, other reasons may support removal of the debtor in possession. Courts have found guidance in the caselaw under § 1104(a) because removal of the debtor in a subchapter V case effects the same result as appointment of a trustee in a traditional case.[59]

A request for conversion, dismissal, or removal of the debtor from possession in a subchapter V case usually asserts some type of debtor misconduct in the management of the

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[52] § 1181(a).
[53] § 1204.
[54] § 1189(a). The duties of a subchapter V trustee in § 1183 are the same as the duties of a trustee in a traditional case, except that the subchapter V trustee's duties do not include the traditional trustee's duty under § 1106(a)(5) to file a plan, file a report of why the trustee will not file a plan, or recommend conversion or dismissal of the case.
[55] § 1106(b).
[56] § 1183(2).
[57] *See* § V(D)(2).
[58] §§ 1104(a)(1), § 1185(a). Section 1104(a)(1) adds "or similar cause" to the specific grounds, which § 1185(a) does not include. Section 1185(a)(1) adds failure of the debtor to perform the obligations of the debtor under the confirmed plan as a ground for removal of the debtor in possession. Section 1104(a)(1) does not state this circumstance as a ground for appointment of a trustee, but inability to effectuate substantial consummation of a confirmed plan and material default under a confirmed plan are grounds for conversion or dismissal under § 1112(a)(4)(M) and (N), and § 1112(b)(1) permits appointment of a trustee as an alternative to conversion or dismissal.
[59] *See* COLLIER ON BANKRUPTCY ¶ 1185.01[1] (16th ed.).

business or property of the estate (such as gross mismanagement or improper use of estate assets), deficiencies in case administration (such as improper disclosure of required information or failure to file timely reports or other papers), failure to file a plan timely or lack of any reasonable prospects for a confirmable plan, the existence of conflicts of interest between the principals or insiders of the debtor and the estate (often arising from potentially avoidable transfers), or some combination (or all) of these circumstances. Frequently, a request for one remedy alternatively seeks one of the others for the same reasons.

Although conversion, dismissal, or removal of the debtor from possession usually occurs upon the request of a party in interest, the court may raise such issues *sua sponte.* [60]

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. [61]

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[60] *In re Coeptis Equity Fund, LLC,* 2022 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 Ozcelebi,* 639 B.R. 365, 425 (Bankr. S.D. Tex. 2022).

[61] E.g., *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* Los Trece Texas, LLC, 2025 WL 2793109 (Bankr. W. D. Tex. 2025) (case dismissed because of substantial or continuing loss to or diminution of the estate and an absence of reasonable likelihood of rehabilitation under § 1112(b)(4)(A) and for bad faith); *In re* Kadiric, 670 B.R. 307 (Bankr. W.D. Mich. 2025) (case converted to chapter 7 based on continuing loss to estate and lack of reasonable likelihood of rehabilitation, failure to timely file plan, and debtors' bad faith and unfitness as fiduciaries as shown by prepetition transfers designed to hinder, delay, or defraud creditors); *In re* Earthsnap, Inc., 670 B.R. 49 (Bankr. E.D. Tex. 2025) (cases of corporation and individual principal converted to chapter 7 based on gross mismanagement (including failure to file reports and failure to open DIP bank accounts), failure to comply with discovery orders, and absence of confirmable plan); *In re* Ghaffari, 2025 WL 869518 (Bankr. D. N. M. 2025) (case dismissed because of failure to comply with court orders requiring debtor to provide notice of confirmation hearing and inability to file a plan that was not facially defective); *In re* TLC Medical Group, 2024 WL 4283801 (Bankr. S.D. Fla. 2024) (case dismissed due to failure to provide information reasonably requested by U.S. Trustee in a timely manner, unauthorized use of cash collateral, and lack of application to retain debtor's counsel); *In re* Lashley, 664 B.R. 408 (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 did not explain $57,920 in cash withdrawals and cash app transactions; (2) debtor's failure to file or confirm plan within 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* 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* Jar 259 Food Corp., 2023 WL 6201739 (E.D.N.Y. 2023); *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); *In re* Neosho Concrete Products Co*.,* 2021 WL 1821444 (Bankr. W.D. Mo. 2021).

If "cause" exists and no unusual circumstances preclude conversion or dismissal,[62] § 1112(b)(1) requires the court to convert or dismiss a case if cause exists unless "the court determines that the appointment *under section 1104(a)* of a trustee or examiner is in the best interests of creditors and the estate."[63] Because § 1104 does not apply in a subchapter V case and a subchapter V trustee already exists, the language of § 1112(a)(1) does not expressly permit removal of the debtor from possession as an alternative to otherwise mandatory conversion or dismissal in a subchapter V case.

At the same time, the directive in § 1185(a) that the court "shall" order removal of the debtor as debtor in possession if cause exists also makes removal of the debtor mandatory.[64] Because both alternatives are mandatory, the court implicitly has the authority to determine which is the better one.

Further, although § 1104(a) does not apply in a subchapter V case, one court reasoned, "[S]ubchapter V contains its own parallel provision in § 1185(a)'s authorization for the court to remove a debtor in possession for cause, with a resulting increase under § 1183(b)(5) in the powers of the subchapter V trustee."[65] The court noted that removal of a debtor from possession is "simply a lesser form of the conversion option" and that § 1112(b)(1) in a traditional case requires consideration "in every instance where cause is shown whether the appointment of a trustee might better serve the interests of creditors and the estate." [66] The court thus concluded that removal of the debtor is an available alternative to dismissal or conversion in a subchapter V case.

Accordingly, when cause exists for both conversion or dismissal and removal of the debtor from possession, courts have considered which alternative is in the best interests of creditors and the estate.[67]

Determination of whether conversion, dismissal, or removal of the debtor from possession is the best choice is a discretionary one involving an assessment of which alternative provides the best prospects for a distribution to creditors. If the business is viable such that confirmation of a plan based on its continued operations may be possible or a sale of the business in the subchapter V case may produce more value that sale in a chapter 7 case, removal of the debtor may be the better choice.

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[62] § 1112(b)(2).

[63] § 1112(b)(1) (emphasis added).

[64] *In re* No Rust Rebar, Inc., 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022); *see In re* Duling Sons, Inc., 650 B.R. 578, 582 (Bankr. D.S.D. 2023).

[65] *In re* Pittner, 638 B.R. 255, 258 (Bankr. D. Mass. 2022).

[66] *Id.* at 259.

[67] *E.g., In re* Pinnacle Foods of California, LLC, 2025 WL 951650 (Bankr. E.D. Cal. 2025); *In re* M.A.R. Designs & Construction, Inc., 653 B.R. 843 (Bankr. S.D. Tex. 2023); *In re* Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. 2023); *In re* No Rust Rebar, Inc., 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022); *In re* Pittner, 638 B.R. 255, 258-59 (Bankr. D. Mass. 2022); *In re* Young, 2021 WL 1191621 at *7 (Bankr. D.N.M. 2021).

Because § 1104 does not apply in a subchapter V case, some courts have stated that § 1112(b)(1) permits no alternative other than conversion or dismissal if cause exists, unless the exception in § 1112(b)(2) applies. *E.g., In re* Ozcelebi, 639 B.R. 365, 383 (Bankr. S.D. Tex. 2022); *In re* MCM Natural Stone, Inc., 2022 WL 1074065 at * 4 (Bankr. W.D.N.Y. 2022). These courts did not consider removal of the debtor from possession as an alternative.

Courts have removed the debtor from possession rather than converting or dismissing the case when continuation of the case in subchapter V with the subchapter V trustee in possession provides better prospects for a distribution to creditors than conversion or dismissal,[68] but not when subchapter V administration is not likely to enhance recovery by creditors.[69]

2. Expansion of trustee powers as alternative to conversion, dismissal, or removal to manage conflicts of interest*

A creditor or the subchapter V trustee may identify, or the debtor's schedules may disclose, potential claims of the estate against the debtor's principals, insiders, or affiliates. The potential claims create a conflict of interest because the debtor's principals control the debtor and, therefore, are responsible for investigating and, if necessary, prosecuting, claims against themselves, their own other entities, or other insiders and affiliates such as family members. A subchapter V plan must include a liquidation analysis,[70] and a plan must take the likely recovery on potential claims into account for purposes of establishing that it meets the "best interest of creditors" requirement for confirmation in § 1129(a)(7).[71]

Resolution of potential claims may occur through a plan if the court at the confirmation hearing determines that the potential claims have no merit[72] or that their proposed settlement in the plan is reasonable.[73] But a creditor or the subchapter V trustee may assert that the existence of the conflict of interest is cause for conversion, dismissal, or removal of the debtor from possession.[74]

In a traditional chapter 11 case, the court may manage a conflict of interest situation by granting derivative standing to the creditors' committee to pursue the potential claims[75] or by appointing an examiner,[76] but subchapter V does not provide for an examiner[77] and committees do not ordinarily exist.[78] Expansion of the subchapter V trustee's powers to include authority to investigate and prosecute potential claims involving a conflict of interest (or to assume responsibility for other matters involving a conflict of interest) provides a similar alternative for an independent fiduciary to handle the potential claims while permitting the debtor to proceed in the case.

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[68] *In re* Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. 2023); *In re* Pittner, 638 B.R. 255, 258-59 (Bankr. D. Mass. 2022).
[69] *In re* Exigent Landscaping, Inc., 656 B.R. 757 (Bankr. E.D. Mich. 2024); *In re* M.A.R. Designs & Construction, Inc., 653 B.R. 843 (Bankr. S.D. Tex. 2023); *In re* No Rust Rebar, Inc., 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022).
[70] § 1190(1)(B).
[71] *In re* Lapeer Aviation, Inc., 2022 WL 7204871 (Bankr. E.D. Mich. 2022); *see* The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (*In re* Alecto Healthcare Services, LLC), 2025 WL 961482 at * 10-11 (D. Del. 2025); *In re* Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024).
[72] *In re* Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024).
[73] The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (*In re* Alecto Healthcare Services, LLC), 2025 WL 961482 at * 10-11 (D. Del. 2025).
[74] See § V(D)(1).
[75] *See* NORTON BANKRUPTCY LAW AND PRACTICE (3D ED.) § 98:33.
[76] § 1104(c).
[77] § 1181(a).
[78] § 1181(b).

Section 1183(b)(2) permits the court to expand the subchapter V trustee's *duties,* as Section IV(B)(4) discusses, but it does not address the expansion of the trustee's *powers*.

The question is whether the court may authorize a subchapter V trustee, rather than the subchapter V debtor, to exercise specified powers of the trustee. The issue does not arise in a traditional chapter 11 case because the debtor in possession and the trustee do not exist at the same time.

Analysis of whether the court has the authority to expand the trustee's powers to prosecute claims starts with § 1184. In a subchapter V case, § 1184, like § 1107(a) in a traditional chapter 11 case, vests the rights and powers of a trustee under the Bankruptcy Code in the debtor in possession.[79] The trustee's powers 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, to assume, reject, or assume executory contracts and unexpired leases under § 365, and to pursue avoidance actions under §§ 545, 547, 548, 549.

Although § 1184 vests the trustee's powers in the subchapter V debtor in possession, it is not unconditional. Importantly, § 1184 begins with the limitation that the debtor's trustee powers are "subject to such limitations or conditions as the court may prescribe."

Because § 1184 permits the court to condition or limit the trustee's powers, it provides authority for the court to remove specified trustee powers from the debtor in possession, thereby necessarily vesting them in the trustee.

The fact that § 1182(b) does not impose a *duty* on the subchapter V trustee to pursue avoidance actions or exercise other trustee powers does not mean that the trustee does not have the *power* to exercise trustee powers that the court removes from the debtor in possession. Indeed, a trustee's authority in a traditional chapter 11 case to pursue such matters does not arise from the trustee's duties under § 1106(a), which do not include any duty to pursue claims of the estate or liquidate its assets. The trustee's authority instead derives from § 323, which makes the trustee the representative of the estate,[80] and gives the trustee the capacity to sue and be sued.[81]

Two reported cases deal with the trustee's authority to pursue claims of the estate but do not control the issue and are distinguishable.

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[79] § 1184. *See* Singh v. Price (*In re* Turkey Leg Hut & Co., LLC), 659 B.R. 539 (Bankr. S.D. Tex. 2024). *But see In re* Roe, 2024 WL 206678 at *2 (Bankr. D. Ore. 2024). The *Roe* court concluded that a subchapter V has concurrent authority with the debtor to exercise trustee powers "to fulfill the statutory duties given to subchapter V trustees in section 1183." *In re* Roe, 2024 WL 206678 at *2. The court held that the subchapter V trustee had the authority to request an order requiring the use of estate property under § 363(b)(1) to fund an escrow account for the payment of administrative claims. *Roe* at best states a limited exception to the general rule, but the exception arguably is not necessary to support the result. The authority of the court in § 1184 to limit the rights and powers of a debtor in possession provides ample authority for the court to require the use of funds for such a purpose.

[80] § 323(a).

[81] § 323(b). *See* Thomas T. McClendon, *Is It In the Name? A Sub V Trustee's Pursuit of Avoidance Actions*, 44-May AM. BANKR. INST. J. 5, 16-17, 56-57 (2025).

In *Singh v. Price (In re Turkey Leg Hut & Co., LLC)*,[82] 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: "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." [83]

Turkey Leg does not address whether the authority of the court in § 1184 to limit or condition the debtor's right to exercise the trustee's powers permits the court to exercise its discretion to authorize a subchapter V trustee to pursue claims where a conflict of interest exists or, more generally, to authorize a trustee to exercise other estate powers (such as liquidation of the debtor's assets) in appropriate circumstances.

The other case is *Ghatanfard v. Zivkovic (In re Ghatanfard)*.[84] There, the bankruptcy court in an oral ruling had converted an individual's subchapter V case to chapter 7 because of conflicts of interest between the debtor and the estate arising from substantial prepetition transfers to his "life partner." The debtor had acknowledged the conflict of interest and proposed that the subchapter V trustee's powers be expanded to permit the trustee to take over the fraudulent transfer claims. The bankruptcy court, however, determined that it could not order such relief over the opposition of a creditor and the subchapter V trustee.[85]

The district court affirmed the bankruptcy court's ruling that the conflict of interest was cause for conversion to chapter 7 and ruled that the bankruptcy court had not "abused its discretion in determining that it did not have the authority, over the objection of a creditor, to expand the Subchapter V Trustee's powers to include litigation of the fraudulent conveyance claims on behalf of the estate."[86]

The district court's ruling in *Ghatanfard* is correct to the extent of its holding that a bankruptcy court has discretion to determine whether a conflict of interest requires conversion as opposed to expansion of the subchapter V trustee's powers to handle litigation that the conflict involves. But *Ghatanfard* does not hold that a court may not do so.

The recitation of the bankruptcy judge's oral ruling in the district court's opinion in *Ghatanfard* indicates that the bankruptcy judge may have preferred expansion of the trustee's

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[82] 659 B.R. 539 (Bankr. S.D. Tex. 2024).
[83] *Id.* at 544.
[84] 666 B.R. 14 (S.D.N.Y. 2024).
[85] *Id.* at 19-20.
[86] *Id.* at 27. In its analysis, the district court observed that the debtor had provided no authority for the proposition that a subchapter V trustee can be empowered to pursue avoidance actions and that *Singh v. Price (In re Turkey Leg Hut & Co., LLC),* 659 B.R. 539 (Bankr. S.D. Tex. 2024), discussed in earlier text, held to the contrary. *Ghatanfard*, 666 B.R. at 26. As earlier text explains, *Turkey Leg* did not address this issue and is distinguishable.

powers to permit the trustee to prosecute the claim, but it does not discuss the bankruptcy judge's reasoning for the conclusion that the statute did not authorize such expansion.[87]

It is arguable that, having concluded that the conflict of interest was cause for conversion, the bankruptcy court in *Ghatanfard* had no option to expand the trustee's powers rather than convert the case because § 1112(b)(1) mandates conversion if cause exists. But if a conflict of interest is manageable through expansion of the trustee's powers, that remedy should be an alternative to conversion for one of two reasons.

First, a court could conclude that "cause" does not include a conflict of interest that is manageable.[88]

Second, a court could decide that managing the conflict of interest by expansion of the trustee's powers satisfies the requirements of § 1112(b)(2) that preclude conversion if "unusual circumstances" establish that conversion is not in the best interests of creditors and the estate,[89] a reasonable likelihood exists that a plan will be confirmed within a reasonable time,[90] a reasonable justification for the act or omission that constitutes grounds for conversion exists,[91] and cure of the grounds for conversion will occur within a reasonable time fixed by the court.[92]

Where the cause for conversion is a conflict of interest, the conflict is manageable, a plan is confirmable within a reasonable time, and creditors are better off under a plan than in a chapter 7 case, unusual circumstances establish that conversion is not in the best interests of creditors and the estate.

The conflict of interest exists because of prepetition events that the debtor cannot change. The cause for conversion is the need to investigate and prosecute the potential claims, not the existence of the claims. As such, cause for conversion based on a conflict of interest does not involve an "act or omission" for which the debtor could provide a "reasonable justification." Nevertheless, the fact that the conflict of interest arises from prepetition events that the debtor cannot change provides a "reasonable justification" for the grounds for conversion. Management of the conflict by permitting the trustee to investigate and prosecute the claims that give rise to the conflict of interest provides an immediate cure of the problem.

The ability of the bankruptcy court to exercise its discretion to authorize a subchapter V trustee to exercise certain trustee powers instead of the debtor is important. Conflicts of interest in subchapter V cases are not uncommon, and the enlistment of the trustee to handle such matters

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[87] *Ghatanfard,* 66 B.R at 19-20.

[88] *See In re* Neosho Concrete Products Co., 2021 WL 1821444 at *8-9 (Bankr. W.D. Mo. 2021) (Cause for removal of debtor from possession based on conflicts of interest does not exist where debtor's principal had "competently managed the estate and adapted to challenges as it encountered them," had agreed to reimburse the estate for the value of preferential transfers he had received, had retained separate counsel, and had prioritized the interests of the debtor above his own.).

[89] § 1112(b)(2).

[90] § 1112(b)(2)(A). The applicable time is a "reasonable period of time" because a subchapter V case is not a small business case in which §§ 1121(e) and 1129(e) apply.

[91] § 1112(b)(2)(B)(i).

[92] § 1112(b)(2)(B)(ii).

on an independent, fiduciary basis permits the other aspects of the reorganization of the debtor to continue under the debtor in possession. A subchapter V debtor who candidly discloses potential claims involving a conflict of interest at the outset of the case should not face conversion or dismissal if the conflict can be managed by putting the trustee in charge of matters involving the conflict.

Moreover, if the court must convert, dismiss, or remove the debtor from possession based on *allegations* of potential claims and the debtor contends that the claims are meritless, rather than authorize the trustee to investigate and pursue the claims, the court might determine that a hearing on the viability of the claims is necessary. Independent evaluation of the claims by the trustee seems a better approach to the problem not only because it permits the debtor to proceed in the subchapter V case on all other matters but also because it permits the trustee and potential defendants to settle the claims and removes the debtor as an advocate against the claims.

E. Issues When Removal of Debtor From Possession Occurs*

When the court removes the debtor from possession under § 1185(a), the parties – and the court – must figure out how the case will proceed and what the exit strategy will be.

The business question is whether reorganization of the debtor as a going concern is feasible or if liquidation of its assets will occur. The legal question is how to effect either alternative in view of the fact that, because only the debtor may file a plan in a subchapter V case,[93] the trustee may not.

If the exit strategy is a confirmed plan that the debtor files, the question is whether compensation of the debtor's professionals for post-removal services is permissible under the Supreme Court's decision in *Lamie v. United States Trustee*.[94] In *Lamie* the Court ruled that an attorney for a former chapter 11 debtor in possession who provided services after conversion to chapter 7 was not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney.

One court avoided exit strategy issues in a subchapter V case by revoking the debtor's subchapter V election after removal of the debtor in possession, thus "converting" the case to a traditional chapter 11 case, and appointing a chapter 11 trustee under § 1104 so that the trustee and creditors could file a plan.[95] Other courts in declining to revoke the subchapter V election based on the circumstances of the case have expressed doubt that a court has the authority to do so in view of the fact that § 103(i) provides for the debtor to control the subchapter V election.[96] Section III(J) of this Update discusses the issue.

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[93] § 1189(a).
[94] 540 U.S. 526 (2004).
[95] *In re* National Small Business Alliance, 642 B.R. 345 (Bankr. D.C. 2022); *cf. In re* CYMA Cleaning Contractors, Inc., 2023 WL 7117445 at *2-3 (Bankr. D.P.R. 2023) (The court concluded that it had authority to revoke the subchapter V election of an ineligible debtor *sua sponte* even after expiration of the time for objection to the election based on the analysis in *National Small Business Alliance*).
[96] *In re* Pinnacle Foods of California, LLC, 2024 WL 3873478 at *5 (Bankr. E.D. Cal. 2024); *In re* Free Speech Systems, LLC, 649 B.R. 729, 734-35 (Bankr. S.D. Tex. 2023); *In re* ComedyMX, LLC, 647 B.R. 457, 463-64 (Bankr. D. Del. 2022).

Another way to avoid exit strategy issues is reinstatement of the debtor to possession under § 1185(b). The debtor thus has the opportunity of "repenting" from the conduct that led to the debtor's ouster and cooperating with the subchapter V trustee and creditors to achieve a result that benefits everyone more than conversion or dismissal. As a practical matter, it is unlikely that a debtor could convince the court to order reinstatement if the trustee does not support it.

Section V(E)(1) considers alternative exit strategies after removal of the debtor in possession, and Section V(E)(2) deals with the *Lamie* issue.

1. Alternative exit strategies after removal of the debtor from possession*

Upon removal of the debtor from possession, the initial business question is whether the trustee will operate the debtor's business, as § 1183(b)(5)(B) permits. As a practical matter, the trustee's operation of the business will usually require the debtor's cooperation because it is unlikely that the business can operate without day-to-day management by the principals of the debtors. Moreover, the trustee, as well as creditors and the court, must have confidence in the commitment of the debtor's principals to operate the business under the trustee's control and in compliance with the Bankruptcy Code.

When the trustee does not continue business operations, continuation of the subchapter V case usually serves no purpose. Conversion or dismissal is the end of the subchapter V case.

If the trustee will operate the business, the business question is whether to reorganize the debtor or liquidate its business as a going concern. If reorganization is feasible, the trustee will operate the business while the debtor pursues confirmation of a plan.[97]

The subchapter V trustee has the duty under § 1183(b)(7) to "facilitate the development of a consensual plan of reorganization." This duty continues after removal of the debtor in possession, so it is appropriate for the trustee to explore the possibility of a plan with the debtor and other parties in interest. The trustee's work could include the drafting of a proposed plan for review by the debtor and its counsel.[98]

In this situation, the subchapter V case will conclude either upon confirmation of a plan or denial of confirmation, resulting in conversion, dismissal, or liquidation in subchapter V.

When reorganization is not feasible and the debtor's business has value as a going concern, the question is whether to conduct a sale in the subchapter V case or convert it to chapter 7.

Liquidation by the subchapter V trustee may result in more value for the estate than chapter 7 liquidation. Although the court may authorize a chapter 7 trustee to operate the

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[97] *See In re* Athena Medical Group, LLC, 2025 WL 2125130 (Bankr. D. Ariz. 2025) (dealing with compensation of debtor's attorneys after confirmation of plan for reorganization of debtor following removal of debtor from possession); *In re* National Small Business Alliance, 642 B.R. 345 (Bankr. D.C. 2022) (Over a year after removal of the debtor from possession and trustee's operation of business, the court revoked subchapter V election, converted case to traditional chapter 11 case, and appointed trustee under § 1104).

[98] *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 44. *See also In re* Duling Sons, Inc., 650 B.R. 578, 582 (Bankr. D.S.D. 2023) (requiring filing of joint plan by debtor and subchapter V trustee after removal of debtor from possession within 90 days, in the absence of which conversion would occur).

debtor's business under § 721 "for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate," sale of a business as a going concern in a chapter 7 case raises significant problems.[99] Moreover, the subchapter V trustee's familiarity with the case and the debtor's business and the trustee's pre-removal relationships with the debtor and creditors may favor sale of the business through continuation of the subchapter V case,[100] although appointment of the subchapter V trustee to serve in the chapter 7 case, as § 701(a)(1) permits,[101] also has these benefits. Whether liquidation should proceed under subchapter V or chapter 7 after removal of the debtor from possession is a fact-specific determination.

A subchapter V trustee's sale of the debtor's business as a going concern produces money for the estate. Administration of the case and distribution of the proceeds may procced in one of three ways.

One alternative is confirmation of a liquidation plan proposed by the debtor.[102] If the debtor declines to file a plan or proposes one that is unconfirmable, the trustee and creditors may consider either conversion to chapter 7 or disbursement of the proceeds through a structured dismissal.[103]

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[99] *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 45. The Final Report observes: "Conversion to Chapter 7 may adversely affect the business's relationships with its customers, suppliers, and employees, who may perceive Chapter 7 as the end of the debtor's business. If the Subchapter V trustee is not appointed as the Chapter 7 trustee, it may be difficult to effect an optimal continuation of the business pending sale."
Id. The Report also noted that the trustee's duty under § 704(a)(1) to liquidate assets "as expeditiously as is compatible with the best interests of parties in interest" may result in the realization of less value than would occur in a Subchapter V case." *Id. See also In re* Boteilho Hawaii Enterprises Inc., 2023 WL 7117223 at *2 (Bankr. D. Haw. 2023) (Discussing hypothetical liquidation of subchapter V debtor's assets in a chapter 7 case, the court noted that a trustee under § 704(a)(1) must "always dispose of the property quickly (although not necessarily at 'fire sale' prices.)").

[100] *See ABI Subchapter V Task Force Final Report*, *supra* note 5, at 45-46.

[101] §§ 701(a)(1) (The United States trustee shall appoint as interim trustee "one disinterested person" that is a panel trustee or that "is serving as trustee in the case immediately before" conversion of the case.); 701(b)(d) (Interim trustee serves as trustee in the case unless creditors elect a trustee at § 341 meeting of creditors.).

[102] *See In re* Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. 2023) (In removing debtor from possession rather than converting case, court required filing of joint liquidation plan by debtor and subchapter V trustee within 90 days, in absence of which conversion would occur.).

[103] A so-called "structured dismissal" involves payment of allowed administrative expenses and distributions on allowed claims, followed by dismissal of the case. *See generally,* Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017). The Supreme Court observed in *Jevic Holding Corp., id.* at 456-57:

> [T]he [Bankruptcy] Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a
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> > "hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).
>
> Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." Ibid., n. 973.

Conversion is necessary if the estate has claims to recover avoidable transfers or other claims against principals or others, such as breach of fiduciary duty claims, accounts receivable, or loans that the debtor made. Conversion may also be required if disputed claims must be resolved through the claims allowance process.

If a chapter 7 estate is likely to have no other assets, a structured dismissal[104] providing for distributions to creditors in accordance with their priorities under the Bankruptcy Code may be preferable because it will result in creditors receiving more money more promptly, without the delay and expenses of chapter 7 administration. A structured dismissal could include provisions for resolution of disputed claims prior to dismissal and disbursement of funds.

In some cases, the debtor, creditors, and the subchapter V trustee may reach consensus as to the appropriate exit strategy after removal of the debtor in possession. When they do not, questions may arise concerning the role of the subchapter V trustee and the authority of the trustee to exercise trustee powers after the debtor's removal.[105]

A subchapter V trustee has the authority to operate the debtor's business upon removal of the debtor from possession,[106] the authority to sell assets under § 363, and the rights under the Bankruptcy Code (among others) to avoid transfers under §§ 544-549. Nevertheless, parties opposed to the trustee's sale of the debtor's business or to the trustee's exercise of avoidance powers may assert that the trustee lacks authority to do such things without a court order.[107]

Although the argument is not well-founded,[108] subchapter V trustees may be concerned that the scope of their powers after the debtor's removal may be unclear.[109] Accordingly, the *ABI Subchapter V Task Force Final Report* encouraged courts "to be specific in the role, duties, and powers of the Subchapter V trustee after removal of the debtor in possession to ensure that all

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[104] See *supra* note 103.

[105] *See ABI Subchapter V Task Force Final Report*, *supra* note 5, at 46 ("A court may want to hear and consider the Subchapter V trustee's perspective regarding the discussions, negotiations, and dealings among all the parties in the case before deciding to keep a case in Subchapter V after removal of the debtor in possession. . . . Otherwise, questions may arise concerning the trustee's authority to sell the debtor's assets under section 363 or to pursue avoidance claims arising from the trustee's initial role in the case with the responsibility to facilitate a consensual plan.").

[106] § 1183(b)(5).

[107] *See ABI Subchapter V Task Force Final Report*, *supra* note 5, at 31-32. The Report explains and rejects the argument:

> This view is that the statutory rights, powers, and functions that revert to the trustee upon removal of a debtor from possession in standard Chapter 11 cases and Subchapter V cases are not the same because section 1181 makes section 1106 inapplicable in Subchapter V cases except as otherwise stated in section 1183. Close scrutiny of section 1183's references to section 1106 indicates that when the debtor has been removed from possession, there are no material differences in duties, and the powers necessary to exercise those duties, between the trustee in a standard Chapter 11 case and the trustee in Subchapter V except for the ability to file a plan.

Id. at 32 n. 8.

[108] *See ABI Subchapter V Task Force Final Report*, *supra* note 5, at 32 n. 8 (quoted in note 219 *supra*).

[109] *See id.* at 31-32.

parties have clarity concerning the timing, cost, and anticipated actions to resolve the Subchapter V case."[110]

2. Compensation of debtor's professionals after removal of debtor from possession*

When a dispossessed subchapter V debtor wants to pursue confirmation of a plan, to seek reinstatement as the debtor in possession, or to otherwise participate in the case, it must have a lawyer, and perhaps other professionals, as a practical matter. Indeed, an entity cannot appear in a bankruptcy case without a lawyer.[111] This section discusses whether the reasonable fees and expenses of a subchapter V debtor's attorney or other professionals for post-removal services are payable as an administrative expense.

Because a chapter 11 debtor in possession has the rights and powers of a trustee,[112] the debtor in possession has the trustee's right to employ attorneys and other professionals under § 327(a). Section 330(a) provides that professionals employed under § 327(a) are entitled to allowance of reasonable compensation and reimbursement of expenses.[113] An award of compensation and reimbursement under § 330(a) is an administrative expense under § 503(b)(2).

Simply put, the language of these statutes provides for allowance of an administrative expense for compensation and reimbursement of professionals employed by the *trustee*, which includes a chapter 11 or subchapter V debtor in possession. Section 330(a) does not provide for allowance of compensation and reimbursement of a *debtor's* professionals (as opposed to a *debtor in possession's* professionals), except for the provision in § 330(a)(4) that authorizes compensation for an individual debtor's attorneys in a chapter 12 or 13 case.

A debtor removed from possession under § 1185(a) is no longer a debtor in possession. Thus, the debtor's professionals now represent the debtor, not the debtor in possession. In a traditional chapter 11 case, a debtor's professionals are not entitled to allowance of compensation and reimbursement for services rendered under § 330 after conversion of the case to chapter 7 or appointment of a chapter 11 trustee, both of which terminate the debtor's status as a debtor in possession, under the Supreme Court's decision in *Lamie v. United States Trustee*.[114]

In *Lamie,* the attorney for the debtor sought compensation under § 330(a) for services after conversion of the case to chapter 7. The Court ruled that the attorney was not entitled to compensation under § 330(a) for postconversion services because, after conversion, the debtor in possession no longer existed, and the attorneys were not employed by the trustee. The same

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[110] *Id.* at 44-45.

[111] *E.g.*, Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993) ("[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.").

[112] § 1107(a) (traditional chapter 11 case); § 1184 (subchapter V case).

[113] § 330(a) also provides for allowance of compensation and expenses of a trustee, an examiner, a professional employed by a committee under § 1103, and an ombudsman appointed under § 332 or § 333. A debtor in possession does not have the trustee's right to compensation. §§ 1107(a) (traditional case), § 1184 (subchapter V case).

[114] 540 U.S. 526 (2004),

principle applies when a trustee is appointed in a traditional chapter 11 case, thus removing the debtor as debtor in possession.[115]

Subchapter V does not address this issue. If the *Lamie* ruling precludes payment from the estate of a subchapter V debtor's professionals after removal, the debtor must find an alternative way to pay them (or find professionals willing to work for free) to have a realistic chance of pursuing a plan, obtaining reinstatement, or otherwise participating in the case. And a debtor who is not an individual will not be able to file anything or be heard without a lawyer. (When the services of the debtor's professionals in the administration of the case would be useful to the trustee because of their familiarity with the debtor and its business – for example, assisting the trustee in connection with the sale of the debtor's business – the trustee may employ the debtor's counsel for specific purposes under § 327(e)[116]).

The question is whether anything in subchapter V requires a conclusion that, notwithstanding *Lamie,* a debtor's professionals are entitled to allowance of an administrative expense for services rendered after removal of the debtor from possession.

In *In re ComedyMX, LLC*, [117] the court entered an unreported order, without objection by the U.S. Trustee or any other party after notice and a hearing, that granted an application for an order permitting attorneys for the dispossessed subchapter V debtor to seek compensation for services to be rendered after the debtor's removal.

The court identified three potential bases to support compensation of the debtor's attorneys for post-removal services:

1. The fees may be awarded on the ground that they are actual, necessary costs and expenses of preserving the estate under § 503(b)(1)(A).

2. An award of fees is appropriate under § 330 on the ground that, as prior counsel to the debtor, the firm is a professional person employed under § 327.

3. Only a debtor may file a plan under § 1189(a). The effect of § 1189(a) is to leave a dispossessed debtor with certain limited obligations of a trustee, such that the dispossessed debtor may retain counsel under § 327(a) to carry out that role.

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[115] *In re* Sunergy California, LLC, 646 B.R. 840, 845 (Bankr. E.D. Cal. 2022), *aff'd* 2023 WL 4184860 (B.A.P. 9th Cir. 2023); *In re* Flying Roadrunner, Inc., 2015 WL 1344445 at *9 (Bankr. W.D. Pa. 2015)*; In re* Johnson, 397 B.R. 486, 490 (Bankr. E.D. Cal. 2008).

[116] *In re* Johnson, 397 B.R. 486 (Bankr. E.D. Cal. 2008). *Lamie v. United States Trustee*, 504 U.S. 526, 538-39 (2004), recognized that a trustee may employ debtor's counsel under § 327(e); *see In re* Athena Medical Group, LLC, 2025 WL 2125130 at *7 n. 35 (Bankr. D. Ariz. 2025) (noting that subchapter V trustee had employed debtor's lawyers after removal as special counsel for non-plan work under § 327(e)).

Section 327(e) authorizes a trustee, with the court's approval, to employ an attorney who has represented the debtor for "a specified special purpose, other than to represent the trustee in conducing the case," if such employment is in the best interest of the estate and if the attorney does not hold or represent any interest adverse to the debtor or the estate with respect to the representation.

[117] *In re ComedyMX, LLC,* Case No. 22-11181, Dkt. No. 153 (Bankr. D. Del. Apr. 25, 2023).

The *ComedyMX* court noted that each ground is subject to counterarguments and expressly stated that its order did not resolve any of the issues. Noting that, in an adversary system, circumstances may make it appropriate to grant relief that is unopposed,[118] the court concluded that, in the absence of any objection, the attorneys could be awarded compensation from the estate for actual, necessary work performed for the benefit of the estate after the debtor's dispossession.

In *In re Athena Medical Group, LLC,*[119] the debtor's lawyers provided services to the debtor after the debtor's removal that resulted in confirmation of a plan. The court held that *Lamie* precluded allowance of compensation under § 330(a) for services after removal of the debtor from possession[120] and rejected the debtor's arguments for allowance of the fees based on the three theories the *ComedyMX* court mentioned.[121]

The court acknowledged that the legal services had resulted in a successful confirmation to the benefit of the estate but ruled that § 523(a)(1)(A)'s allowance of an administrative expense for "actual, necessary costs and expenses of preserving the estate" does not include fees for a debtor's lawyers.[122] Sections 317, 330, and 503(b)(2) specifically govern fees and expenses of the debtor's attorney, the court explained, while allowance of an administrative expense under § 503(b)(1) applies more generically. Allowance of the fees under § 503(b)(1), the court concluded, "would improperly circumvent more specific provisions of the Code that do not allow for such fees."[123]

The fact that the attorneys had been employed under § 327(a) to represent the debtor in possession at the outset of the case also provided no basis for allowance of the fees. Upon removal of the debtor from possession, the court explained, the debtor no longer functioned as a trustee, and attorneys it hired are no longer employed under § 327 unless the trustee retained them.[124]

The *Athena Medical Group* court rejected the contention that, because only the debtor can file a plan in a subchapter V case, a removed debtor retains the limited obligation of a trustee to file a plan that authorizes the retention of counsel under § 327(a), entitled to compensation under § 330(a), to perform that function.

The court noted that a trustee in a traditional chapter 11 case has a duty to file a plan under § 1106(a)(5), which does not apply in a subchapter V case, and that the debtor's right to file a plan arises under § 1189(a), not from a duty of a trustee. "Therefore," the court reasoned,

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[118] The court cited its unreported decision in *In re Arsenal Intermediate Holdings*, LLC, Case No. 23-10097, Dkt. No. 176 (Bankr. D. Del. March 27, 2023), which addresses 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.
[119] 2025 WL 2125130 (Bankr. D. Ariz. 2025).
[120] *Id.* at *4-6. *Accord, In re* NIR West Coast, Inc., 638 B.R. 441, 452-53 (Bankr. E.D. Cal. 2022).
[121] *Id.* at *6-11.
[122] *Id.* at *9-11.
[123] *Id.* at *11.
[124] *Id.* at * 8-9.

"it is illogical to argue that a debtor continues to retain the rights of the trustee to file a plan, when the debtor's right never emanated from the trustee's rights in the first place."[125]

Recognizing the need for a subchapter V debtor to retain and compensate professionals after removal in appropriate circumstances,[126] the *ABI Subchapter V Task Force Final Report* recommended an amendment to § 1185 to add a new section to permit the court, after notice and a hearing, to authorize the employment and compensation of professionals by the debtor after removal if the court finds that one of three circumstances exist:[127]

> 1. There is a reasonable likelihood that the debtor can file a confirmable plan within a reasonable period of time and the debtor requires the services of a professional to do so;
>
> 2. The debtor requires the services of a professional to perform any duties of the debtor; or
>
> 3. The debtors' employment of a professional is in the best interests of creditors and the estate.

3. Alternative theories for compensation of debtor's professionals after removal of debtor from possession*

In the absence of legislation that permits payment of a subchapter V debtor's professionals after removal, the ability of the debtor to obtain an unopposed order like the one in *ComedyMX,* [128] or persuading the court to disregard the *Athena Medical Group*[129] reasoning and grant such relief despite an objection, the debtor and its professionals must make arrangements for compensation of the professionals other than from the estate. Under the *Athena Medical Group* ruling, the debtor will be able to pay the professionals only if a plan is confirmed, and then only after payments to creditors have occurred.[130]

The logical source for payment of post-removal compensation and reimbursement is the holders of the equity interests in the debtor. The debtor (out of possession, and therefore with no fiduciary duties), the professional, and the equity holders could agree that the equity holders will

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[125] *Id.* at *7.

[126] *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 47-51.

[127] *Id.* at 50-51. The proposed amendment incorporates the standards of § 330 for allowance of compensation:

> The court after notice and a hearing may award to a professional employed under this subsection reasonable compensation for actual, necessary services rendered by the professional and by any paraprofessional person employed by such person and reimbursement for actual, necessary expenses based on a consideration of the necessity and benefit of such services and the other factors set forth in section 330.

Id. at 51. The proposed amendment further provides that the court may limit the scope of the services of any professional that the debtor employs.

[128] *In re* ComedyMX, LLC, Case No. 22-11181, Dkt. No. 153 (Bankr. D. Del. Apr. 25, 2023) (discussed in § V(E)(2)).

[129] *In re* Athena Medical Group, LLC, 2025 WL 2125130 (Bankr. D. Ariz. 2025) (discussed in § V(E)(2)).

[130] *See In re* Athena Medical Group, LLC, 2025 WL 2125130 at *7 n. 35 (Bankr. D. Ariz. 2025). Because compensation and reimbursement for post-removal services are not allowable as an administrative expense, payments to the professionals cannot be included in the calculation of projected disposable income.

pay the fees and expenses. Because the debtor (not the debtor in possession as trustee) is employing the professional, the court's approval under § 327(a) is not necessary.

Nevertheless, with regard to attorneys and perhaps other professionals, the arrangement requires attention to ethical considerations relating to payment of fees by a person other than the client, including provisions in the terms of the engagement that deal with waiver of potential conflicts of interest after informed consent.[131] Absent unusual circumstances, the arrangement should not involve a nonwaivable conflict of interest because the debtor and its equity holders have the same objective: confirmation of a plan and reinstatement of the debtor in possession.[132]

In addition, § 329(a) requires disclosure of any agreement between the debtor and an attorney, and any payment made, for services rendered or to be rendered in connection with the case. Bankruptcy Rule 2016(b) requires that the attorney file the disclosure statement and send it to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Because payment will not come from the estate, it is not necessary for the court to allow the fees. In the case of an attorney, however, if compensation of the attorney exceeds the reasonable value of services, § 329(b) permits the court to cancel the agreement or order the return of any payment in excess of reasonable compensation.

If the services of an attorney or other professional results in confirmation of a plan, the owners who have paid them have an argument that they have an administrative expense claim under § 503(b)(3)(D). Section 503(b)(3)(D) permits allowance of an administrative expense for (among others) an equity security holder (1) who makes a "substantial contribution" to a chapter 11 case and (2) incurred an "actual, necessary expense" in doing so (3) unless the expense is for compensation and reimbursement specified in paragraph (4) of § 503(b), which provides for an administrative expense for "reasonable compensation for professional services rendered" and "reimbursement for actual, necessary expenses" incurred by an attorney or accountant of a creditor, indenture trustee, equity security holder or committee not appointed under § 1102.

The owners' premise is that confirmation could not have occurred without counsel for the debtor (and possibly other professionals) and that, therefore, their arranging for the retention of attorneys (or perhaps other professionals) made a substantial contribution to the case. At least with regard to a debtor that is an entity, the premise is irrefutable: only a debtor may file a plan, and an entity must have a lawyer to appear in a bankruptcy court. One could quibble that an individual could achieve confirmation *pro se* with the assistance of the subchapter V trustee, but an individual's ability to obtain confirmation of a plan without a lawyer is questionable at best.

To obtain the required professional services for the debtor necessary for the substantial contribution, the owners had to incur the expense of paying the professional themselves. The

[131] American Bar Association Model Rule of Professional Conduct 1.7.

[132] An issue could arise if a dispute exists among various factions of equity security holders of the treatment of equity security holders under the plan or if one or more equity holders do not want the debtor to proceed.

causal link is likewise irrefutable unless one accepts the notion that a professional will provide services for free.

Although the expense is for professional compensation and reimbursement of a professional, the professional is not a professional specified in paragraph (4) of § 503(b) that paragraph (3) excludes. The professionals listed in paragraph (4) do not include professionals employed by a debtor.

Objectors may raise three arguments against allowance of a § 503(b)(3) administrative expense.

The first two involve the text of the statutes. One is that "expense" in paragraph (3) of § 503(b) does not include fees of the debtor's professionals. The related argument is that paragraph (4) of § 503(b) governs professional compensation and reimbursement and, therefore, paragraph (3) does not permit allowance of professional compensation and reimbursement of expenses at all.

The owners' response is that paragraph (3) expressly excludes compensation and reimbursement only of certain professionals (those specified in paragraph (4)) as an allowable expense, but the debtor's professionals are not in that list. Similarly, paragraph (4) deals only with attorneys and accountants for those specified entities and thus the specific provisions for them do not exclude reimbursement and expenses for other professionals.

More generally, the third argument is that allowance of an administrative expense to the owners for payment of the debtor's professionals is inconsistent with the statutory interplay of §§ 503(b), 327(a), and 330 and the *Lamie* ruling that professionals of a debtor (other than an individual in a chapter 12 or 13 case) are not entitled to compensation and reimbursement as an administrative expense. Allowing an indirect payment of the debtor's professionals from the debtor's estate when the debtors make the payment in the first instance is an impermissible end-run around the statutory scheme that prohibits direct payment.

The owners' response is that (1) the statutory language permits allowance and excludes compensation and reimbursement only of specified professionals and (2) the result is consistent with the operation of other statutes and *Lamie* because allowance of an administrative expense occurs only when the expense was necessary for a substantial contribution.

An alternative arrangement for the debtor and owners to consider is joint representation of the debtor and the owners after removal, with the owners assuming responsibility for payment. The post-removal debtor is no longer a fiduciary, and the debtor and owner have the same interests and objectives in the representation. Court approval is not required under § 327 because the debtor is not a debtor in possession.

This alternative permits an attorney or accountant to seek allowance of compensation and reimbursement of expenses as an administrative expense under paragraph (4) of § 503(b) because of the services rendered in making a substantial contribution to the case in representing the owners, whose expenses in making a substantial contribution are allowable under paragraph

3. Other professionals are not included in paragraph (4), so a joint representation agreement with other professionals would not provide this advantage.

Allowance of an administrative expense under paragraph (4) in this situation is subject to the same objections that arise under the first alternative that seeks allowance under paragraph (3). Under a "substance over form" analysis, it is no different than allowance of the fees of debtor's professionals under § 330 and payment of the fees by the estate as an administrative expense under § 503(b)(2). As in the previous situation, it is an end-run around other provisions of the Bankruptcy Code and the *Lamie* ruling that prohibit payment of attorneys and accountants for the debtor by the estate.

A third alternative that takes the "end-run" objection into account is retention of current professionals to represent the debtor (with payment by the owners) and retention of independent counsel to represent the owners. Debtor's counsel must file the plan, but the owners' counsel (or other professionals) takes the lead and does most of the work in its drafting and negotiating.

Like the trustee and creditors, the owners are parties in interest and may consult with the debtor about the plan and prepare a proposed plan for the debtor to consider. Similarly, the debtor's lawyer must represent the debtor in confirmation litigation, but the owners – like the trustee and creditors – are entitled to appear and be heard at the confirmation hearing and to participate in pre-confirmation litigation.

Under this arrangement, the owner's lawyer (or other professional) is clearly providing services for the owners, and not for the debtor. Those services are consistent with the rights of the owners as parties in interest to participate in the case.

The result is that the owners' lawyer (or other professional) does most of the work and most of the total compensation and reimbursement arises from that work. The owners have an administrative expense claim under paragraph (3) for compensation and reimbursement of their lawyers and other professionals that does not involve compensation of the debtor's professionals. In addition, they have a paragraph (3) claim for their payment of the debtor's professionals.

Objectors still have the argument that "expense" in paragraph (3) does not include the expense of compensation and reimbursement of professionals that an owner incurs in making a substantial contribution, but the argument seems weaker when it is not connected to the debtor's professionals.

F. Employment and Compensation of Subchapter V Debtor's Attorneys and Professionals*

Like a debtor in possession in a traditional case,[133] a subchapter V debtor in possession has the rights, powers, and duties of a trustee under § 1184, with limited exceptions.[134]

[133] 11 U.S.C. § 1107(a).

[134] A debtor in possession does not have a trustee's right to compensation under § 3330 and does not have a trustee's duty to file lists, schedules and statements under § 1106(a)(2) (a duty of the debtor under § 521(a)(1)) or a trustee's investigative duties under § 1109(a)(3), and (4).

The Bankruptcy Code requires that the court approve a trustee's employment of attorneys and other professionals, § 327, and allow their compensation under § 330.[135] Because a debtor in possession exercises rights and powers of a trustee, these provisions apply to a subchapter V debtor's employment and of professionals and their compensation.

The principles and standards governing employment and compensation of debtor's professionals are the same in traditional and subchapter V cases. Although they are familiar to practitioners with experience in chapter 11 cases, professionals with little or no chapter 11 experience may not be aware of them.

This section reviews basic concepts and notes illustrative problems that have arisen in subchapter V cases.

Bankruptcy Rule 2014 requires an application for the employment of professionals and specifies its required contents. Generally, a professional is not entitled to compensation for services rendered before the filing of the application in the absence of "excusable neglect" for proceeding to provide services before the filing or the existence of unusual circumstances to justify retroactive approval of employment.[136]

Bankruptcy Rule 6003 (a)(1) prohibits a court from granting an application to employ professionals within 21 days after the filing of the petition unless necessary to avoid immediate and irreparable harm. Nevertheless, an application for employment of the debtor's attorneys (and other professionals) should be filed at the same time as the petition. Courts generally permit compensation for services rendered after the filing of an employment application but before it is granted, but they usually will not permit compensation for services rendered before its filing.[137]

A professional employed by a debtor in possession must be a "disinterested person" under § 327(a). Section 101(14) defines "disinterested person" to mean a person who is not a creditor, equity security holder, or insider and who is not, and was not in the two years before the filing of the petition, an officer, director, or employee of the debtor. § 101(14)(A), (B). In addition, a disinterested person must not have an interest "materially adverse to the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in the debtor, or for any other reason." § 101(14)(C).

Bankruptcy Rule 2014 requires that the application for approval of employment of a debtor's professional disclose all of the professional's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and

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[135] Section 328 permits retention of professionals on specified terms.

[136] *E.g., In re* Russ's Mulch & Trucking LLC, 2025 WL 3558053 (Bankr. E.D. Wisc. 2025) (court found no excusable neglect and denied compensation for services prior to filing of application); *In re Golesis,* 659 B.R. 767 (Bankr. D. Utah 2024) (court found no unusual circumstances and denied compensation for services prior to filing of application).

[137] *E.g., In re* Russ's Mulch & Trucking LLC, 2025 WL 3558053 (Bankr. E.D. Wisc. 2025); *In re Golesis,* 659 B.R. 767 (Bankr. D. Utah 2024).

any person employed in the United States trustee's office and include a verified statement setting forth all of the connections. Bankruptcy Rule 2002(a)(2)(F), (3).

A professional's failure to make complete disclosure of all connections and potential conflicts of interest often results in denial of compensation.

Issues arise when a principal of a debtor or other third party advances funds for a professional's prepetition retainer or guarantees payment of compensation for services during the case.

In *In re Doug Gross Construction, Inc.,* 2024 WL 2990298 (Bankr. W.D.N.Y. 2024), the court concluded that the debtor's law firm did not represent the debtor's 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.

Section 330 governs compensation of a debtor in possession's professionals. It permits "reasonable compensation for actual, necessary services rendered" by the debtor's professional, § 330(a)(1), and reimbursement for "actual, necessary expenses." § 330(a)(2). Section 330(a)(3) specifies the factors for the court to consider in allowing compensation. Section 330(a)(4) prohibits compensation for "unnecessary duplication of services" or services that were not reasonably likely to benefit the estate or were not necessary to the administration of the case.

A number of courts have considered objections to compensation of a subchapter V debtor's lawyers.

In *In re PM Management—Kileen I NC LLC,* 2024 WL 4834630 at *11-12 (Bankr. N.D. Tex. 2024), the court reduced the compensation of the debtor's attorneys in a subchapter V case in which a liquidating plan had been confirmed from $839,020 to $637,829.09. The reduction of $201,191.91 was based on the court's conclusion that fees in certain categories were "unreasonable and tainted by conflict" with the interests of insiders.

In *In re Hillman,* 2024 WL 409118 (Bankr. N.D.N.Y. 2024), the court reduced the hourly rate for attorneys who performed administrative tasks and reduced the overall compensation by ten percent for the attorney's failure to comply with local rules regarding project billing categories, inclusion of a statement concerning the debtor's ability to pay, and other deficiencies, including "lumping" and "vagueness."

The debtor's counsel in *In re 2202 East Anderson St., LLC,* 2024 WL 1340655 (Bankr. C.D. Cal. 2024), sought a total of $ 50,035.25 in fees for services rendered after the court ruled that the debtor was ineligible for subchapter V and appointed a chapter 11 trustee, who sold its real estate.[138] The court considered two objections of the trustee to the fees.

First, the trustee objected that fees of $15,385 were not allowable because they were for services in an effort to keep the case in subchapter when it was inevitable that its subchapter V status would be terminated and a trustee appointed. The court concluded that most of the attorney's services trying to allow the case to proceed under subchapter V were reasonably likely to benefit the estate at the time they were performed. But the attorney had not done a cost/benefit analysis of the attorney's services seeking an alternative to the sale of the property and how those services benefitted the estate, as opposed to the principal. The court reduced the requested compensation by $ 8,000.

The trustee also asserted that the lawyer should receive only $ 1,000 for services to obtain approval of employment instead of the requested $ 9,060.40. The court reduced the fees by $ 3,000, concluding that the lawyer would have spent less time had it complied with the court's procedures concerning disclosures regarding payment of counsel's retainer by a principal.

In *In re Pinnacle Foods of California, LLC,* 2025 WL 1090920 (Bankr. E.D. Cal. 2025), the debtor sought to assume franchise agreements, which the court had denied under applicable Ninth Circuit precedent.[139] Although the court allowed attorney's fees for services in connection with filing and prosecution of the motion to assume the franchise agreements, it disallowed fees for continued efforts to assume them after the court had ruled, concluding that such services were not necessary or beneficial to the estate.

The court in *1333 Beacher Lane Va., LLC,* 2025 WL 3083057 (Bankr. E.D. Va. 2025), allowed the fees of the debtor's attorney over the objection of the debtor's principal asserted on behalf of the debtor. The case contains an extensive factual analysis of the standards required for allowance of compensation under § 330.

Courts have stated that a postpetition retainer for debtor's counsel is permissible in appropriate circumstances. The court in *In re Golden Fleece Beverages, Inc.,* 2021 WL 6015422 (Bankr. N.D. Ill. 2021), approved a postpetition retainer for the subchapter V debtor's replacement counsel.

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[138] Section V(E)(2) discusses the issue of whether a debtor's professionals are entitled to compensation after removal of the debtor from possession.

[139] Catapult Entertainment, Inc. v. Perlman (*In re* Catapult entertainment, Inc.), 165 F.3d 747 (9th Cir. 1999).

In *In re Soul Wellness LLC,* 669 B.R. 848 (Bankr. S.D. Fla. 2025), however, the declined to approve a postpetition retainer for debtor's counsel who filed the case, finding no exceptional circumstances to warrant authorizing the postpetition retainer. Section IV(E)(4) of this Update discusses the issue in connection with deposits for payment of the subchapter V trustee's fees and expenses.

The court in *In re Raocore Tech, LLC,* 2025 WL 82880 (Bankr. D.D.C. 2025), declined to approve an "evergreen retainer" whereby the debtor would make postpetition payments as an additional retainer as counsel submitted statements for services during the case. The court noted that evergreen retainers are permissible in appropriate circumstances and listed factors for consideration in making the determination. Section IV(E)(4) of this Update discusses the factors the court identified.

VI. Administrative and Procedural Features of Subchapter V

A. Elimination of Committee of Unsecured Creditors*

A subchapter V case does not have a creditor's committee unless the court orders otherwise for cause.[140] The provision is consistent with the objectives of subchapter V to provide an expedited process for the quick, inexpensive, and efficient reorganization of smaller businesses.[141] It is also consistent with the practical reality that, prior to enactment of subchapter V, many cases of smaller business did not have a creditors' committee due to the lack of creditors willing to serve on the committee.

Moreover, the subchapter V trustee's oversight duties under § 1183(b)(1) and (3), together with the court's authority under § 1183(b)(2) to expand the trustee's duties to include investigative responsibilities, give the subchapter V trustee a role in the case that serves many of the purposes of a creditors' committee and makes a creditors' committee less necessary.[142]

In *In re Cinemex Holdings USA, Inc.,* 2025 WL 2489585 (Bankr. S. D. Fla. 2025), a creditor requested that the court appoint a creditors' committee. As cause for the appointment, the creditor asserted the need to investigate the eligibility of the three related debtors for subchapter V because the debtor was close to the debt ceiling, to investigate a $ 50 million claim of the debtor's parent and determine whether it should be recharacterized as equity, and to provide a "unified voice" for unsecured creditors in the case.[143]

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[140] In a traditional case, § 1102(a)(1) provides for the U.S. Trustee to appoint a committee of creditors holding unsecured claims. In a subchapter V case, § 1181(a)(2) provides that § 1102(a)(1) does not apply unless the court orders otherwise for cause.

[141] *See, e.g., In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 339-340 (Bankr. S.D. Fla. 2020).

[142] *E.g., In re* Cinemex Holdings USA, Inc., 2025 WL 2489585 at *3 (Bankr. S.D. Fla. 2025); 7 COLLIER ON BANKRUPTCY ¶ 1102.04[1] (16th ed.); *cf. In re* Peak Serum, Inc. 623 B.R. 609, 634 (Bankr. D. Colo. 2020) (Because appointment of a trustee is mandatory in a subchapter V case, debtor is subject to "some level of oversight by a neutral third party.").

[143] *Id.* at *2.

The court noted[144] that *In re Sharity Ministries*[145] was the only subchapter V case it had found in which a court appointed an official committee. In *Sharity Ministries,* the court at a hearing *sua sponte* ordered the appointment of a members' committee so that approximately 10,000 members could "have a voice" in their treatment "without individual members having to incur the costs of doing so."[146] The U.S. Trustee had filed a motion to remove the debtor from possession or to expand the subchapter V trustee's duties to include investigatory duties and presented evidence "that the debtor had misled its members, was an insurance company operating without licensure and regulation, and that a substantial amount of the members' contributions were used to pay a third party rather than the members' medical expenses."[147]

The *Cinemex Holding* court found no guidance on the standards for determining "cause" for the appointment of a committee in two other cases.

One was *In re* B*onert*,[148] where the debtor in a traditional case sought to amend its petition to elect subchapter V. The committee, appointed a few weeks prior to the filing of the amendment, objected that allowing the case to proceed under subchapter V would prejudice it. In rejecting the committee's argument, the court noted, "The Committee will not be disbanded if it can demonstrate that its continued existence will improve recoveries to creditors, will assist in the prompt resolution of this case, and is necessary to provide effective oversight of the Debtors." [149]

The other was *In re Wildwood Villages, LLC*.[150] In rejecting a request for the filing of a class proof of claim, the *Wildwood Villages* court remarked, "While true that creditor committees are disfavored in Subchapter V cases, the statute permits a bankruptcy court to use its discretion and appoint a creditors' committee in an appropriate case."

After reviewing the provisions of § 1183(b)(2), which permits expansion of the trustee's duties to include investigatory duties for cause, and § 1185(a), which permits removal of the debtor from possession for cause, the *Cinemex Holdings* court quoted a leading treatise:[151]

> The provision authorizing the court to appoint a committee for cause allows the court to take into account all of the relevant facts and circumstances. The court will balance the potential cost of a committee against the need to protect the interests of creditors in the reorganization process, taking into account the enhanced role of the United States trustee or the appointment of a subchapter V trustee.

"In sum," the court reasoned, "in determining whether a committee should be appointed in a Subchapter V case a court should take into consideration factors that cannot, or logically

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[144] *Id.* at *4.
[145] Case No. 21-11001, Tr. Of Aug. 9, 2021 H'rg, Doc. No. 150 at 61-63 (Bankr. D. Del. Aug. 10, 2021).
[146] *Id.*
[147] *See Cinemex Holdings,* 2025 WL 2489585 at * 4 (summarizing the record in *Sharity Ministries*).
[148] 619 B.R. 248 (Bankr. C.D. Cal. 2020).
[149] *Id.* at 254.
[150] 2021 WL 1784408 (Bankr. M.D. Fla. 2021).
[151] *Cinemex Holdings,* 2025 WL 2489585 at *5, *quoting* 7 COLLIER ON BANKRUPTCY ¶ 1102.04[1] (16th ed.).

should not, be addressed by the remedies provided by section 1183(b)(2) or factors which rise to the level of cause for removal of a debtor in possession under section 1185."[152]

In exercising its discretion, the court concluded, it must "consider balancing the potential cost of a committee against the need to protect the interests of creditors; in other words, whether the needs of moving the case forward and controlling costs is outweighed by the needs of creditors."[153]

Taking into account the "enhanced role" of the subchapter V trustee, the court listed seven non-exclusive factors that a court should consider in determining whether cause for appointment of a committee exists:[154]

1. The size and complexity of the case (whether the case is one which more closely resembles a traditional chapter 11 case);

2. The number of creditors involved in the case and the nature of their debt;

3. The nature of the debtor's assets;

4. The nature of the debtor's business and how it is regulated;

5. The amount of secured debt, the number of secured creditors, and the nature of the collateral in which such creditors assert a lien;

6. Whether and to what extent any other creditor or other party in interest supports the relief requested; and

7. Whether any other factors are present in the case that, notwithstanding § 1183(b)(2), would interfere with the ability of the Subchapter V trustee to perform the trustee's normal statutory duties effectively.

Applying these factors, the court determined that the creditor had not established sufficient cause for appointment of a creditors' committee. The case was not complex, no other party had joined in the request, and the fact that the debts were "close to the debt ceiling" was "not persuasive" because the debtors would qualify for subchapter V under the debt limit Congress set even if they were "only one penny under the ceiling."[155]

The need to investigate the parent company's $50 million claim was not cause because the subchapter V trustee could investigate the claim and object to its allowance if appropriate and, in any event, the debtor had not yet filed a plan, so "no one even knows how the Debtors propose to treat the insider claim."[156] The trustee and the creditor could object to the plan.

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[152] *Id.* at * 5.
[153] *Id.*
[154] *Id.* at * 5-6.
[155] *Id.* at *6.
[156] *Id.*

The court rejected the argument that the unsecured creditors "needed a voice" in the case. The court observed that the creditors in the case were primarily landlords with some vendors that numbered in the hundreds at most, unlike the 10,000 members in *Sharity Ministries.*[157]

B. Elimination of Requirement of Disclosure Statement

C. Required Status Conference and Debtor Report

D. Time for Filing of Plan

E. No U. S. Trustee Fees

F. Modification of Disinterestedness Requirement for Debtor's Professionals

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

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

I. Filing of Proof of Claim; Bar Date

J. Extension of Deadlines for Status Conference and Debtor Report and For Filing of Plan

The debtor in a subchapter V case has the exclusive right to file a plan[158] and must do so within 90 days after the order for relief.[159] The court may extend the deadline if the need for the extension is "attributable to circumstances for which the debtor should not justly be held accountable."[160] Although confirmation of the plan in a small business case must occur within 45 days after its filing unless the court extends it,[161] subchapter V does not have a deadline for confirmation.

A debtor's failure to timely file a plan constitutes cause for conversion to chapter 7 or dismissal under § 1112(4)(J). Compliance with the deadline for filing a plan, therefore, is important for a debtor.

A debtor who is not prepared or able to file a plan that it expects the court to confirm by the deadline has two alternatives. Because subchapter V has no deadline for confirmation and permits preconfirmation modification of a plan,[162] one strategy is to file a plan by the deadline that the debtor will later amend, sometimes called a "placeholder plan." The more conventional alternative is to seek an extension of the deadline.

Courts have criticized the filing of "placeholder plans" as "a waste of time and resources for all parties-in-interest [that] does not represent Congress's intent in enacting subchapter

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[157] *Id.*
[158] § 1189(a).
[159] § 1189(b).
[160] § 1189(b).
[161] § 1129(e). The deadline for the debtor in a small business case to file the plan is 300 days after the order for relief, unless the court extends it. § 1121(e)(2).
[162] § 1193(a).

V . . . . The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans."[163] One court 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 and that cause therefore existed for conversion.[164]

Courts have taken different approaches to the determination of whether the need for an extension is "attributable to circumstances for which the debtor should not justly be held accountable."[165]

In re Signia, Ltd.[166] illustrates the "beyond-the-debtor's control" view. Under this interpretation, the debtor must establish external circumstances beyond the debtor's control to obtain an extension of the plan deadline.[167] Under the plain meaning of the statutory language and the caselaw and legislative history of the identical language in chapter 12 for extension of the deadline for filing a plan,[168] the court concluded that § 1189(b) permits extension of the deadline only because of external events that the debtor did not cause.

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

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[163] *In re* Baker, 625 B.R. 27, 38 (Bankr. S.D. Tex. 2020); *accord, e.g. In re* Waterville Redevelopment Co. IV, LLC, 2024 WL 3658765 at *6 n.9 (Bankr. D. Me. 2024); *In re* Signia, Ltd., 2024 WL 331967 at * 1 (Bankr. D. Colo. 2024) (Placeholder 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.").

[164] *In re* United Safety and Alarms, Inc., 2024 WL 973674 (Bankr. S.D. Fla. 2024).

[165] Two cases, discussed in the text *infra,* review the different approaches and discuss and collect cases on the issue. *In re* Signia, 2024 WL 331967 (Bankr. D. Colo. 2024); *In re* Trinity Legacy Consortium, LLC, 656 B.R. 429 (Bankr. D.N.M. 2023).

[166] 2024 WL 331967 (Bankr. D. Colo. 2024).

[167] *Accord, e.g., 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).

[168] § 1221.

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 differ from common meaning. Specifically, the court referred to Justice Frankfurter's statement on statutory interpretation, *id.* at *9:[169]

> [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," the court explained, is § 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.

The court extensively reviewed the legislative history of § 1221 and the caselaw 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."[170]

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).

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[169] 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).

[170] *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 *Signia* court denied the debtor's 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.[171]

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

[171] 2024 WL 331967 at *12 (Bankr. D. Colo. 2024).

section 1189(b) with sufficient facts and, when necessary, evidence to meet the standard set forth therein.

Other courts have applied a more flexible standard in determining whether to extend the plan deadline.

In re Baker[172] identified four factors for a court to consider in determining whether to extend the deadline for the filing of a plan: (1) whether the circumstances raised by the debtor were within the debtor's control; (2) whether the debtor had made progress in drafting a plan; (3) whether the deficiencies preventing that draft from being filed were reasonably related to the identified circumstances; and (4) whether any party-in-interest had moved to dismiss or convert the case or otherwise objected to a deadline extension in any way.

The court in *In re Trinity Legacy Consortium, LLC,*[173] identified and applied 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.[174] The 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."[175]

Such an equitable inquiry, the court explained, seeks to "strike the correct balance of [subchapter V's] goals of speed and access to a realistic reorganization scheme." It takes into account "whether the debtor manipulated the timing of his bankruptcy case, potential prejudice to creditors, and whether the debtor [is complying] with his obligations under the Code."[176]

In striking that balance, the *Trinity Legacy Consortium* court continued, "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.[177]

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[172] 625 B.R. 27 (Bankr. S.D. Tex. 2020).
[173] *Trinity Legacy Consortium,* 656 B.R. 429 (Bankr. D.N.M. 2023).
[174] *Id.* 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 parties); *In re* Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742, 746 (Bankr. M.D. Fla. 2020) (considering prejudice to creditors). 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.
[175] 656 B.R. at 437 (footnotes omitted).
[176] *Trinity Legacy Consortium,* 656 B.R. at 437, discussing *In re* Trepetin, 617 B.R. 841, 848-49 (Bankr. D. Md. 2020).
[177] *Trinity Legacy Consortium,* 656 B.R. at 440.

The court then identified specific factors to consider: (1) whether the need for the extension is within the debtor's reasonable control; (2) the danger of prejudice by granting or refusing to grant the extension; (3) the length of the extension; (4) the debtor's good faith; (5) the debtor's progress in formulating a meaningful plan; and (6) the views of creditors as a whole and the subchapter V trustee.

The debtor in *Trinity Legacy Consortium* sought an extension 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. Applying the standards of the "equitable inquiry" approach, the court granted the extension, finding that the debtor was close to concluding its negotiations with creditors in the mediation and that the extension would not unduly prejudice creditors.[178]

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 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.

Under the "beyond-the-debtor's control" interpretation, the debtors in *Trinity Legacy Consortium* and *Mateos* would not have qualified for an extension based on the prospective settlements and resolution of issues in the related case because, among other things, each debtor could have proposed a plan with differing provisions depending on the outcome of the settlements or related case.

In a case in which the bankruptcy judge has not indicated what standards for an extension of the plan deadline govern, the careful debtor's lawyer in need of an extension for good reasons that are nevertheless within the debtor's control under the *Signia* approach must file a motion for an extension of the plan deadline and request a hearing well in advance of the plan deadline so that, if the court denies the extension, the debtor will have sufficient time to meet the deadline.

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

[178] *Id.* at 442-43.

essentially a two-party dispute, and had involved contentious and expensive litigation. *Id.* at *8-9.

K. Debtor's Postpetition Performance of Obligations Under Lease of Nonresidential Real Property – § 365(d)

L. Automatic Stay Issues in Subchapter V Cases*

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.

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.,* 661 B.R. 565 (Bankr. S.D. Tex. 2024).

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.

VII. Contents of Subchapter V Plan

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

B. Requirement of § 1190 for Contents of Subchapter V Plan; Modification of Residential Mortgage*

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. *See generally* Nate Juster*, Not So Fast: Cure-and-Maintain Plans in Subchapter V*, XLIII ABI Journal 12, 22–23, 72–73, December 2024.

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.[179]

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 *debtor'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 apply to 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.

In *In re Joiner,* 2025 WL 281053 (Bankr. W.D.N.C. 2025), the court held that the provisions in § 1190(3) that permit a subchapter V plan to modify a claim secured by a principal residence under certain circumstances[180] do not prevent a secured creditor from making the § 1111(b) election

C. Payment of Administrative Expenses Under the Plan

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

A common situation in a subchapter v Case is a guaranty by the principal of one or more debts. Some debtors have included provisions in plans that enjoin enforcement of a guaranty or other actions against the principals of the debtor during the term of the plan. The provisions

[179] *See generally* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 5:42.
[180] *SBRA Guide* § VII(B) discusses § 1190(3).

typically provide for termination of the injunction if the debtor defaults under the plan and for tolling of the statute of limitations while the injunction is in effect.

Affected creditors have objected that such an injunction is impermissible under § 524(e), which states that the discharge of a debt does not affect the liability of any other entity on the debt and does not meet the "fair and equitable" requirement for cramdown confirmation in § 1191(b).

Courts have recognized that a bankruptcy court has the authority under § 105(a) to temporarily enjoin collection of debts of the debtor from third parties in "unusual circumstances"[181] when necessary to facilitate reorganization. The circumstances include (1) an identity of interests between the nondebtor and debtor such that enforcement of the obligation against the nondebtor is essentially enforcement against the debtor and (2) an adverse impact of enforcement against the nondebtor on the debtor's ability to accomplish reorganization.

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 obtained a preliminary injunction against the pursuit of litigation against the principal pending development of a reorganization plan.

The debtor proposed a plan that 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

[181] *E.g.,* Queenie, Ltd. v. Nygard Int'l., 321 F.3d 282 (2d Cir. 2003); *In re* Zale Corp., 62 F.3d 746, 761 (5th Cir. 1995); Patton v. Bearden, 8 F.3d 343, 349 (6th Cir. 1993); S.E.C. v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 960 F.2d 285, 293 (2d Cir. 1992); Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (*In re* W. Real Estate Fund, Inc.), 922 F.2d 592, 601 (10th Cir. 1990); A.H. Robins Co. v. Piccinin, 788 F.2d 998, 1003-06 (4th Cir. 1986).

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).

Although the Supreme Court's ruling in *Harrington v. Purdue Pharma L.P.*[182] that a plan cannot contain nonconsensual third party releases abrogated *Dow Corning* (and similar rulings of other courts), courts have concluded that *Purdue Pharma* does not address temporary injunctions against enforcement of claims against principals of a debtor pending payments under a plan and that they are permissible in appropriate circumstances.[183]

[182] 144 S.Ct. 2071 (2024

[183] *In re* Miracle Restaurant Group, LLC, 2025 WL 1400915 (Bankr. E.D. La. 2025); *In re* Hal Luftig Company, 667 B.R. 638 (Bankr. S.D.N.Y. 2025).

In *In re Hal Luftig Company,* 667 B.R. 638 (Bankr. S.D.N.Y. 2025), the court had granted the debtor's request in an adversary proceeding to extend the automatic stay to prohibit a creditor from enforcing its judgment against the principal of the debtor. The debtor's plan provided for continuation of the stay until the debtor received a discharge after completion of payments of projected disposable income for five years, which would not result in full payment of the creditor's claim. No creditors accepted the plan.

The creditor objected to confirmation on the ground that inclusion of the stay extension violated the fair and equitable requirement of 11 U.S.C. § 1191(b). The court noted that the language of the fair and equitable requirement for subchapter V cases in § 1191(c) states that it "includes" the specified requirements. Thus, the court observed, courts have held that § 1191(c) establishes baseline requirements and that courts have discretion to consider other factors when appropriate. *Id.* at 656-657. [184] Because the plan satisfied all other requirements for cramdown confirmation under § 1191(b), the only question before the court was whether the plan was fair and equitable under § 1191(c).

The *Hal Luftig* court began by noting that extension of the automatic stay to non-debtors is permissible when "a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Id.* at 657.[185] Determination of whether to extend the stay, the court continued, involves the four-factor analysis that governs issuance of a preliminary injunction, *id.* at 657-58:

(1) likelihood of success on the merits;

(2) likelihood of irreparable injury in the absence of an injunction;

(3) balancing of hardships; and

(4) the public interest.

The court concluded that non-consensual third party stay extensions survived the Supreme Court's ruling in *Purdue Pharma*[186] that the Bankruptcy Code does not authorize non-consensual third-party releases.[187] *Id.* at 658-59.

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[184] The court cited .*In re Curiel*, 651 B.R. 548, 561 n.7 (B.A.P. 9th Cir. 2023) (Section 1191(c) "states that whether the plan is fair and equitable includes those requirements. Because the term 'includes' is not limiting, a court may consider other relevant factors as well."); and *In re Trinity Fam. Prac. & Urgent Care PLLC*, 661 B.R. 793, 816 (Bankr. W.D. Tex. 2024) ("[M]eeting 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.") (emphasis in original).

[185] The court quoted *Queenie, Ltd. V. Nyugard Int'l,* 321 F.3d 282, 287-88 (2d Cir. 2003).

[186] Harrington v. Purdue Pharma L.P., 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024).

[187] The court cited: *In re Parlement Techs., Inc.,* 661 B.R. 722, 724 (Bankr. D. Del. 2024); *Purdue Pharma L.P. Massachusetts (In re Purdue Pharma, L.P.),* 666 B.R. 461, 472-73 (Bankr. S.D.N.Y. 2024); and *Coast to Coast Leasing, LLC v. M & T Equip. Fin. Corp. (In re Coast to Coast Leasing, LLC)*, 661 B.R. 621, 624 (Bankr. N.D. Ill. 2024).

Nevertheless, the court explained that courts[188] had concluded that *Purdue Pharma* changed the "likelihood of success" factor from the likelihood that the plan process would result in a non-debtor release to the likelihood that the debtor would achieve alternative outcomes that could be viewed as "success on the merits." The alternative successful outcomes include providing a breathing spell from the distraction of litigation to permit the debtor to focus on the reorganization of its business or the court's belief that the parties may ultimately be able to negotiate a plan that includes a consensual resolution of the claims against the non-debtors. *Id.* at 659.

The *Luftig* court next considered whether a non-debtor stay extension could remain in place for the life of the plan. Acknowledging that many courts view stay extensions as temporary injunctive relief, the court noted that the duration of some non-debtor stay extensions, in the aggregate, had been comparable to the length of the extension under the debtor's plan. *Id.* at 659-60. The court concluded that the stay extension could last for the length of the plan, consistent with the provision of § 362(c)(2)(C) that continues the automatic stay in a chapter 11 case until the time a discharge is granted or denied. *Id.* at 660.

The *Luftig* court then analyzed whether the circumstances satisfied the requirements for extending the automatic stay to the principal under the standards it enunciated.

The court first concluded that the creditor's enforcement of its judgment would have an immediate adverse economic effect on the estate. The court found that most of the debtor's business was generated through the principal's efforts, that successful reorganization depended that he be able to continue his efforts on current projects and new opportunities, and that collection efforts had affected the debtor's ability to generate revenue. *Id.* at 660.

The court then examined the four factors in the preliminary injunction analysis and concluded that all had been satisfied.

First, providing relief to the principal from the distractions of litigation was necessary for the success of the debtor's reorganization and thus satisfied the modified "likelihood of success on the merits" requirement. *Id.* at 660-61. Second, the debtor would suffer irreparable harm because it would be difficult or impossible for the debtor's business to carry out the plan and successfully reorganize if the principal could not focus on its business operations. *Id.* at 661. Third, the balance of hardships weighed in the debtor's favor. Whereas the creditor's collection efforts would undermine the debtor's reorganization, the harm to the creditor was minimal because extension of the stay was not permanent; upon the conclusion of plan payments, the creditor could proceed to pursue its claim. *Id.* at 661-62. Finally, the court found that the stay extension was not adverse to the public interest because promoting a successful reorganization serves the public interest. *Id.* at 662.

The court concluded that, in the circumstances of the case, the extension of the stay to the principal did not render the plan unfair and inequitable.

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[188] *Massachusetts (In re Purdue Pharma, L.P.),* 666 B.R. 461, 473 (Bankr. S.D.N.Y. 2024); *In re Parlement Techs., Inc.,* 661 B.R. 722, 724 (Bankr. D. Del. 2024).

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.

The court in *In re Miracle Restaurant Group, LLC,*[189] confirmed a subchapter V plan that contained an injunction prohibiting actions to collect debts treated through the plan from any guarantor, insider, officer, director, employee, or interest holder during the term of the plan. The plan provided for termination of the injunction upon an uncured default by the debtor and tolled the statute of limitations.

The plan provided for an unsecured creditor in its own class to receive monthly payments, with interest, during the three-year term of the plan and a balloon payment for the balance at the end of the term. The creditor and the U.S. Trustee objected to confirmation on the ground that *Purdue Pharma* prohibited the temporary injunction.

The court agreed with the *Hal Luftig* court that *Purdue Pharma* did not preclude a plan provision for a nonconsensual temporary injunction to prohibit enforcement of claims against nondebtor parties.[190] A temporary injunction is permissible in the Fifth Circuit, the court ruled, in "unusual circumstances"[191] under *Feld v. Zale Corp. (In re Zale Corp.)*,[192] if the issuance of such an injunction under § 105(a) as part of a confirmed plan satisfies the four-prong test for issuance of a preliminary injunction, as earlier text discusses.[193]

"Unusual circumstances," the *Miracle Restaurant* court explained, include circumstances (1) when the debtor and nondebtor have such an identity of interests that enforcement of a claim against the nondebtor is essentially enforcement of a claim against the debtor or (2) when enforcement against a nondebtor will have an adverse impact on the debtor's ability to accomplish reorganization.[194]

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[189] 2025 WL 1400915 (Bankr. E.D. La. 2025).
[190] *Id.* at * 4.
[191] *Id.* at * 6-8.
[192] 62 F.3d 746, 760 (5th Cir. 1995).
[193] 2025 WL 1400915 at * 9.
[194] *Id.* at *7-8, *quoting* Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746, 761 (5th Cir. 1995). The *Miracle Restaurant* court, 2025 WL at * 8, noted other cases that *Zale Corp.* cited as examples of "unusual circumstances: Patton v. Bearden, 8 F.3d 343, 349 (6th Cir. 1993) ("Such circumstances usually include when the debtor and the

The court found an identity of interest between the debtor and the guarantors and that the temporary injunction was necessary to the debtor's successful reorganization.[195] The guarantors were vital to successful reorganization, the court explained, because they provided day-to-day management of the debtor. Enforcement of the guaranties would divert their time, attention, and resources from the debtor's reorganization efforts.

Further, the court observed, the plan contemplated refinancing the balance of the debtor's unpaid debts at the end of the term; enforcement of the guaranties could negatively affect the strength of any necessary guaranty for such refinancing and discourage any future infusion of capital or financing. The adverse impact on refinancing efforts could affect the debtor's implementation of the plan and reduce creditor recoveries.

The court also concluded that the injunction satisfied the four-prong preliminary injunction test: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issues; (3) the threatened injury in the absence of an injunction outweighs the threatened harm the injunction may cause to the enjoined party; and (4) issuance of the injunction does not disserve the public interest.[196]

In the context of a temporary plan injunction, the court explained, the "substantial likelihood of success on the merits" requirement is whether the reorganization is likely to succeed. The court observed that no party had objected to the feasibility of the plan and that the court had determined at the confirmation hearing that the plan was feasible, a finding that supported the conclusion that the plan is substantially likely to succeed.

The court found that the record showed that "the opportunity for this Debtor to successful reorganize is seriously jeopardized" in the absence of a temporary injunction, thus satisfying the "irreparable injury" requirement.[197]

Under the terms of the confirmed plan, the court noted, the creditor would be paid in full within the plan's three-year term, and the injunction would expire upon the debtor's failure to timely cure any default. The only harm to the creditor, the court found, was that it had to accept payment terms that it did not like. "That harm is minimal," the court reasoned, "compared to the harm the Debtor faces if the temporary injunction is not granted: the Debtor forfeits its ability to reorganize."[198]

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non-bankrupt party are closely related or the stay contributes to the debtor's reorganization."); S.E.C. v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 960 F.2d 285, 293 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1003–06 (4th Cir. 1986) (stating that a § 105 injunction may be appropriate where proceeding would have an adverse impact on the debtor's ability to reorganize or deplete property of estate).

[195] 2025 WL at *9.

[196] *Id.* at *9-10.

[197] *Id.* at *9.

[198] *Id.* at *10.

Issuance of an injunction would not disserve the public interest, the court ruled, because "[t]he public has an interest in allowing businesses to reorganize instead of liquidate."[199] Moreover, the court continued, issuance of the injunction also protects "numerous other creditors and their rights to receive equitable distributions under the Plan."[200]

The court in *In re Engineering Recruiting Experts, LLC,*[201] applied the reasoning in *Hal Luftig* and *Miracle Restaurant* in concluding that a plan could in appropriate circumstances include a temporary injunction against enforcement of claims against co-debtors during the term of the plan. The court applied the *Zale* factors to conclude that a temporary injunction in the plan to protect the principal – its sole owner and the "linchpin"[202] of its operations – was permissible. Although the plan provided for protection of "any co-debtor," the court limited the injunction to the principal because the debtor had not presented evidence or argument with regard to any other co-debtors.[203]

See also In re Fortuna Auction LLC, 2025 WL 3726083 (Bankr. S.D.N.Y. 2025) (Court confirmed consensual plan under § 1191(a) and overruled objection of United States Trustee to injunction during the plan period prohibiting actions against principal, concluding that the facts supported it under the *Hal Luftig* analysis. The objection of a creditor to the injunction was resolved and withdrawn.)

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

1. Review of confirmation requirements in traditional chapter 11 cases and summary of changes for subchapter V confirmation

2. Differences in requirements for and consequences of consensual and cramdown confirmation

3. Benefits to debtor of consensual or cramdown confirmation

4. Whether balloting on plan is necessary*

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:

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[199] *Id.* at 10, *quoting* Neutra, Ltd. v. Terry (*In re* Acis Capital Mgmt., L.P.), 604 B.R. 484, 529 (N.D. Tex. 2019)
[200] *Id.*
[201] 673 B.R. 32 (Bankr. M.D. Fla. 2025).
[202] *Id.* at *5.
[203] *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).

5. Final decree and closing of case*

When cramdown confirmation occurs under § 1191(b), § 1194(b) provides for the trustee to make payments to creditors under the plan unless the plan or confirmation order provides otherwise and that § 1192 provides that discharge does not occur until the debtor completes payments under the plan for the specified period. *SBRA Guide* § VII (A)(5) notes that, after cramdown confirmation, the trustee continues to serve in the case and that entry of a final decree and closing of the case must await competition of payments.

Plans or confirmation orders in cramdown situations often provide for the debtor, rather than the trustee, to make payments to creditors. Section IX(D) of this Update discusses termination of the trustee's services after substantial consummation of the plan and entry of a final decree in these circumstances.

B. Cramdown Confirmation Under § 1191(b)

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

2. Cramdown requirements for secured claims*

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.

The court in *In re James Pine & Son Trucking LLC,* 2024 WL 4343179 (Bankr. D. N. J. 2024), ruled that the method for determining the value of a secured creditor's collateral in a subchapter V case is the same as in a traditional chapter 11 case. Because the debtor proposed to retain a dump truck in the plan, the court held that § 506(a) requires its valuation at replacement value.

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.

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

In re Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024), illustrates that the absence of the absolute priority rule means that the holders of equity interests may retain them under a cramdown plan in a subchapter V case. The *Edgewood Food Mart* court confirmed a plan over the objection of a creditor who contended, among other things, that the plan was not proposed in good faith because it enabled the principal to retain his equity interest and earn future profits without providing for the payment of creditors in full. Noting that subchapter V does not have an absolute priority rule that prevents retention of equity without payment of creditors in full, the court concluded that the principal "may retain his equity interest in Debtor even if it has value without full payment of Debtor's creditors." *Id.* at 434.

The court ruled, *id.* at 434:

> So long as a debtor complies with the other confirmation requirements unique to Subchapter V, a plan that takes advantage of this feature of Subchapter V is not proposed in bad faith."

An individual who is not eligible for subchapter V faces the prospect that the absolute priority rule may prevent the debtor from retaining property unless all impaired classes accept the plan.[204] 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

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

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.

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

i. Determination of projected disposable income*

Sections VIII(B)(4)(iii) through (x) further discuss projected disposable income issues

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

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." Section VIII(B)(4)(ii) discusses *In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), in which the court reasoned that Congress's recognition that small businesses typically have shorter lifespans "suggests that a plan term of three years is more reasonable, generally speaking (or as a default), than a five-year term, absent unusual circumstances." *Id.* at *10.

In re Trinity Family Practice & Urgent Care PLLC, 661 B.R. 793 (Bankr. W.D. Tex. 2024), adopts a different approach. The *Trinity Family Practice* 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. 661 B.R. at 813.

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 815 (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. [205]

The court began by noting that the "fair and equitable" provision in § 1191(b) *includes* the requirement that it comply with § 1191(c). 661 B.R. at 815-16. 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 finding [that the] plan is fair and equitable."[206]. . . 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),[207] 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,* 661 B.R. at 818.

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." 661 B.R. at 818. The court reasoned that requiring an objecting party to prove "unusual circumstances," 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.* 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. 661 B.R. at 820. 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." 661 B.R. at 819.

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[205] 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." 661 B.R. at 812. Moreover, the court consistently noted that its determination involved both questions. *Id.* at 816, 823, 825, 827. Separate identification of both components is helpful for analytical purposes.

[206] 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).

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

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. 661 B.R. at 821. The court then discussed the confirmation process for addressing 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 three-year baseline payment period, the court reasoned, a bankruptcy court should give "appropriate deference" to the debtor's business judgment when considering the debtor's proposed period of payments. 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. 661 B.R. at 821. 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. 661 B.R. at 821-22.

At the conclusion of the hearing on whether the court should require a longer period, the court explained, it has these alternatives, 661 B.R. at 822:

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, 661 B.R. at 822:

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 postpetition, preconfirmation 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. 661 B.R. at 823-27. Neither the debtor nor the creditor offered any argument or evidence of unique or extraordinary facts or circumstances. *Id.* at 827. Accordingly, the court denied confirmation without prejudice and allowed the debtor an opportunity to file an amended plan.

The court confirmed a plan providing for payment of projected disposable income for three years in *In re Edgewood Food Mart, Inc.,* 666 B.R. 418 (Bankr. N.D. Ga. 2024). Noting the different approaches of *Urgent Care* and *Trinity Family Practice,* the court concluded that a three-year period was appropriate under either analysis. *Id.* at *14. The court observed that the plan paid creditors over three years what they would have received in a five-year plan. The quicker payment was possible because the debtor's principal had committed to fund professional fees and had caused an affiliated entity that was the debtor's landlord to agree to assumption of the lease with its cure claim treated as a general unsecured claim. The court also observed that the debtor's principal would be providing postpetition management services without compensation, whereas he had previously received a salary.

In *In re Premier Glass Services, LLC,* 664 B.R. 465, 473-74 (Bankr. N.D. Ill. 2024), the court noted that the debtor's projections should be for five years, not the four years proposed in the plan, in view of the court's authority under § 1191(c)(2) to fix a commitment period of five years. The *Premier Glass* court did not expressly fix five years as the commitment period, but it analyzed the *Trinity Family Practice* factors in determining that the proposed plan was not "fair and equitable." Section VIII(B)(4)(12) *infra* further discusses the *Premier Glass* application of the "fair and equitable" requirement.

The debtor in *Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix),* 2024 U.S. Dist. LEXIS 59741 (C.D. Cal. 2024), proposed a plan to pay projected disposable income to non-insider unsecured creditors in Class 3 for three years, resulting in 12.5 percent distribution. The claims of insiders in classes 2 and 4 would not receive any payments of PDI, but they retained their right to full payment after the payments to unsecured creditors. Multiple Energy Technologies, LLC ("MET"), an unsecured creditor in Class 3 holding a $2.4 million claim, objected to the plan because, among other things, the plan favored insider unsecured creditors and, therefore, discriminated unfairly. *Id.* at *5.[208]

[208] The opinion does not include any discussion of whether the PDI commitment period should have been five years. Further, although the plan provided that the distribution to non-insider creditors could be reduced, at debtor's election, by 40 percent if paid within 90 days, the opinion does not discuss whether payment of the discounted amount would satisfy the PDI test.

The bankruptcy court confirmed the plan, concluding that creditors could not demand more than payment of projected disposable income for the required period. The district court summarized the bankruptcy court' ruling, 2024 U.S. Dist. Lexis 59741 at *5-6 (docket citations omitted):

> With the "fair and equitable" treatment statutorily capped at three-to-five years of Disposable Income, creditors cannot demand anything more. . . .Congress enacted a structure where creditors like MET and Class 3 are entitled to nothing more than three-to-five years' of projected Disposable Income. . . . After that three-to-five year period, the Debtor and its insiders can pay whatever they find agreeable. And, in the meantime, the voluntary subordination of the Class 2 and 4 claims so as not to dilute Class 3 recovery only benefits Class 3.

The district court reversed, concluding that the bankruptcy court's incorrect application of the law was an abuse of discretion. 2024 U.S. Dist. Lexis 59741 at *6. The district court reasoned that the "fair and equitable" requirement in § 1191(c) *includes* the projected disposable income requirement in § 1191(c)(2) and that use of the word "includes" indicated that the list was not exhaustive.

The district court then concluded, *id.* at 7:

> Thus, not only was the Bankruptcy Court required to consider whether MET's recovery was unfairly discriminatory in light of the disposition of assets beyond disposable income, it was also required to consider how MET's recovery compared to the recovery of other creditors during the entire duration of the Plan – not just the five years after confirmation.

The district court observed that, if subchapter V plans were "truly limited to disposable income and capped at five years, the Plan's provisions for Class 2 and 4 creditors would contravene both requirements." *Id.* at 7.

The district court reasoned that two other provisions of the Bankruptcy Code reinforced its interpretation.

First, the court examined the requirement in § 1129(c)(2)(A) that a debtor pay all of its projected disposable income within the commitment period. Emphasizing the requirement that a debtor pay *all* of its disposable income within the commitment period, the court concluded that the provision prohibited a plan from requiring that the debtor pay *all* of its PDI after the commitment period but did not prohibit a provision for the payment of less than all of the debtor's disposable income in years after year five. *Id. at* *8-9.

Second, the court noted that, although chapter 13 has a temporal limitation of five years for plan payments (§ 1322(d)(1)), chapter 11 does not. *Id.* at * 9-10.

The *Hologenix* district court summarized its holding, 2024 U.S. Dist. LEXIS 59741 at * 10-11 (C.D. Cal. 2024) (docket citation omitted):

In sum, the Bankruptcy Court erred in finding that MET was entitled to only "three-to-five years' of projected disposable income," which led the Bankruptcy Court to overlook a substantial part of the Plan, including the provisions entitling certain creditors to 100% recovery. Although the court makes no conclusion regarding whether the plan unfairly discriminates against Class 3 creditors as opposed to Class 2 and 4 creditors, it does note that the disparity between 12.5% (Class 3 recovery) for some creditors and 100% (Class 2 and 4) recovery for others is dramatic.

iii. Adequacy of projections of projected disposable income*

A subchapter V plan must include "projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization."[209] If the debtor's projections of income and expenditures establish compliance with the projected disposable income requirement, no basis for a PDI objection exists unless the debtor's projections are inadequate (because, for example, they are not credible, lack any factual basis, or are incomplete), or do not properly project disposable income. An objection may assert that the projections understate income, overstate expenditures, or include expenditures that are not permissible deductions.

Courts addressing the adequacy of a debtor's financial projections have noted, "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).

But the situation changes when a party challenges the projections.

In *In re Premier Glass Services, LLC,* 664 B.R. 465 (Bankr. N.D. Ill. 2024), the debtor's calculation of projected disposable income for the four-year term of its plan included deductions for depreciation, reimbursement of its members for taxes they would incur based on the "pass-through" to them of the debtor's income, and legal fees for ongoing litigation with its major creditor over its claim. The creditor objected to the inclusion of these deductions in the PDI calculation.

The court acknowledged that, although a small business debtor's projections "deserve some deference, since looking into the future 'is not an exact science,'" the court must "consider whether the estimate of projected disposable income is reliable and accurate based on the evidence presented" when an objection is filed. 664 B.R. at 471.[210] Further, the court explained, because the PDI requirements are a statutory minimum for determining whether a plan meets the "fair and equitable" requirement in § 1191(c) for cramdown confirmation under § 1191(b), the court may consider other relevant factors in determining whether to confirm a plan. *Id.* at 472.

The *Premier Glass* court concluded that, to meet the burden of showing that a plan is fair and equitable, a debtor must show a "sincere effort" regarding two things. First, a reasoned basis

[209] § 1190(1)(B).
[210] The court quoted *In re* Channel Clarity Holdings, LLC, 2022 WL 3710602 at *15 (Bankr. N.D. Ill. 2022), *quoting In re* Lost Cajun Enters., LLC, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

must exist for the debtor's projections. Second, the debtor must show that the line items deducted from disposable income are "indeed 'necessary for the continuation, preservations, and operation of the debtor's business' and therefore fair and equitable to the unsecured creditors.' § 1191(c) and (d)." 664 B.R. at 473.

The court acknowledged that the calculation of income on an after-tax basis could be necessary given the debtor's status as a pass-through entity but ruled that the debtor had not demonstrated a reasoned basis for its projections. 664 B.R. at 474-75.

Similarly, the court observed that the depreciation deduction, which it found to be a reserve for replacement costs for broken or outdated equipment could be necessary, but the debtor had provided no credible evidence about what equipment it would have to replace or what other capital expenditures might be required. *Id.* at 475-76.

The *Premier Glass* court concluded that the debtor had failed to show that the legal fees were based on a reasoned projection and that they were necessary for the continuation, preservation, or operation of the debtor's business. Moreover, the court continued, the evidence did not show that the legal fees were fair and equitable. 664 B.R. at 476. Section XV(D) discusses this aspect of the court's ruling.

In *In re Edgewood Food Mart, Inc.,* 666 B.R. 418 (Bankr. N.D. Ga. 2024), the court found that the debtor's calculation of projected disposable income was credible based on the testimony of the debtor's accountant, an expert in forensic analysis and accounting with extensive experience in bankruptcy cases, who had been working with the debtor before the filing of the petition.

iv. 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.

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 caselaw 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.[211]

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.[212]

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[213] and § 105(a) because they "were clearly necessary and appropriate under the facts of this case." *Id.* at *4.

In *In re Packet Construction, LLC,* 672 B.R. 905 (Bankr. W.D. Tex. 2024), the court conducted a thorough analysis of whether cramdown confirmation requires that a plan contain a

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[211] 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.

[212] In *In re Engineering Recruiting Experts, LLC,* 673 B.R. 32 (Bankr. M.D. Fla. 2025), the court, in approving a provision in a cramdown plan confirmed under § 1191(b) for an injunction prohibiting actions against the principal during the plan period, noted that the plan required quarterly reports to the subchapter V trustee and all creditors and permitted any creditor or the trustee to seek increased payments based on actual results. The reported opinion does not indicate that any party raised any objection to this provision or that the court addressed the issue. Section VII(D) of this Update discusses the injunction issue.

[213] 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."

"true-up" provision for the debtor pay more if actual disposable income exceeds projections. The court ruled that it does not, *id.* at 906:

> [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). *Packet Construction,* 672 B.R. at 908.

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. 672 B.R. at 909.

The court then discussed the chapter 12 and chapter 13 caselaw 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. 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 the chapter 12 approach 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. 672 B.R. at 910-13.

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 913-14.

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 914. 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 914-15 (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.

The court in *In re Premier Glass Services, LLC,* 664 B.R. 465, 478 (Bankr. N.D. Ill. 2024), addressed the "true-up" issue in the context of a debtor's calculation of projected disposable income that included deductions for reimbursements to the debtor's members for taxes they would incur on "pass-through" income of the debtor, capital replacement costs, and attorney's fees for ongoing litigation with a creditor. The court noted that the plan provided no upward adjustment in payments for creditors if these amounts were less than projected and observed, *id.* at 478 (footnote in original):

> While courts disagree about whether a bankruptcy judge can *require* a true-up, there is no binding precedent to prevent a court from confirming a plan where a debtor has included such a provision.[214] A true-up may be especially appropriate where, as here, a debtor sets aside large reserves for projected capital expenditures that benefit its insiders at the expense of its creditors.
>
> A true-up seems especially appropriate for the legal fees deduction, because it does not appear there is any real relationship between past legal expenses and projections.

[214] Courts are split as to whether a court can require payments based on actual results. *See Update* § VIII(B)(4)(iv).

v. Projected disposable income in individual cases*

An individual debtor has income from the debtor's business, may have non-business income, and has both personal and business expenditures. Section VIII(B)(4)(vi) discusses business income and expenditures.

A logical source for guidance on PDI issues in an individual subchapter V case is caselaw in chapter 13 cases and in chapter 11 and 12 cases of individuals. Most of the PDI caselaw arises in chapter 13 cases, so it is important to understand how the current chapter 13 provisions differ from the ones prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and how the subchapter V provisions are like the former chapter 13 provisions and different from the current ones.

BAPCPA amended the chapter 13 PDI requirement in two general ways.

First, BAPCPA changed the income component from "income that is received by the debtor" to "current monthly income." Section § 101(10A) defines "current monthly income" by reference to a debtor's historical income in the six months preceding the filing of the petition and has specific exclusions.[215] In a subchapter V case, income is the same as in a pre-BAPCPA chapter 13 case.

Second, BAPCPA changed the manner of determining expenditures that may be deducted as expenses reasonably necessary for the "maintenance or support" of the debtor and the debtor's dependents that the debtor may deduct in determining disposable income. After BAPCPA, the so-called "means test" standards govern the deductions that an "above-median"[216] debtor may take in calculating disposable income; they do not apply to a "below-median" debtor.[217] (The means test rules also do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.[218]) The maintenance

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[215] For a discussion of current monthly income in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:26.

[216] Generally, an "above-median" debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a "below-median" debtor is one whose income is below the median. *See* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:12. The rules for determining the debtor's status are set forth in § 322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the "means test" rules for determination of disposable income; and § 1325(b)(4), which defines "applicable commitment period" for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an "above-median" debtor must use the means test rules and pay projected disposable income for five years. A "below-median" debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor's plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed five years. *See* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at §§ 4:9, 8:12.

[217] § 1325(b)(3).

[218] In chapter 11 cases, § 1129(a)(15) states that projected disposable income is "as defined in [§ 1325(b)(2)]." §1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of "amounts reasonably necessary to be expended" under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in § 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably

and support deduction provisions in subchapter V cases are the same as in all pre-BAPCPA cases and in post-BAPCPA cases of below-median debtors.[219]

A specific difference is that § 1325(b)(2)(A)(ii) permits the deduction of certain charitable contributions. The subchapter V and chapter 12 statutes do not contain this deduction.

Courts have concluded that caselaw in pre-BAPCPA chapter 13 cases and in cases of below-median debtors[220] provides guidance in subchapter V cases for determining a debtor's disposable income.[221] Thus, for example, a debtor may not be entitled to deduct expenditures for "luxury items" in calculating PDI.[222]

One of the specific exclusions from "current monthly income" in § 101(10A) is for Social Security benefits.[223] Because the income component in a subchapter V case is "income received by the debtor," it is arguable that Social Security benefits must be included in a subchapter V case. Social Security income, however, is exempt from property of the estate.[224] One court has concluded that Social Security benefits are not taken into account in determining projected disposable income in a subchapter V case.[225]

An individual debtor in a subchapter V case must file Schedules I and J that report the debtor's income and expenses. 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 some circumstances, the debtor may be required to disclose the income of a nonfiling spouse.[226]

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necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

[219] Given the lower income of above-median debtors, their cases do not generate much case law on the issue.

[220] For a discussion of application of the "reasonably necessary" standard for expenditures for maintenance and support in chapter 13 cases, see *In re* Cesaretti, 2023 WL 3676888 at *14-16 (Bankr. D. Nev. 2023); CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:28.

[221] *E.g., In re* Cesaretti, 2023 WL 3676888 at *14 (Bankr. D. Nev. 2023); *In re* Hyde, 2022 WL 2015538 at * 9 (Bankr. E.D. La. 2022).

[222] *In re* McBride*,* 2023 WL 8446205 at *7 (Bankr. D. Me. 2023).

[223] § 101(10A)(B)(ii)(I).

[224] 42 U.S.C. § 407(a) ("The right of any person to any future payment under this subchapter [referring to subchapter II of Title 42] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.").

[225] *In re* Ghaffari, 2025 WL 33352 at * 1 (Bankr. D.N.M. 2025) (An individual debtor is not required to contribute Social Security income to fund a subchapter V plan, although an individual debtor may choose to make plan payments with Social Security income), *citing In re* Cranmer, 697 F.3d 1314, 1319 (10th Cir. 2012) (holding that a debtor's exclusion of exempt social security income from his chapter 13 plan cannot constitute a lack of good faith); *see* Alyssa Nelson, *Are Social Security Benefits "Disposable Income" for the Purposes of Subchapter V?,* 40-Sept AM. BANKR. INST. J. 30 (2021).

[226] *In re* McBride*,* 2023 WL 8446205 at *3 (Bankr. D. Me. 2023). The court stated that the debtor must disclose the nonfiling spouse's income if the household expenses on Schedule J included all 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.* For a discussion of inclusion of a nonfiling spouse's income and expenditures in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, *at* § 8:70.

In re McBride, 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), illustrates application of PDI requirements in an individual case. 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.[227]

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.*

vi. Projected disposable income of a business*

Section 1191(d) defines "disposable income" as "the income that is received by the debtor that is not reasonably necessary to be expended" for purposes specified in paragraph (1) of § 1191(d), which governs personal expenditures, discussed in the previous section, and paragraph (2), which applies to business expenditures. Chapters 12[228] and 13[229] use the same language. The definition thus contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that the debtor anticipate (*e.g.,* the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.,* increasing

[227] For a discussion of inclusion of a nonfiling spouse's income and expenditures in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 8:70.
[228] § 1225(b)(2)(B).
[229] § 1325(b)(2)(B).

inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

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

If the debtor's disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income[230] but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

In re Premier Glass Services, LLC,[231] addressed these issues. The court acknowledged that the calculation of income on an after-tax basis could be necessary given the debtor's status as a pass-through entity but ruled that the debtor had not demonstrated a reasoned basis for its projections.[232] Similarly, the court observed that a reserve for replacement costs for broken or outdated equipment could be necessary, but concluded that the debtor had provided no credible evidence about what equipment it would have to replace or what capital expenditures might be required.[233] Another court concluded that the PDI calculation could include an operating reserve based on testimony of the debtor's principal that the reserve was necessary to protect against shortfalls in cash due to the cyclical nature of the debtor's income.[234]

vii. Salary or other payments to owners of affiliates*

Expenditures of a business may include payments to owners or affiliates for salary or other items such as rent for the business premises that an affiliate owns.

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.

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

[231] 664 B.R. 465, 474-76 (Bankr. N.D. Ill. 2024).

[232] *Id.* at 474-75.

[233] *Id.* at 475-76.

[234] *In re* Urgent Care Physicians, Ltd., 2021 WL 6090985 at *10 (Bankr. E.D. Wisc. 2021).

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.

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 provided management services to its customers, largely affiliated companies, who reimbursed the debtor for all its expenses and paid a fee calculated as a percentage of the debtor's expenses. Because customers paid the expenses and a reduction of expenses would reduce the amount of the fees, the court concluded that whether the expenses were excessive did not matter.

viii. Projected disposable income and payments on secured claims*

In re McBride, 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023), addresses the relationship of payments on secured claims and projected disposable income.

In *McBride,* 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 confirmable because the debtor's calculation of projected disposable income was faulty, as section VIII(B)(4)(v) of this Update 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 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.

ix. Deduction of legal fees for defending dischargeability litigation*

The discharge of an individual in a subchapter V case is subject to the exceptions in § 523(a). When cramdown discharge of an entity occurs under § 1191(b), an entity's discharge may also be subject to the § 523(a) exceptions under one interpretation of the subchapter V discharge provisions.[235]

[235] *SBRA Guide* § X(D)(2) discusses the issue.

The PDI question is whether the debtor's legal fees for dischargeability litigation are reasonably necessary for the "continuation, preservation, or operation of the business of the debtor."[236] In an individual case, a further question is whether such fees are reasonably necessary for the "maintenance or support of the debtor or a dependent of the debtor."[237] A similar question is whether legal fees for dischargeability litigation prior to confirmation are not allowable as an administrative expense because dischargeability litigation does not benefit the estate.[238]

The court in *In re Premier Glass Services, LLC,*[239] considered, but did not decide, the extent to which a debtor may deduct anticipated legal expenses for dischargeability litigation in calculating projected disposable income. The court concluded that the debtor had failed to show that the legal fees were based on a reasoned projection and that they were necessary for the continuation, preservation, or operation of the debtor's business. Moreover, the court continued, the evidence did not show that the legal fees were fair and equitable.

x. The role of the "fair and equitable" requirement in the analysis of projected disposable income issues*

This section discusses cases in which courts have considered the fair and equitable requirement for cramdown confirmation in § 1191(b) in connection with determination of projected disposable income issues under § 1191(c)(2). Under the "rule of construction" in § 1191(c) for the condition that a plan be "fair and equitable," the PDI test is one of three specific requirements for meeting it. (The other two requirements are that, with respect to secured claims, the plan meet the requirements of § 1129(b)(2)(A) for cramdown in a traditional case, § 1191(c)(1),[240] and that it meet a feasibility requirement, § 1191(c)(3).[241])

In general, the projected disposable income test in § 1191(c)(2) requires that the plan provide for the distribution of projected disposable income (or its value) for a three-year period "or such longer period not to exceed five years as the court may fix."[242] Section 1191(d) defines "disposable income.

Some courts have observed that a debtor's proposed payments to creditors must meet the "fair and equitable" requirement in § 1191(b) in addition to the specific requirements of the PDI test in § 1191(c)(2) in their consideration of the following issues:

1. How to determine projected disposable income, including the adequacy of the debtor's projections and the types of expenditures that the debtor may deduct in calculating PDI.

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[236] § 1191(d)(2).
[237] § 1191(d)(1)(A).
[238] *See* NORTON BANKRUPTCY LAW AND PRACTICE §§ 106.1, 106.6. See *Update* § X(E).
[239] 664 B.R. 465, 476-77 (Bankr. N.D. Ill. 2024).
[240] *See SBRA Guide* § VIII(B)(2).
[241] The feasibility requirement in §1191(c)(3) is that the court determine either that the debtor will be able to make payments under the plan (§ 1191(c)(3)(A)) or that a reasonable likelihood exists that the debtor will be able to make plan payments. (§ 1191(c)(3)(B)). In the latter situation, the court must also determine that the plan provides "appropriate remedies to protect the holders of claims or interests in the event that the payments are not made." § 1191(c)(3)(B). *See SBRA Guide* § VIII(B)(5)
[242] *See SBRA Guide* § VIII(B)(4).

2. Whether the debtor must make payments based on actual results instead of deductions, a so-called "true-up" requirement.

3. How to "fix" the length of the PDI commitment period as three years, five years, or something in between.

These courts note that the "rule of construction" in § 1191(c) provides that the condition that a plan be "fair and equitable" *includes* the three specific requirements in § 1191(c)(1), (2), and (3).[243]

> [Subsection (c)] states that whether the plan is fair and equitable **includes** those requirements. Because the term "includes" is not limiting, a court may consider other relevant factors as well. § 102(3).
>
> The language of the PDI test in §§ 1191(c)(2) and 1191(d) itself addresses the first issue.

Section 1191(d) defines "disposable income" as income that is "received by the debtor" and "is not reasonably necessary to be expended" for specified purposes. For a business, the expenditures must be "necessary for the continuation, preservation, or operation of the business of the debtor." § 1191(d)(2). An individual debtor may also deduct expenditures for the maintenance or support of the debtor or a dependent and for payment of postpetition domestic support obligations. § 1191(d)(1). The adequacy of the debtor's projections raises evidentiary and burden of proof issues, but the statute provides sufficient guidance for determination of the adequacy of projections and what types of expenditures are deductible.

The court in *In re Premier Glass Services, LLC,* 664 B.R. 465 (Bankr. N.D. Ill. 2024), however, in considering the adequacy of the debtor's PDI projections and whether certain deductions in calculating it were permissible, phrased the issues as whether the debtor had established that the plan was fair and equitable rather than whether the plan met the PDI requirements in § 1191(c)(2). Thus, the court stated, *id.* at 473:

> [A] debtor seeking to confirm a nonconsensual plan under Sub. V bears the burden of showing that its plan is fair and equitable. To do that, it must show a "sincere effort" regarding two things: first, it must show that there is a reasoned basis for its projections, and second, it must show that line items deducted are indeed "necessary for the continuation, preservation, and operation of the debtor's business" and therefore fair and equitable to creditors. § 1191(c) and (d).

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[243] Hamilton v. Curiel (*In re* Curiel), 651 B.R. 548, 561 n.7 (B.A.P. 9th Cir. 2023) (emphasis in original) (dicta; Part XII *supra* discusses the case), *appeal dismissed,* 2023 WL 1187031 and 2023 WL 11887032 (9th Cir. 2023); *accord, e.g*., Multiple Energy Technologies, LLC v. Hologenix (*In re* Hologenix), 2024 U.S. Dist. LEXIS 59741 at *7 (C.D. Cal. 2024) (discussed in *Update* § VIII(B)(4)(ii) *supra*); *In re* Premier Glass Services, LLC, 664 B.R. 465, 472 (Bankr. N.D. Ill. 2024) (discussed in §§ VI(A), (E), (F), *supra*); *In re* Trinity Family Practice Urgent Care PLLC*,* 661 B.R. 793, 815-16 (Bankr. W.D. Tex. 2024).

In reaching this conclusion, the *Premier Glass* court relied on caselaw under chapter 12 applying the PDI test in the context of the good faith requirement. Thus, among other observations, the court noted, "The disposable income provision exists 'to prevent large expenditures by debtors for non-essential items which ultimately reduce the sum available to pay holders of unsecured claims.'" [244]

The *Premier Glass* court found that the debtor had not shown that its projected expenditures for tax reimbursements to principals of the "pass-through" entity and replacement costs and capital expenditures were credible and had not shown that projected legal fees for postconfirmation litigation with the objecting creditor were based on a reasoned projection and necessary. Accordingly, the court concluded that the debtor failed to establish that the plan was fair and equitable. *Id.* at 476.[245]

With regard to legal fees, the court examined the factors that *In re Trinity Family Practice & Urgent Care, PLLC,* 661 B.R. 793, 822-23 (Bankr. W.D. Tex. 2024), developed in determining whether to fix the PDI period for more than five years.[246] The court concluded, "Ultimately, these factors help a court weigh whether plan provisions unreasonably benefit a debtor at the expense of the unsecured creditor class – and most of these weigh against finding this plan to be fair and equitable." *Premier Glass,* 664 B.R. at 477.

The second issue is whether the projected disposable income test may require payments to creditors based on actual results if they are better than projected – a so-called "true-up." As section VIII(B)(4)(iv) of this Update discusses, one court has concluded that the language of § 1191(c)(2) permits a court to require a true-up, but the better view is that the language does not permit a true-up."

In its thorough analysis of the issue, the court in *In re `Construction, LLC,* 672 B.R. 905 (Bankr. W.D. Tex. 2024), ruled that subchapter V does not generally require a true-up. But the court added, "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." *Id.* at *1. The court held, *id*. at 7-8:[247]

> [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.

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[244] *Premier Glass,* 664 B.R. at 473, *quoting In re* Fortney*,* 36 F.3d 701, 705 (7th Cir. 1994) (quoting *In re* Hedges*,* 68 B.R. 18, 20-21 (Bankr. E.D. Va. 1986)).
[245] Section VIII(B)(4)(iii) of this Update discusses these aspects of the court's ruling.
[246] Section VIII(B)(4)(iii) discusses *Trinity Family Practice* and the factors.
[247] Section VI(A) discusses the *Packet Construction* opinion.

The court in *In re Premier Glass Services, LLC,* 664 B.R. 465 (Bankr. N.D. Ill. 2024), in its analysis of determination of permissible expenditures for purposes of the PDI test, as earlier text discusses, noted that the plan contained no "true-up" provision that would adjust payments to creditors if the projected expenditures were less than anticipated. The court acknowledged disagreement over whether a court can require a true up but noted that no binding precedent prevented confirmation of a plan that included such a provision. *Id.* at 478. A true up might be "especially appropriate," the court observed, because the debtor's plan "sets aside large reserves for projected capital expenditures that benefit its insiders at the expense of its creditors" and because of the apparent lack of "any real relationship between past legal expenses and projections." *Id.* at 478.

The third PDI issue is the length of the period for payment of PDI. Section 1191(c)(2) permits the court to "fix" the PDI commitment period for more than three years, not to exceed five, but provides no guidance on whether, when, or how to do it. Courts have (perhaps predictably) concluded that the statute leaves the issue to their discretion and (also predictably) developed factors (non-exclusive, of course) to use in exercising it. Section VIII(B)(4)(ii) of this Update[248]

In re Trinity Family Practice & Urgent Care PLLC, 661 B.R. 793 (Bankr. W.D. Tex. 2024), the 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. [249]

The court explained that the "fair and equitable" provision in § 1191(b) *includes* the requirement that it comply with § 1191(c). 661 B.R. at 815. The court explained, *id.* at 815-16:

> 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 finding [that the] plan is fair and equitable."[250]. . . 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.

As § VIII(B)(4)(ii) discusses in detail, the court established procedures for a court to follow in determining the PDI period and the factors to consider in deciding what PDI period is necessary for the plan to be fair and equitable.

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[248] *See also SBRA Guide* § VIII(B)(4)(ii).

[249] 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." 661 B.R. at 812. Moreover, the court consistently noted that its determination involved both questions. *Id.* at 816, 821, 823, 825, 827. Separate identification of both components is helpful for analytical purposes.

[250] 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).

All of these courts base their analyses of these PDI issues on the requirement that the plan be fair and equitable rather than on compliance with the provisions of the PDI test in § 1191(c)(2) alone. It is axiomatic that interpretation and application of general standards like those in the PDI test should be "fair" in the common sense of the word. Likewise, a statutory interpretation should ordinarily produce a result that is "equitable" in the ordinary meaning of that word.

But those words have a different meaning when they are combined as a term of art in reorganization law -- the "fair and equitable" requirement. And the development of standards for determining PDI issues through the creation of additional requirements of the "fair and equitable" condition is inconsistent with the "fair and equitable" doctrine as it developed historically and was codified in Chapter 11 upon its enactment by the Bankruptcy Reform Act of 1978.

"Fair and equitable" is a term of art that describes a judicially-created doctrine. As Justice Douglas observed in *Case v. Los Angeles Lumber Products Co.,*[251] the words "fair and equitable" are "words of art" that "acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations."

When the Bankruptcy Reform Act of 1978 enacted the current Bankruptcy Code as a comprehensive revision of bankruptcy law to replace the Bankruptcy Act of 1898, it included the requirement in § 1129(b) that a plan be "fair and equitable" with respect to a dissenting class for cramdown confirmation in Chapter 11, which combined the previous reorganization provisions in Chapter X, XI, and XII into that single chapter.

The fair and equitable doctrine had several components in addition to the absolute priority rule at the time of enactment of the Bankruptcy Code. The other primary one[252] in addition to the absolute priority rule is the rule against premiums on claims, which prohibits payment of more than the allowed amount of a claim.[253] Other components were rules that: (1) permitted "step-ups" to compensate senior creditors for loss of priority when the plan provided for all classes to receive the same equity; [254] (2) permitted the issuance of better quality or more quickly amortizing securities to junior classes, provided that the senior class received property equal to the full amount of its claim;[255] and (3) permitted the inclusion of postpetition interest in the claims of creditors who had contracted for it in their loan documents.[256] In addition, the absolute priority rule was subject to the new value exception.[257]

Although some proposals for the new bankruptcy law codified other components of the fair and equitable doctrine, the final legislation did not.[258] Legislative history indicates that the omission of other "fundamental" components of the fair and equitable rule in the codification

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[251] 308 U.S. 106, 115 (1939).
[252] *See, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][a].
[253] *See, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][a][ii].
[254] *See, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][i][A]..
[255] *See, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][i][B].
[256] *See, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][i][C].
[257] *See, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][c].
[258] *See, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b].

was "to avoid complexity and because they would undoubtedly be found by a court to be fundamental to 'fair and equitable' treatment of a dissenting class."[259]

The express inclusion of the absolute priority rule in § 1129(b) and the omission of other features has generated debate as to whether the other components survived enactment of the Bankruptcy Code or have been changed by other provisions of the Bankruptcy Code.[260] The continued vitality of the other components, however, is immaterial for present purposes. Rather, the question is whether the "fair and equitable" requirement imposes additional confirmation requirements that the Bankruptcy Code does not specifically contain.

In traditional cases, § 1129(b)(2) expressly states that the fair and equitable condition "includes" the specific requirements that subparagraphs (A), (B), and (C) state. The rule of construction in § 101(3) is that "includes" is not limiting.

Courts have, therefore, concluded in traditional cases that a plan's compliance with the specific standards in § 1129(b) does not necessarily satisfy the fair and equitable requirement.[261] For example, the court in *Sandy Ridge Development Corp. v. Louisiana National Bank (In re Sandy Ridge Development Corp.),*[262] stated:

> [S]imple technical compliance with the requirements of section 1129(b)(2) does not assure that the plan is fair and equitable. Instead, this section merely sets minimal standards that a plan must meet, and does not require that every plan not prohibited be approved.[263]

The caselaw in traditional chapter 11 cases has developed an additional fair and equitable requirement in the context of the requirements in § 1129(b)(2)(B)(2)(A) for treatment of a secured claim, usually a real estate mortgage, involving lengthy payment periods, negative

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[259] Kenneth N. Klee, *Cram Down II,* 64 AM. BANKR. L. J. 229, 231 (1989), *quoting* 124 Cong. Rec. 32407 (Sept. 28, 1978) (remarks of Rep. Don Edwards) and 124 Cong Rec. 34006 (Oct. 5, 1978) (remarks of Sen. DeConcini). The nearly identical statements are by the "floor leaders managing the bankruptcy reform legislation; the statements were made in lieu of a conference report as the bankruptcy legislation did not go through a formal conference." Klee, *supra,* at 231 n. 16. *See* Kenneth N. Klee, *Legislative History of the New Bankruptcy Code,* 28 DePaul L. Rev. 941, 953-56, 54 AM. BANKR. L. J. 275, 289-94 (1980).

[260] *E.g.,*7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b]; Kenneth N. Klee, *Cram Down II,* 64 AM. BANKR. L. J. 229 (1989).

[261] *E.g*., Sandy Ridge Development Corp. v. Louisiana National Bank (*In re* Sandy Ridge Development Corp.), 881 F.2d 1346, 1352 (5th Cir. 1989); Federal Sav. & Loan Ins. Corp. v. D & F Construction, Inc. (*In re* D & F Construction, Inc.)*,* 865 F.2d 673, 675 (5th Cir. 1989); Travelers Ins. Co. v. Bryson Props., XVIII (*In re* Bryson Props., SVIII), 961 F.2d 496, 505 (4th Cir. 1992); Aetna Realty Investors, Inc. v. Monarch Beach Venture, Ltd. (*In re* Monarch Beach Venture, Ltd.), 166 B.R. 428, 436 (C.D. Cal. 1993); *In re* City of Detroit, 524 B.R. 147, 260-61 (Bankr. E.D. Mich. 2014) (discussing § 1129(b) as applicable in Chapter 9 case); *In re* Ponce de Leon 1403, Inc. 523 B.R. 349, 389 (D. P.R. 2014) *In re* Trenton Ridge Investors, LLC, 461 B.R. 440, 498-99 (Bankr. S.D. Ohio 2011); *In re* Kennedy, 158 B.R. 589, 599-601 (Bankr. D.N.J. 1993) (citing and discussing cases); *see* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][ii]; Jack Friedman, *What Courts Do to Secured Creditors in Chapter 11 Cramdown,* 14 Cardozo L. Rev. 1495, 1506-07 (1993).

[262] 881 F.2d 1346 (5th Cir. 1989).

[263] *Id.* at 1352 (interior punctuation and citation and quotation of Federal Sav. & Loan Ins. Corp. v. D & F Construction, Inc. (*In re* D & F Construction, Inc.)*,* 865 F.2d 673, 675 (5th Cir. 1989) omitted).

amortization, or both.[264] A leading treatise describes the additional feature of the fair and equitable rule as "a prohibition against the unfair and unreasonable shifting of risk relating to the operations and financial performance of the reorganized debtor" to a creditor.[265] Another commentator concluded, "Fair and equitable as it applies to secured claims requires not only the satisfaction of one of the explicit requirements of clauses (i), (ii), or (iii) [of § 1129(b)(2)(A)], but also that the technical fulfillment of these three clauses should not impose an unreasonable risk of the plan's failure on the secured creditor." [266]

The foregoing discussion leads to three general principles applicable to the question of whether the fair and equitable condition imposes additional requirements that expand the requirements of the PDI test.

First, fair and equitable requirements are not limited to the specific ones in the statute. The specific rules state minimum standards but do not preclude additional ones. The consensus is that the additional requirements include the unstated ones that courts developed in formulating the fair and equitable doctrine.

Second, an expansive view of the caselaw is that a plan is also not fair and equitable if it imposes an unreasonable risk on creditors. The caselaw specifically considers the risk of the debtor's failure, typically in the context of treatment of a secured claim.

Third, courts have not recognized any other requirement that the fair and equitable doctrine imposes for treatment of claims.

Perhaps bankruptcy judges should have the authority to impose new requirements for cramdown confirmation that they conclude are necessary for a plan to comply with their view of what is "fair and equitable." But it is questionable whether such an approach is appropriate when the statute states specific fair and equitable requirements, which the PDI test does.

With regard to the PDI test, the only applicable uncodified component of the fair and equitable doctrine is the prohibition of unreasonable risk, specifically, the risk of the debtor's default. In a subchapter V case, however, the fair and equitable condition specifically addresses risk in §1191(c)(3) with its requirement that the court find either that the debtor will make payments under the plan or that a reasonable likelihood exists that the debtor will make the payments and the plan contains adequate remedies to protect creditors in the event of default.

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[264] *E.g.,* Federal Savings & Loan Ins. Corp. v. D & F Construction, Inc. (*In re* D & F Construction, Inc.), 865 F.2d 673 (5th Cir. 1989); Aetna Realty Investors, Inc. v. Monarch Beach Venture, Ltd. (*In re* Monarch Beach Venture, Ltd.), 166 B.R. 428 (C.D. Cal. 1993); *In re* Trenton Ridge Investors, LLC, 461 B.R. 440 (Bankr. S.D. Ohio 2011); *In re* Kennedy, 158 B.R. 589 (Bankr. D. N.J. 1993) (collecting and discussing cases); *In re* Miami Center Associates, Ltd., 144 B.R. 937 (Bankr. S.D. Fla. 1992); *In re* Manion, 127 B.R. 887, 889-90 (Bankr. N.D. Fla. 1991); *In re* Mulberry Agr. Enterprises, Inc., 113 B.R. 30 (D. Kan. 1990); *In re* Club Associates, 107 B.R. 385 (Bankr. N.D. Ga. 1989); *In re* EFH Grove Tower Associates, 105 B.R. 310 (Bankr. E.D. N.C. 1989).

[265] 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][b][ii].

[266] Jack Friedman, *What Courts Do to Secured Creditors in Chapter 11 Cramdown,* 14 Cardozo L. Rev. 1495, 1506-07 (1993).

Cramdown confirmation in a subchapter V case, however, involves a different type of risk. Under the operation of the subchapter V PDI provisions, a risk in addition to default is that the debtor has understated its projected disposable income through overly conservative predictions of income and unduly generous predictions of expenditures. Because only the debtor may modify the plan, creditors risk the loss of disposable income to which they would be entitled based on accurate projections.

If the "unreasonable risk" component of the fair and equitable doctrine is stretched to include the risk of inaccurate projections, it has implications for two PDI issues: (1) the adequacy of the debtor's projections and permissible deductions in the calculation of PDI; and (2) whether a court may require a "true-up" such that the debtor pays disposable income based on actual results.

With regard to the first issue, as a practical matter, it makes no difference whether standards for the adequacy of projections and the calculation of PDI arise from application of the PDI test or as an additional requirement of the fair and equitable condition. *Premier Glass* applies the PDI test in a "fair" way that is "equitable" in the usual sense of those words. The usual rules of statutory construction support the *Premier Glass* result based solely on interpretation of the text. It is not necessary to expand the fair and equitable condition to create a new requirement that is arguably beyond the scope of the doctrine.

The argument in favor of requiring a "true-up" provision so that PDI is determined by actual results is that it is necessary to provide fairness to creditors and to produce an equitable result because: (1) a true up eliminates the ability of the debtor to manipulate the calculation of disposable income because it largely controls the information that produces the projection; and (2) without a "true-up," a debtor may modify the plan after confirmation if its performance does not meet its projections whereas creditors cannot modify if the debtor generates more money than projected.

The better view is that compliance with the PDI provision does not require a "true-up" under the terms of the statute.[267] The "fair and equitable" argument for a different result proceeds as follows: (1) the PDI provision states a minimum requirement, but the fair and equitable condition may require more; (2) the fair and equitable condition prohibits cramdown confirmation of a plan that poses an "unreasonable risk" for creditors; (3) a "true-up" is essential to protect creditors from the risks of debtor manipulation and the assumption of "downside" risk without a corresponding "upside" opportunity.

Although the argument may be appealing on fairness grounds, it has several weaknesses.

A fundamental problem is that the conclusion directly contradicts the language of the subchapter V statute. Whether to require payment to creditors based on actual results is a policy question that Congress resolved when it enacted language that precludes such a requirement. Congress's decision to limit postconfirmation modification to debtors, similarly, reflects a policy

[267] *See In re* Packet Construction, LLC, 2024 WL 1926345 at *3 (Bankr. W.D. Tex. 2024) ("To require a 'true up' is to eliminate the future-looking element indicated by the word 'projected.'"). Section VI(A) discusses the issue.

decision that does not properly provide the basis for a conclusion that courts can address its possible unfairness by creating an additional requirement that Congress did not include.

In short, subchapter V specifically contemplates and permits the situation that the argument posits as an unreasonable risk for courts to address through expansion of the fair and equitable requirement. Courts properly decline to engage in judicial legislation of this nature.

A second problem is that the premise of the "unreasonable risk" argument arises from application of the fair and equitable rule in the context of *secured* claims where the risks are possible diminution of value of the creditor's collateral and the risk of nonpayment. The risk that the argument advances in the subchapter V situation is different.

Any plan for payment of claims over time necessarily involves the risk that the debtor will not make required payments. Subchapter V addresses this issue through the requirement for cramdown confirmation that the court determine that the debtor will be able to make payments under the plan or that there is a reasonable likelihood that it will.[268]

But the risk of nonpayment is not the type of risk that the "unreasonable risk" argument in favor of a "true-up" identifies. Rather, the risk that the argument advances is that creditors will not receive *as much* as the debtor could pay based on actual results. Indeed, the argument assumes that the debtor will make payments as proposed but seeks an increase in their amount. Thus, the reasons for expansion of the fair and equitable requirement to protect secured creditors are not applicable in the subchapter V context. The caselaw expanding fair and equitable requirements to protect secured creditors from unreasonable risks in traditional chapter 11 cases does not provide a proper basis for adding a requirement to the fair and equitable rule in a subchapter V case based on a different type of risk.

As earlier text discusses, *Trinity Family Practice* develops a framework for determination of the length of the PDI commitment period, addressing both procedural aspects and the factors that a court properly considers in making that determination. The court reasoned that the fair and equitable condition required its conclusions. The framework is a sound one, but it is not necessary to create a new feature of the fair and equitable doctrine to construct it.

Section 1191(c)(2) states that, for a plan to be fair and equitable, the debtor must pay projected disposable income for three years, "or such longer period not to exceed 5 years as the court may fix." It provides no guidance about how the court determines whether the period should be three years, five years, or something in between.

The statutory directive for the court to "fix" the commitment period without any guidance necessarily leaves the question to the discretion of the court and invites the bankruptcy court to develop appropriate procedures for making the determination and reasons for choosing the length. A court's exercise of discretion must be "fair," and it must be "equitable," but the "fair and equitable" condition does not appear to add anything to help resolve the issue. Indeed, none of the components of the fair and equitable condition appear to relate to the length of the PDI commitment period.

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[268] § 1191(c)(3).

In summary, invocation of the fair and equitable doctrine does not seem to be appropriate to resolve questions about the PDI requirement. The PDI requirement is a specific statutory part of the fair and equitable condition, but the fair and equitable doctrine does not provide a basis for applying that requirement or adding to it.

In the *Premier Glass* and *Trinity Family Practice* cases discussed above, this theoretical analysis makes no difference in the outcome. A reasonable question, therefore, is why bankruptcy professionals and judges should care about what appears to be an interesting academic issue.

The answer is that use of the fair and equitable analysis in determination of PDI issues invites the expansion of the fair and equitable doctrine to prohibit or require provisions in a plan that the statute does not require. For example, could the "fair and equitable" condition require a plan to pay creditors for more than five years?

Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix), 2024 U.S. Dist. LEXIS 59741 (C.D. Cal. 2024), provides support for the argument that it can.

The *Hologenix* court discussed the length of the PDI period in the context of an objection to confirmation based on unfair discrimination. The debtor proposed a plan to pay projected disposable income to non-insider unsecured creditors in Class 3 for three years, resulting in 12.5 percent distribution. The claims of insiders in classes 2 and 4 would not receive any payments of PDI, but they retained their right to full payment after the payments to unsecured creditors. Multiple Energy Technologies, LLC ("MET"), an unsecured creditor in Class 3 holding a $2.4 million claim, objected to the plan because, among other things, the plan favored insider unsecured creditors and, therefore, discriminated unfairly. Id. at *5.

The bankruptcy court ruled that the plan did not discriminate unfairly because the unsecured creditors were receiving the most to which they were entitled and because, after the distributed all its projected disposable income to the unsecured creditors, it could make payments to other creditors. *Id.* at *6-7.

The district court ruled that the bankruptcy court incorrectly applied the law and that it was required to consider how the creditor's recovery compared to the recovery of other creditors during the entire duration of the plan. *Id.* at * 7-8.

The district court in *Hologenix* reasoned that whether a plan is "fair and equitable" is not limited to the specific requirements in §1191(c), so the plan's compliance with the PDI test in §1191(c)(2) was not sufficient. *Id.* at *7. Focusing on the word "all" in §1191(c)(2), the court concluded that the requirement for distribution of "all of the projected disposable income of the debtor" during the PDI commitment period did not prohibit "the provision of some amount of disposable income that is less than 100% after five years." *Id.* at 8-9. Thus, the court said, "[A] plan could require 100% of a debtor's disposable income in years one through five, 75% in years six through eight, and so on." *Id.* at * 9.

The *Hologenix* court did not hold that the fair and equitable condition could require a debtor to pay some, but not all, of its disposable income beyond a five-year term. Nevertheless, that result is a logical implication of its analysis.

This aspect of the court's reasoning was not necessary to its holding on unfair discrimination. The ruling is that a plan that provides for partial payment to some unsecured creditors and full payment to others does not pass the unfair discrimination test solely because payments to the partially paid creditors satisfy the PDI test. The only PDI point material to the ruling is that the commitment period specified in §1191(c)(2) does not prohibit a debtor from making payments for a longer time, an indisputable proposition.

Perhaps the *Hologenix* court would take a different approach in a case where all unsecured creditors are receiving the same treatment. In any event, limitation of the court's analysis of the fair and equitable condition and its relationship to the PDI test to the context of an unfair discrimination objection is appropriate.

5. Requirements for feasibility and remedies for default*

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.,* 2020 WL 6122645, at *2 (Bankr. M.D. Fla. 2020), *aff'd* 2021 WL 12324962, M.D. Fla. 2021), *aff'd* 125 F.4th 1365 (11th Cir. 2025); *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)(11). 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 VIII(B)(4)(viii) of this Update, § 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].

6. Payment of administrative expenses under the plan

C. Postconfirmation Modification of Plan

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

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

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.

The key difference between the subsections is one of timing. A consensual plan may only be modified before the plan is "substantially consummated,"[269] 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 caselaw 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

[269] *See* 11 U.S.C. § 1101(2); *SBRA Guide* § VIII(C)(1) 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.

D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases

1. Classification of claims and interests; unfair discrimination*

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.

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.

The court in *In re Edgewood Food Mart, Inc.,* 666 B.R. 418 (Bankr. N.D. Ga. 2024), ruled that a plan did not discriminate unfairly against the unsecured claim of the objecting creditor because it provided the same treatment for that claim as it did for the only other unsecured claim. The court observed, "When considering discrimination between classes of claims and whether the treatment is unfairly discriminatory the classes of claims must be of the same priority." *Id.* at 437, *quoting In re 431 W. Ponce De Leon, LLC,* 515 B.R. 660, 681 (Bankr. N.D. Ga. 2014).

The court in *Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix),* 2024 U.S. Dist. LEXIS 59741 (C.D. Cal. 2024), discussed more fully in Sections VIII(B)(ii) and (x), expressed a different view. In *Hologenix,* the plan provided for a distribution of 12.5 percent to non-insider creditors from payment of all projected disposable income to them, whose claims would be discharged. No payments would be made on unsecured claims of insiders, but their claims would not be discharged; they could thus be paid in full flowing completion of the plan. The bankruptcy court confirmed the plan, concluding that the non-insider creditors were not entitled to anything more than projected disposable income and that, thereafter, the debtor and insiders could pay "whatever they find agreeable." *Id.* at *5-6.

On appeal, the district court reversed and remanded, ruling that the bankruptcy court erroneously ruled that the creditor's receipt of all projected disposable income during the plan period precluded its unfair discrimination argument. *See supra* §§ VIII(B)(ii) and (x). Without considering whether the plan provisions effectively subordinated the insider claims, the district court ruled that the bankruptcy court was "required to consider how [the creditor's] recovery compared to the recovery of other creditors during the entire duration of the Plan – not just the five years after confirmation." 2024 U.S. Dist. LEXIS 59741 at * 8-9.

The *Hologenix* court did not determine the unfair discrimination issue, *id.* at 10-11, but vacated the confirmation order and remanded for further proceedings. *Id.* at *17-18.

2. Acceptance by all classes and effect of failure to vote; untimely ballot*

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), bankruptcy courts in the Tenth Circuit have followed *Ruti-Sweetwater* in subchapter V cases to

confirm a plan as consensual under § 1191(a) even though one or more impaired classes did not vote, ruling that a silent class is deemed to have accepted it for purposes of §1129(a)(8).[270] One court, however, concluded that the requirement in § 1129(a)(10) that one impaired class of claims accept the plan requires affirmative acceptance.[271] (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). Four 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 Sushi Zushi of Texas, LLC,* 2025 WL 957792 (Bankr. W.D. Tex. 2025); *In re Thomas Orthodontics, S.C.,* 2024 WL 4297032 at *6-7 (Bankr. E.D. Wisc. 2024); *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

[270] *In re* Jaramillo, 2022 WL 4389292 (Bankr. D.N.M. 2022); *In re* The Lost Cajun Enterprises, LLC, 2021 WL 6340185 at *7 (Bankr. D. Col. 2021); In *re* Roundy, 2021 WL 5428891 at *2 (Bankr. D. Utah 2021); *In re* Robinson*,* 632 B.R. 208, 218 (Bankr. D. Kansas 2021).
[271] *In re* Jaramillo, 2022 WL 4389292 (Bankr. D.N.M. 2022).

> 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.

Four courts have rejected this approach. *In re* Sushi Zushi of Texas, LLC, 2025 WL 957792 (Bankr. W.D. Tex. 2025); *In re Thomas Orthodontics, S.C.,* 2024 WL 4297032 at *6-7 (Bankr. E.D. Wisc. 2024); *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.

In *In re Thomas Orthodontics, S.C.,* 2024 WL 4297032 (Bankr. E.D. Wisc. 2024), all classes had accepted the plan except a secured creditor in its own class, which had not objected to confirmation. The court conducted an evidentiary hearing on another creditor's objection to cramdown confirmation on the ground that the debtors were not committing all their disposable income to the plan. Five days after the conclusion of the evidentiary hearing (and 95 days after the voting deadline), the secured creditor filed an acceptance of the plan.

The debtors requested that the court deem the secured creditor to have accepted the plan by its silence or, alternatively, to count the untimely ballot as an acceptance of the plan. The court followed the majority view that acceptance requires an affirmative vote, *id.* at *6-7, and refused to count the untimely ballot under the "excusable neglect" standard of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380 (1993). *Thomas Orthodontics,* 2024 WL 4297032 at *3-6.

The first *Pioneer* factor is the danger of prejudice to nonmoving parties. The court explained that it had conducted a full evidentiary hearing on confirmation at which all participating parties had assumed that that cramdown standards applied because the secured creditor had not voted. The objecting creditor and the U.S. Trustee had "spent time and effort preparing for and attending the hearing [and had] made strategic decisions regarding the evidence that would be presented at the hearing based on that assumption." 2024 WL 4297032 at *4.

The court noted that the objecting creditor might receive more if the court determined that the debtors were not committing all their disposable income to the plan. Although prejudice to the creditor was not clear since the court had not yet made that decision, the court concluded that the debtors had presented nothing to meet their burden of showing that nonmoving parties were not prejudiced. The court stated, "It seems unfair for the debtors to obtain a strategical advantage by taking action to change the facts after a full evidentiary hearing, particularly without explaining how their late submission did not prejudice the other parties." *Id.* at *4.

The court then considered the second *Pioneer* factor – the length of the delay and its potential impact on the proceedings. Noting that the creditor had not voted until five days after conclusion of the hearing and 95 days after the ballot deadline and that the debtors had not filed a motion to deem the ballot timely for another 15 days, the court concluded, *id.* at *4:

> The Court declines to incentivize such behavior by allowing the debtors to do the work of obtaining the necessary ballots only after the Court and the other parties in interest expended the time and effort of an evidentiary hearing. Moreover, allowing parties in interest to solicit (or return) ballots from non-participating creditors after an evidentiary hearing on plan confirmation could only invite mischief. For example, if the Court allowed debtors to solicit late acceptances, could creditors or other parties in interest solicit late rejections? Likely not, and the debtors have not explained why there should be a difference between allowing late acceptances and late rejections.

With regard to the third *Pioneer* factor – the reason for the delay, including whether the delay was within the reasonable control of the movant – the court observed that the secured creditor had made a conscious decision not to vote either for or against the plan and voted only after prompting by the debtors' counsel. Under these circumstances, the court reasoned, it would not have granted a motion by the creditor because the failure to meet the deadline did not result from "carelessness or the like," as the *Pioneer* inquiry requires. *Id.* at 5.

The fact that the debtors, rather than the secured creditor, requested counting of the untimely filing did not change the result, the court continued. The court concluded, *id.* at *5:

> If the debtors wanted [the secured creditor] to return a ballot, the time for soliciting the ballot was before the deadline, or at the very least well in advance of the evidentiary hearing on plan confirmation.

The court concluded that the good faith of the debtors – *Pioneer's* fourth factor – was "a neutral factor at best." *Id.* Acknowledging that that the debtors wanted consensual confirmation and that they had a right to it if they could satisfy its requirements, the court reasoned that "the time for satisfying those requirements was before the confirmation hearing, not after." *Id.*

The court noted the debtors' argument that if the court denied confirmation and the debtors sought confirmation of a modified plan to creditors with new ballots, the secured creditor would likely vote for the plan and that the debtors could seek consensual confirmation under § 1191(a) but with added administrative costs. The court rejected the argument, *id.* at 6:

> That may be a practical reason to allow a late ballot in a different case, but in this case there are pending objections that the [debtors'] plan does not meet other requirements of § 1129(a), including the requirement that the plan be proposed in good faith. Therefore, the lack of creditor consent is not the only thing preventing confirmation under § 1129(a).

The court concluded that the circumstances of the case did not warrant extension of the deadline for the secured creditor's ballot. *Id.*

The *ABI Subchapter V Task Force Final Report* addressed the problem of a "silent class."[272] The Report concluded that the existence of a silent class should not prevent consensual confirmation under § 1191(a), but that the absence of affirmative acceptance by a class should not result in confirmation without compliance with the cramdown standards in § 1191(b).[273] The Report proposed a statutory amendment to permit confirmation under § 1191(a) if no impaired class rejects the plan, no creditor within a silent class objects to confirmation, and the plan meets the cramdown requirements in § 1191(b).[274]

3. Classification and voting issues relating to priority tax claims

4. Timely assumption of lease of nonresidential real estate

5. The "best interests" or "liquidation" test of § 1129(a)(7)*

The court in *In re Boteilho Hawaii Enterprises, Inc.,* 2023 WL 7117223 (Bankr. D. Haw. 2023), *aff'd* 2024 WL 4143933 (B.A.P. 9th Cir. 2024) (unpublished), 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 bankruptcy 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)." 2023 WL

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[272] *ABI Subchapter V Task Force Final Report*, *supra* note 5, at 56-61.

[273] *Id.* at 60.

[274] *Id.* at 61. The Task Force recommended amendment of § 1191(a) to insert the italicized language:

> § 1191. Confirmation of plan
> (a) Terms. – The court shall confirm a plan under this subchapter only if *either* –
> *(1)* all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met; *or*
> *(2) (A) all of the requirements of section 1129(a), other than paragraphs (8), (10), and (15) of that section, of this title are met;*
> *(B) all of the requirements of section 1191(b) are met; and*
> *(C) no class of claims or interests that is impaired under the plan votes to reject the plan and no creditor within such class objects to confirmation of the plan.*

7117223 at * 2. The bankruptcy 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), *aff'd* 2024 WL 4143933 (B.A.P. 9th Cir. 2024).

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). But a court at confirmation may review the claims, conclude that they have no merit, and confirm a plan that does not provide for their prosecution. *In re Edgewood Food Mart, Inc.,* 666 B.R. 418 (Bankr. N.D. Ga. 2024).

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 the debtor had valued accounts receivable in substantial amounts owed by affiliates of the debtor at zero. Based on its review of the financial conditions of the affiliates, the court concluded that the receivables had no realizable value.

In *In re Edgewood Food Mart, Inc.,* 666 B.R. 418 at 434-35 (Bankr. N.D. Ga. 2024), the court rejected the objecting creditor's argument that the plan did not meet the liquidation test because it did not take account of claims against the principal and affiliates. The court analyzed each potential claim and determined that none were viable. The court also concluded that the creditor's offer to purchase the debtor's assets would not result in a greater recovery for the creditor than the plan in view of the fact that the debtor's principal assumed responsibility for subchapter V professional fees under the plan that would have to be paid in a chapter 7 liquidation.

In *The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (In re Alecto Healthcare Services, LLC),* 2025 WL 961482 at * 10-11 (D. Del. 2025), the court affirmed the bankruptcy court's confirmation of a plan that included the settlement of potential fraudulent conveyance and breach of fiduciary duty claims against the debtor's insiders. Evidence before the bankruptcy court included testimony of the debtor's independent director that supported the bankruptcy court's determination that the proposed settlement fell above the lowest point in the range of reasonableness.

6. Voting by holder of disputed claim

7. Individual must be current on postpetition domestic support obligations

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

9. The good faith requirement of § 1129(a)(3)*

In re Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024), discusses a number of objections of a creditor based on the good faith requirement of 11 U.S.C. §1129(a)(3) in the context of cramdown confirmation of a subchapter V plan. The court concluded that the debtor had filed its liquidation plan in good faith where the plan would pay more to creditors than a chapter 7 liquidation because it involved concessions from insiders, including waiver of salary of the principal, operation of the business for a limited time to pay more to creditors, and had provided reliable financial projections.

The court also rejected the creditor's arguments that the plan was not in good faith because the plan did not provide for the pursuit of claims against the principal. The court noted that the plan provided for meaningful distributions to creditors and that the evidence did not support a finding that the debtor had viable claims or that the debtor violated the business judgment rule by not pursuing them.

Finally, the court rejected the contention that the fact that the principal would retain his equity interest that could enable him to retain future profits without paying creditors in full showed the absence of good faith. Because subchapter V has no absolute priority rule, the court explained, the principal could retain his equity interest even if it had value without full payment to creditors. The court stated, 666 B.R. at 434:

> So long as a debtor complies with the other confirmation requirements unique to Subchapter V, a plan that takes advantage of this feature of Subchapter V is not proposed in bad faith.

In *In re Trinity Family Practice & Urgent Care PLLC,* 661 B.R. 793 (Bankr. W.D. Tex. 2024), the court ruled that a plan for payment of projected disposable income 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). Section VIII(B)(4)(ii) of this Update discusses the issue of the length of the period for payment of PDI.

Section VIII(D)(8) discusses the good faith requirement in the context of a consensual plan when a creditor objects because the debtor is not paying enough disposable income.

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).

10. The "feasibility" requirement of § 1129(a)(11)*

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

Section 1129(a)(11) also imposes a feasibility requirement by providing that confirmation "is not likely to be followed by the liquidation, or the need for further reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

A number of courts have addressed feasibility under § 1129(a)(11) in subchapter V cases.

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 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 BAP 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 . . . ."[275] The BAP has also held that a debtor need not "prove that success is inevitable."[276]

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.

In re Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024), illustrates the obvious point that a principal's escrow of cash in the amount of all payments due under the plan to unsecured creditors effectively resolves feasibility issues under § 1129(a)(11). The objecting creditor asserted that the plan was not feasible because it contemplated the liquidation of the debtor after completion of plan payments and that the debtor had failed to provide adequate financial projections to show that the debtor could operate after confirmation.

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[275] 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).
[276] Comput. Task Grp., Inc. v. Brotby (*In re* Brotby), 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003).

The court concluded that the later liquidation of the debtor did not affect its feasibility. The court noted that § 1129(a)(11) recognizes that some plans may result in liquidation. In any event, the court continued, "The feasibility requirement is about whether the plan can be completed as laid out, not about the long-term future of the business after bankruptcy." *Id.* at 437.

With regard to the adequacy of financial projections, the court found that they were adequate and that, even if they were optimistic, the principal's escrow of funds established feasibility. *Id.* at 437.

SBRA Guide § VIII(B)(5) discusses the bankruptcy court's ruling in *In re Ellingsworth Residential Community Association, Inc.*, 2020 WL 6122645 (Bankr. M.D. Fla. 2020), confirming the plan of the homeowner's association over the objection (among others) of a homeowner that it was not feasible because it depended on assessment of homeowners for funding. The Eleventh Circuit affirmed. *Guan v. Ellingsworth Residential Community Association, Inc., (In re Ellingsworth Residential Community Association, Inc.),* 125 F.4th 1365 (11th Cir. 2025).

In re Cleary Packaging, LLC, 657 B.R. 780 (Bankr. D. Md. 2023), denied confirmation of a creditor's plan in a traditional case that began as a subchapter V case[277] because the 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 of its plan under § 1129(a)(11).

In *In re Absolute Dimensions, LLC,* 2026 WL 93834 (Bankr. D. Kan. 2026), the debtor amended its timely filed plan some 16 months after the filing of its petition. During the postconfirmation period, the debtor's business rarely had positive cash flow, and it failed to timely pay all of its postpetition obligations (primarily rent and postpetition taxes). Nevertheless, the debtor was able to make agreements with parties that postponed the court's consideration of issues in the case, and creditors in all voting classes accepted the plan.

[277] The debtor elected application of subchapter V upon the filing of its petition but amended the election so that the case proceeded as a traditional case after the Fourth Circuit ruled that the § 523(a) exceptions to discharge were applicable to a cramdown discharge in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging, LLC),* 36 F.4th 509 (4th Cir. 2022). *SBRA Guide* § X(C)(2) discusses the case in detail. Section X(C)(2) of this Update discusses proceedings in the bankruptcy court after the Fourth Circuit's decision.

The U.S. Trustee, however, objected to confirmation on the ground that the plan was not feasible in view of the consistent negative income during the postpetition period, unpaid postpetition debt, and negative monthly income in the debtor's cash flow projections for several months after confirmation.

After an evidentiary hearing, however, the court found that the debtor's business was improving, that it anticipated new business that would increase its cash flow, and that its projections were conservative, that the liquidation of collateral would reduce the monthly payment to the secured lender, and that variable costs were likely to decrease. Accordingly, the court concluded that confirmation was not likely to be followed by liquidation of the debtor or a need for further financial reorganization and confirmed the plan.

11. Compliance with provisions of the 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).

12. 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 two cases have addressed the 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.

In re Cleary Packaging, LLC, 657 B.R. 780 (Bankr. D. Md. 2023), began as a subchapter V case, but the debtor amended its subchapter V election so that the case proceeded as a traditional case after the Fourth Circuit ruled that the § 523(a) exceptions to discharge were applicable to a cramdown discharge.[278] Section X(C)(2) of this Update discusses proceedings in the bankruptcy court after the Fourth Circuit's decision.

The debtor and the judgment creditor that had brought the dischargeability action filed competing plans. The judgment creditor voted to accept its plan and to reject the debtor's; three unsecured creditors voted to reject the creditor's plan and to accept the debtor's. The court denied confirmation of both plans.

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).

E. § 1129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases

1. The § 1111(b)(2) election*

Undersecured creditors in traditional chapter 11 cases are reluctant to make the § 1111(b) election for strategic reasons. Subchapter V eliminates the strategic advantages that an undersecured creditor may have if it does not make the election. For a discussion of the issues, see Paul W. Bonapfel, *To 1111(B) or Not to 1111(B): Whether 'Tis Nobler to Elect in Subchapter V Cases*, 34 NORTON JOURNAL OF BANKR. LAW AND PRACTICE, Art. 2 (May 2025).

[278] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022). *SBRA Guide* § X(C)(2) discusses the case in detail.

In *In re Joiner,* 2025 WL 281053 (Bankr. W.D.N.C. 2025), the court held that the provisions in § 1190(3) that permit a subchapter V plan to modify a claim secured by a principal residence under certain circumstances[279] do not prevent a secured creditor from making the § 1111(b) election.

2. Realization of the "indubitable equivalent" of a secured claim – § 1129(b)(2)(A)(iii)

F. Illustrative Confirmation Orders*

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).

Some confirmation orders appear to confirm plans with provisions that are inconsistent with statutory requirements.

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

[279] *SBRA Guide* § VIII(E)(1) discusses § 1111(b).

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 Smallhold, Inc.,* 2025 WL 2395029 at * 8-9 (Bankr. D. Del. 2025) (In dealing with jurisdictional issues after confirmation of a cramdown plan under § 1191(b), the court noted that the confirmation order provided for vesting of all property of the estate in the debtor pursuant to § 1141. Thus, arguments based on the property of the estate remaining in the estate under § 1186 did "little to advance the debtor's position," and the confirmation order's provisions were "effectively the end of that matter." *Id* at *9.); *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.).

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

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

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

Plans or confirmation orders in cramdown situations often provide for the debtor, rather than the trustee, to make payments to creditors, as § 1194(b) permits.

Section IX(D) of this Update discusses termination of the trustee's services after substantial consummation of the plan and entry of a final decree in these circumstances.

C. Unclaimed Funds

D. Termination of Trustee's Service After Cramdown Confirmation When Debtor Makes Plan Payments*

As *SBRA Guide* § IV(D)(1) discusses, the time for termination of the trustee's service depends on whether the court confirms a consensual plan under §1191(a) or a cramdown plan 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 under § 1183(c)(1) upon substantial consummation,[280] which ordinarily occurs when distribution commences.

Subchapter V does not specify a termination date for the trustee's service when confirmation of a plan occurs under the cramdown provisions of §1191(b). The statute contemplates that the trustee continue to serve and make 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.

Four bankruptcy courts have concluded that, when the debtor 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 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.

[280] Section 1101(2) defines "substantial consummation." *SBRA Guide* § VIII(C)(1) at 161-64 discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

> 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." 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 the factors a court should consider in determining whether an estate has been administered:

(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 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 noted, 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, its order provided for the trustee to file a final report in connection with reopening of the case for entry of a final decree and for discharge of the trustee upon completion of plan payments.

The court in *In re Carolina Sleep Shoppe,* 2025 WL 1122411 (Bankr. E.D.N.C. 2025), entered a final decree and closed the case after cramdown confirmation upon substantial consummation where the plan provided for the debtor to make payments under the plan and the confirmation order provided for termination of services of the subchapter V trustee upon substantial consummation.

The court concluded that the provision of the confirmation order discharged the trustee upon substantial consummation and that the case had been fully administered under the factors in the Advisory Committee Note to Bankruptcy Rule 3022, discussed above. Accordingly, the court ruled, it was required to enter a final decree and close the case under § 350(a) and Bankruptcy Rule 3022.

The *Carolina Sleep Shoppe* court addressed two procedural matters. First, the court directed the subchapter V trustee to file a report of no distribution as a simple docket entry to inform the court and parties of the discharge of the trustee. Second, the court noted that the appropriate way to request to close the case is through a motion rather than including such a request in a final report. 2025 WL 1122411 at *9.

Although *Florist Atlanta, Lager,* and *Carolina Sleep Shoppe* 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 approaches to closing of the case.

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, its order provided for the trustee to file a final report in connection with reopening of the case for entry of a final decree and for discharge of the trustee upon completion of plan payments. In *Carolina Sleep Shoppe,* the court closed the case.

X. Discharge*

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 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].

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

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

C. Exceptions to Discharge in Subchapter V Cases

1. Exceptions to discharge after consensual confirmation

2. Exceptions to discharge after cramdown confirmation

3. Procedure for determination of exceptions to discharge under § 523(a)(2), (4), or (6)*

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.[281]

D. Whether § 523(a) Exceptions Apply to Cramdown Discharge of an Entity

1. Statutory language and background

2. Judicial debate over application of § 523(a) exceptions to cramdown discharge of an entity*

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. [282] When confirmation occurs under the cramdown provisions of § 1191(b), however, § 1141(d) does not apply. § 1181(c). Instead, § 1192 governs the discharge.

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[281] *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).

[282] Halo Human Resources, LLC v. American Dental of LaGrange (*In re* American Dental of LaGrange), 2025 WL 384536 (Bankr. M.D. Ga. 2025); 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); Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), 2020 WL 13881425 (Bankr. E.D. Tex. 2020).

In *Halo Human Resources, LLC v. American Dental of LaGrange (In re American Dental of LaGrange),* 2025 WL 384536 (Bankr. M.D. Ga. 2025), a creditor filed a complaint to except its debt from discharge and objected to confirmation of the debtor's plan. A stipulation between the debtor and creditor resolved the objection to confirmation, and the court confirmed the plan under § 1191(a). The stipulation provided that the withdrawal of the objection to confirmation "shall not be construed as waiving any claims or defenses by either party" in the dischargeability action. *Id.* at *2 & n. 8. After confirmation, the debtor moved to dismiss the complaint for failure to state a claim on which relief could be granted on the same day the court entered the confirmation order. The court granted the motion to dismiss because § 523(a) exceptions do not apply to the discharge of a corporation under § 1141(d), which is the discharge a debtor receives in a subchapter V case upon confirmation of a plan under § 1191(a). *Id.* at * 6-7.

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[283] and the 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.

Six more bankruptcy courts[284] and the Bankruptcy Appellate Panel for the Ninth Circuit[285] 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.[286]

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[283] 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. 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. Dist. LEXIS 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.*

[284] Spring v. Davidson (*In re* Davidson), 2025 WL 51126 (Bankr. N.D. Fla. 2025); 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.); *rev'd* 2024 WL 4789403 (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).

[285]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).

[286] 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).

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), and the Eleventh Circuit in *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, 142 F.4th 1323 (11th Cir. 2025), agreed with the Fourth Circuit's conclusion in *Cleary Packaging.* Three bankruptcy courts and one district court 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.[287]

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* 8 COLLIER ON BANKRUPTCY ¶ 1192.03[2] (16th ed.); *SBRA Guide* § X(D)(2).

An interesting epilogue to 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 is that the bankruptcy court eventually confirmed a consensual plan.

After the Fourth Circuit's ruling, 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 debtor and the creditor filed separate plans, and the bankruptcy court considered their confirmation 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's plan 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

[287] Chicago & Vicinity Laborers' District Pension Plan v. R & W Clark Construction, Inc. (*In re* R & W Clark Construction, Inc.), 2024 WL 4789403 (N.D. Ill. 2024); *rev'g* 656 B.R. 628 (Bankr. N.D. Ill. 2024); Marmic Fire & Safety Co., Inc. v ETG Fire, LLC (*In re* ETG Fire, LLC), 2025 WL 915381 (Bankr. D. Co. 2025); 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).

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.

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).

The court later confirmed a consensual plan of reorganization.

E. Attorney's Fees of Debtor's Counsel for Dischargeability Litigation*

An individual may face claims from one or more creditors that some debts are excepted from discharge under § 523(a). A corporation (or other entity) has the same problem if cramdown consensual confirmation occurs and the court applies the interpretation of the cramdown discharge provisions in § 1192(2) that the § 523(a) exceptions apply to its discharge.[288]

When a lawyer defends dischargeability litigation, a question is whether the services are on behalf of the *debtor in possession* as opposed to the *debtor.* Put another way, the question is whether the services benefit the *estate.*

The answer is important for two reasons.

The first is whether the fees are allowable as an administrative expense, payable by the estate. As § V(E) of this Update explains, § 330(a) provides for compensation of a lawyer for the debtor in possession and does not permit compensation of the debtor's lawyer. Moreover, § 330(a)(4)(A)(ii) prohibits allowance of compensation for services that are not "reasonably

[288] See *SBRA Guide* § X(D)(2).

likely to benefit the estate" or "necessary in the administration of the case" (except for services of counsel for a chapter 13 debtor or an individual chapter 12 debtor).

The second is whether the fees are a permissible deduction for purposes of the projected disposable income test in § 1191(c)(2). Permissible deductions from disposable income under § 1191(d) are reasonably necessary expenditures for "the maintenance or support of the debtor or a dependent of the debtor"[289] or for "the payment of expenditures necessary for the continuation, preservation, or operation of the debtor."

In re Schlomer[290] considers the first issue. The court had approved the retention of special counsel to represent the individual debtor in dischargeability litigation in a traditional chapter 11 case. In this opinion, the court scheduled a hearing *sua sponte* on whether to reconsider the retention order to "clarify that [the lawyer] need not and does not represent the interests of the bankruptcy estate but rather the debtor personally and, accordingly, that [the lawyer] need neither be retained under section 327 nor have its compensation governed by sections 328 or 330."[291]

Noting the distinction between the debtor and debtor in possession in an individual chapter 11 case, the court stated the general rule that "if the professional services do not benefit the estate, then they cannot be paid from estate assets"[292] and cited cases in which other courts had ruled that a lawyer's fees for services on behalf of the debtor personally did not benefit the estate.[293]

The court then turned to the retention and compensation of what it called counsel for the "actual debtor" in a chapter 11 case. The term is a useful one that refers to a debtor when the debtor's personal interests, as opposed to the estate's, are at stake and the debtor hires counsel for representation on the debtor's own behalf.

The court explained how provisions of the Bankruptcy Code govern the retention and compensation of an "actual debtor's" attorney.

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[289] § 1191(d)(1)(A). Subparagraph (B) permits deduction for a domestic support obligation, which is inapplicable to this issue.

[290] 672 B.R. 915 (Bankr. W.D. Tex. 2025).

[291] *Id.* at 918.

[292] *Id.* at 919.

[293] Keate v. Miller (*In re* Kohl), 95 F.3d 713 (8th Cir. 1996) (holding that debtor's efforts to protect exempt homestead from foreclosure and to reaffirm and negotiate tax debts do not benefit chapter 11 estate); *In re* Young, 2021 WL 6091102 at *6 (Bankr. D.N.M. 2012) ("Fees that benefit only the Debtors as individuals and not in their capacities as debtors in possession provide no benefit to the estate in a Chapter 11 case and are not compensable from assets of the estate.").

The court also cited two cases involving employment of divorce counsel. *In re* Goldstein, 383 B.R. 496, 502 (Bankr. C.D. Cal. 2007) ("In this case, authorizing each joint debtor to employ respective divorce counsel is in the best interest of the two estates involved in this case."); *In re* Colin, 27 B.R. 89 (Bankr. S.D.N.Y. 1983) (permitting chapter 11 individual debtor-in-possession to retain special counsel to pursue divorce action.). Finally, the court cited one case in which the court examined the fee application to determine what benefited the estate and what did not. *In re* Polishuk, 258 B.R. 238 (Bankr. N.D. Okla. 2001).

Debtors are entitled to "vigorously litigate any proceedings in which they are personally entangled"[294] and may retain counsel to represent their personal interests. But because a debtor in possession has a fiduciary duty to the estate, debtors and their counsel must "remain vigilant to make sure that they do not act contrary to the interests of the estate, including in their litigation decisions."[295] When a debtor's personal interests conflict with those of the estate, "debtors must remove themselves (or be removed) from their role as trustee/debtor-in-possession."[296]

"[S]o long as the debtor's interests do not conflict with the estate's, the debtor can take actions to benefit itself, including by hiring lawyers to represent its interests. Nor does the Code specifically limit the debtor's ability to pay compensation out of non-estate assets, aside from the requirements of section 329 of the Bankruptcy Code."[297] Section 329 requires disclosure of compensation paid or agreed to be paid by a debtor and authorizes the court to cancel any retention agreement and to require the return of any payment to the extent the payment exceeds the reasonable value of services rendered.

In the context of representation in a nondischargeability action, the court noted, "Nondischargeability proceedings primarily impact not the bankruptcy but whether the debts at issue will be discharged and thus removed from the debtor's post-bankruptcy life."[298] The court cited cases ruling that dischargeability litigation does not benefit the estate and that a debtor's attorney's fees cannot be paid from estate assets.[299]

The court doubted that the court's approval of the debtor's retention of counsel to defend a dischargeability action or of counsel's compensation was required and scheduled a hearing to reconsider the retention order. The court proposed to hold that the lawyer need not be retained under § 327(e), that compensation was not approved under § 328 or subject to review under § 330, and that compensation was subject only to review under § 329.[300]

If fees for dischargeability litigation must be paid from non-estate assets, the debtor's problem is finding non-estate assets.

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[294] 672 B.R. 915 at 922.
[295] *Id.* at 922.
[296] *Id.* at 922. The court did not discuss, as an alternative to removal of the debtor from possession, the expansion of the trustee's duties to manage the conflict, as Section IV(C) discusses.
[297] *Id.* at 921.
[298] *Id.* at 921.
[299] *Id.* at 921 n. 19. The court cited: Stewart v. Law Offices of Dennis Olson, 93 B.R. 91, 95 (N.D. Tex. 1988); *In re* Jones, 665 F.2d 60 (5th Cir. 1982) (adopting rule, under pre-Bankruptcy Code law, that "attorneys' fees related to defending against objections to the discharge are not payable out of the estate"); *In re* Polishuk, 258 B.R. 238, 249-50 (Bankr. N.D. Okla. 2001) (finding, in Chapter 11 case in which debtor was in possession, that nondischargeability litigation with ex-spouse did not benefit the estate and therefore the fees could not be paid from estate assets). *See also In re* Kadiric, 670 B.R. 307, n. 10 (Bankr. W.D. Mich. 2025), *citing In re* Schlomer, 672 B.R. 915 at *4 (Bankr. W.D. Tex. Feb. 19, 2025) ("For the sake of transparency, the court expresses concern about the estate's retaining counsel to defend the Debtors' discharge, a matter of peculiar importance to the Debtors but seemingly of no value to the estate or their creditors generally."); NORTON BANKRUPTCY LAW AND PRACTICE §§ 106.1, 106.6.
[300] *Id.* at 924..

In a traditional chapter 11 case, an individual debtor has no non-estate assets other than exempt property because § 1115(a) provides that, in the case of an individual, property of the estate includes postpetition earnings and any property acquired after the commencement of the case. Section 1115(a), however, does not apply in a subchapter V case,[301] so an individual debtor in a subchapter V case could pay dischargeability counsel from postpetition earnings. But if cramdown confirmation under § 1191(b) occurs, property of the estate includes postpetition earnings and postpetition property.[302]

An individual in a subchapter V case, therefore, can pay for dischargeability counsel at least until confirmation of a plan. The individual may do so thereafter if consensual confirmation occurs under § 1191(a) with money from earnings that is not needed for personal expenses and payment of obligations under the plan. After cramdown confirmation, however, that option does not seem to be available, although it is arguable that a debtor should be able to pay a personal expense with money that is not required to make the payments under the plan.

In the case of a corporation or other entity, property of the estate under § 541(a)(1) includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Property of the estate includes "proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after commencement of the case" under § 541(a)(6) and "any interest that the estate acquires after commencement of the case" under § 541(a)(7). A corporation or other entity, therefore, has no earnings or assets that do not constitute estate property.

It is arguable in the case of a corporation or other entity that representation in dischargeability litigation provides a benefit to the estate or is necessary to administration of the case because the debtor must have counsel to defend the litigation[303] and no other source for payment of attorney's fees exists. Further, the estate of an entity has an interest in the nondischargeability litigation because a ruling that a debt is nondischargeable may negatively affect the ability or willingness of the debtor to proceed with a plan. If the debtor will be saddled with nondischargeable debt, owners may conclude that it is not worth their time and effort to try to reorganize the debtor.

The debtor in *Schlomer* had anticipated dischargeability litigation and paid the dischargeability lawyer a $60,000 prepetition retainer. A prepetition retainer may provide a non-estate source for payment of dischargeability counsel. Nevertheless, as the *Schlomer* court noted, "Transfers of the debtor's assets immediately prior to a bankruptcy proceeding may also be subject to avoidance under various provisions of bankruptcy law, and retainers in which the debtor still has an equitable interest as of the petition date may become property of the estate and complicate non-estate counsel's ability to be paid."[304]

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[301] § 1181.
[302] § 1186(a).
[303] A corporation cannot appear in a bankruptcy court without counsel. *E.g.*, Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993) ("[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.").
[304] *In re Schlomer,* 672 B.R. 921, n. 18 (Bankr. W.D. Tex. 2025). The court cited: §§ 541–51; Arens v. Boughton (*In re* Prudhomme), 43 F.3d 1000, 1004 (5th Cir. 1995); Barron v. Countryman, 432 F.3d 590 (5th Cir. 2005);

The court in *Schlomer* stated that the issues of potential avoidability or recovery of any prepetition transfers for a retainer, or whether a retainer is property of the estate, were beyond the scope of its opinion, and that applies to the discussion here. Note, however, that the same judge in *In re Von Backstrom,* 2026 WL 59377 (Bankr. W.D. Tex. 2026), ruled that an attorney's $15,000 prepetition security retainer for anticipated services in defending adversary proceedings was property of the estate and required the attorney to turn the retainer over to chapter 7 trustee. The court explained that, under Texas law, the security retainer was not earned at the time of filing of the case, the attorney held it in trust such that it was property of the estate, and estate property cannot be used to defend dischargeability actions or to protect exemptions.

The second issue is whether the expenses of dischargeability litigation are deductible in determining a debtor's projected disposable income.

If a debtor cannot use estate property to pay expenses of dischargeability litigation, one argument is that they cannot be deducted because, due to the cramdown discharge that gives rise to the PDI requirement, all assets and earnings of the debtor are property of the estate. Because the debtor cannot use property of the estate to pay the expenses, no deduction is permissible.

The second argument is that dischargeability litigation expenses are not expenditures that the definition of disposable income permits. The question is whether they are expenditures for the "maintenance and support" of the debtor or necessary for the "continuation, preservation, or operation of the business of the debtor."

In *In re Premier Glass Services, LLC,*[305] the court considered whether the debtor could deduct anticipated legal fees for appealing from an arbitration award against the debtor and its principal jointly and defending the dischargeability litigation the creditor filed.[306] The litigation thus involved the merits of the creditor's claim as well as its dischargeability. The court ruled that the debtor had not established that the amount of the fees was based on a reasoned projection and had not shown that the fees were necessary for the continuation, preservation, or operation of the debtor's business. Further, the court ruled that the evidence did not show that the deduction for legal fees was "fair and equitable."[307] (The court did not consider whether fees for dischargeability litigation could not be deducted because the debtor could not pay them from estate assets.)

The court expressed concern that payment of the legal fees provided "considerable benefit" to the debtor's owners and the principal at the expense of creditors. If the creditor prevailed, the court said, "the deduction for legal fees will be a total loss, and will be, in effect, a transfer from [the creditors] to the [Debtor's] counsel."[308]

Wootton v. Ravkind (*In re* Dixon), 143 B.R. 671 (Bankr. N.D. Tex. 1992); *In re* Miell, 2009 WL 2253256, at *1–4 (Bankr. N.D. Iowa 2009).

[305] 664 B.R. 465 (Bankr. N.D. Ill. 2024).

[306] The court had ruled that the § 523(a) exceptions applied to the debtor's discharge if cramdown confirmation occurred. Christopher Glass & Aluminum, Inc. v. Premier Glass Services, LLC (*In re* Premier Glass Services, LLC), 2024 WL 3808696 (Bankr. N.D. Ill. 2024).

[307] *Id.* at 476.

[308] *Id.* at 477.

The court denied confirmation because the debtor did not meet its burden of proof and permitted the debtor to file a new plan.[309] It did not make a definitive ruling on the deductibility of the litigation expenses. Nevertheless, the opinion illustrates the difficulties debtors face in paying for litigation against creditors with money that would otherwise be available to pay them.

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

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

B, Postpetition Property and Earnings in Subchapter V Cases

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

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

C. 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* § XI(B).

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[310] 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

[309] *Id.* at 469.

[310] 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* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 10, § 16:7 at 362-63.

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 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.

XII. Default and Remedies After Confirmation

A. Remedies for Default in the Confirmed Plan*

The provisions of a debtor's confirmed 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.

APPENDIX B* Summary of Amendments to The Federal Rules of Bankruptcy Procedure to Implement SBRA

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rule 1020(a) – Provides for the debtor to state in a voluntary petition whether the debtor is a small business debtor and, if so, whether the debtor elects application of subchapter V. election of subchapter V to be included in voluntary petition. In an involuntary case, the debtor must provide the same information in a statement filed within 14 days of the order for relief.

Former Rule 1020(c), providing for a small business 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, is deleted.

Former Rule 1020(d) is 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 on a creditor's committee (unless a committee has been appointed) and instead requires service on the 20 largest unsecured creditors.

Rule 2009(c) – Permits appointment of one trustee in jointly administered case under subchapter V as well as in cases under chapters 7 and 11.

Rule 2012 – Makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter inapplicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as Rule 2015(c). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rule 3011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in "small business case" also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a "small business case," although a subchapter V debtor is a "small business debtor.")

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

APPENDIX C Summary Comparison of Bankruptcy Code Chapters 11, 12, & 13 (Prepared by Bankruptcy Judge Mary Jo Heston's Chambers)
APPENDIX D Key Events in the Timeline of Subchapter V Cases (Prepared by Bankruptcy Judge Benjamin A. Kahn and Law Clerk Samantha Ruben)
APPENDIX E Comparison of Subchapter V With Chapter 13 and Chapter 11