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SUBCHAPTER V

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Materials Included:

1. *Summary of Subchapter V*.
2. *Subchapter V Eligibility*, by Christopher A. Jones, March 2024.
3. *Cramdown Confirmation*, by David Cox, March 2024.
4. ABI Article, *Must the Sub V Debtor's Debts Be Linked to Its Current Business?* ABI JOURNAL, Vol. XLII, No. 10, October 2023, by Caleb Chaplain and David Cox.
5. *Top 15 Features of New Subchapter V*, by Hon. Paul W. Bonapfel, U.S. Bankruptcy Judge, N.D. Georgia, February, 2020.
6. *Key Events in the timeline of Subchapter V Cases, by Hon. Benjamin A. Kahn,* U.S. Bankruptcy Judge, M.D. North Carolina, and Samantha M. Ruben, Law Clerk.
7. *Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12 & 13*, prepared by the chambers of the Hon. Mary Jo Heston, U.S. Bankruptcy Judge, W.D. Washington.
8. *Small Businesses, Big Challenges*, by Hannah W. Hutman and David Cox, May 2022.

Summary of Subchapter V

Judge Bonapfel of the Bankruptcy Court for the Northern District of Georgia has put together a detailed and helpful guide on subchapter V (the "Guide") that is freely available on his Court's website: https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf. The majority of the information included in these materials were originally discussed in the Guide. Additionally, we have pulled certain exhibits from Judge Bonapfel's Guide and included them herein. If you would like more information on subchapter V, the Guide is a great first step and resource.

Through the Small Business Reorganization Act of 2019 ("SBRA"), Congress created subchapter V of Chapter 11. Subchapter V provides a streamlined Chapter 11 process to provide an economically feasible and efficient option for small business debtors, and to remove some of the obstacles to reorganization. Subchapter V is limited to individuals and entities that qualify as a "small business debtor"—defined as a person or entity engaged in commercial or business activities that has aggregate secured and unsecured debts as of the date of filing of less than $2,725,625.00. This threshold debt amount was increased to $7,500,000.00 under the Coronavirus Aid, Relief, and Economic Security Act (the "Cares Act") and the subsequent Bankruptcy Threshold Adjustment and Technical Corrections Act (the "Corrections Act"). The Corrections Act extended the increase in the debt limit until June 2024.

Debtors who qualify for subchapter V must affirmatively elect such treatment. If a small business debtor does not make the election, the current provisions of chapter 11 governing small business cases, rather than subchapter V debtors, will apply. For debtors that elect to proceed under subchapter V, it will (1) modify confirmation requirements; (2) provide for the participation of a trustee while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) change several administrative and procedural rules; (4)

alter the rules for the debtor's discharge; and (5) modify the definition of property of the estate with regard to property an individual debtor acquires postpetition, including postpetition earnings (which has implications for operation of the automatic stay of § 362(a)).

A. Changes in Confirmation Requirements

First, only the subchapter V debtor may file a plan or a modification of it. The court may confirm the debtor's plan even if all classes reject it. Additionally, the absolute priority rule is not included in the "fair and equitable" requirement for cramdown confirmation in subchapter V. Instead, the plan must comply with a new projected disposable income requirement. *See In re Staples*, Case No. 2:22-cv-157-JES, Docket No. 15 (Jan. 6, 2023) (finding that confirmation order requiring all actual disposable income be reported and distributed did not violate subchapter V because the value of the property to be distributed was not less than the projected disposable income). The impact of these changes means that a small business owner can keep the sweat equity in their business through this process. This is an impactful change as subchapter V debtors often have their retirement plans in their businesses.

Unlike standard chapter 11, 12, or 13 cases, the subchapter V plan can modify a claim secured only by a security interest in the debtor's principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor.

B. Debtor in Possession

Under subchapter V, the debtor remains in possession of its assets and operates the business with the rights and powers of a trustee, unless the debtor is removed as debtor in possession by the court. Additionally, the U.S. Trustee appoints a subchapter V trustee to oversee and monitor the case, appear and be heard on specified matters, to facilitate a consensual plan, and

to make distributions under a nonconsensual plan confirmed under the cramdown provisions. As discussed more below, the role of the subchapter V trustee is not quite as adversarial as in other chapters.

C. Case Administration

Subchapter V modifies the typical chapter 11 procedures in several respects. The changes are summarized in the chart included below from Judge Bonapfel's Guide.

a. No committee of unsecured creditors. Unless the court orders otherwise, a committee of unsecured creditors is not appointed in a subchapter V.[1]

b. Required status conference and report from debtor. Within 60 days of the filing, the court must hold a status conference on the case. No later than 14 days before this status conference, the debtor must file a report detailing the efforts the debtor has and will make to achieve a consensual plan.

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

d. No disclosure statement. Section 1125, which states the requirements for disclosure statements and regulates the solicitation of acceptances for a plan, does not apply in a subchapter V case unless ordered otherwise. Accordingly, no disclosure statement is required. However, the plan must include many of the details that are traditionally found in a disclosure statement: (1) brief history of the debtor's business operations; (2) liquidation analysis; and (3) feasibility projections.

[1] This rule was also made applicable in non-subchapter V chapter 11 cases for small business debtors by SBRA.

e. No U.S. Trustee fees. One of the modifications contributing to the economic feasibility of subchapter V is the lack of U.S. Trustee fees. The debtor is not required to pay U.S. Trustee fees under subchapter V.

D. Discharge

a. Consensual Plan. If the court confirms a consensual plan, the subchapter V debtor receives a discharge under § 1141(d)(1)(A) upon confirmation. Subsection 1141(d)(5) which delays discharge in individual cases until completion of payments does not apply in subchapter V cases. One effect of such discharge is that the automatic stay terminates under § 362(c)(2)(C).

b. Cramdown Plan. If the court confirms a cramdown plan, § 1141(d) does not apply and confirmation does not result in a discharge. Rather, new § 1192 provides for a discharge upon the completion of plan payments for a period of at least three years or such longer time not to exceed five years as fixed by the court.

E. Property of the Estate

Under § 1115, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. However, this section does not apply in a subchapter V. But, if the court confirms a plan under the cramdown provisions of the new § 1191(b), property of the estate will include postpetition assets and earnings in cases of both individuals and entities.

Role of the Subchapter V Trustee

A subchapter V trustee is appointed in all subchapter V cases. Subchapter V trustees are standing trustees as opposed to panel trsutees. A subchapter V trustee takes on a similar role to a chapter 12 or 13 trustee. However, a subchapter V trustee has the specific duty to "facilitate the

development of a consensual plan of reorganization" as discussed in the new § 1183(b)(7). This likely will present different issues for a subchapter V trustee than their chapter 12 or 13 counterparts and may result in a less adversarial relationship between the parties.

Section § 1183 lists the trustee's duties. Section 1106, which details the duties of a trustee in a standard chapter 11, does not apply in a subchapter V case. However, § 1183 does incorporate several of the provisions of § 1106 in certain circumstances. As in chapters 12 or 13, the subchapter V debtor retains possession of its assets and operates the business. However, if the debtor is removed as debtor in possession, the subchapter V trustee can be ordered to operate the business of the debtor.

The subchapter V trustee is tasked with participating in the plan process and to be heard on plan and other matters, which implies a right to obtain information about the debtor's property, business, and financial condition. However, the subchapter V trustee, like a chapter 12 trustee, does not have a duty to investigate the financial affairs of the debtor. Chapter 7, 13, and 11 trustees have a broad duty of investigation, but the subchapter V trustee enjoys a much less adversarial role. However, the court may impose investigative duties upon the subchapter V trustee under § 1183(b)(2).

Similar to chapters 12 and 13, a subchapter V trustee under § 1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received; (2) to examine proofs of claim and object if necessary; (3) to oppose the discharge of the debtor if advisable; (4) to furnish information concerning the estate and its administration as requested by parties in interest, unless the court orders otherwise; and (5) to make and file a final report. Additionally, under § 1183(b)(4), the subchapter V trustee has the duty, like chapter 12 and 13 trustees, to ensure that the debtor commences timely payments under a confirmed plan.

Subchapter V Eligibility

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1) Eligibility for Subchapter V

   a) Determined "as of" the petition date.

      i) In re Hillman, 2023 WL 3804195, at *3 (Bankr. N.D.N.Y. June 2, 2023) ("Debtor must demonstrate she was presently engaged in commercial or business activities as of the Petition Date.")

      ii) In re Thurmon, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020) ("In § 1182(1)(A) of the Bankruptcy Code, 'engaged in' is written not in the past or future but in the present tense.")

      iii) In re Ikalowych, 629 B.R. 261, 281 (Bankr. D. Colo. Apr. 15, 2021) ("[T]he 'engaged in' phrase is used throughout the Bankruptcy Code, and it always means the same thing: that a person or entity is presently doing something.")

   b) Court can consider eligibility *sua sponte* at any time.

      i) *In re CYMA Cleaning Contractors Inc.*, 2023 WL 7117445, at *3 (Bankr. D.P.R. Oct. 27, 2023) (court "may *sua sponte* revoke the Subchapter V designation made by a debtor in its petition under the Bankruptcy Code" even though no party objected to the designation and the deadline had passed more than a year before).

   c) Contingent liabilities – how are they considered?

      i) In re Parking Mgmt., Inc., 620 B.R. 544, 555 (Bankr. D. Md. 2020) ("[L]ease rejection claims were contingent as of the date of filing and are not considered in the debt limitation determination.")

      ii) In re Macedon Consulting, Inc., 652 B.R. 480, 486 (Bankr. E.D. Va. 2023) (court held that full future liability under commercial leases must be considered noncontingent and liquidated" for purposes of calculating noncontingent liquidated debts)

   d) Is the debtor engaged in commercial or business activities?

      i) In re Fam. Friendly Contracting LLC, 2021 WL 5540887, at *3 (Bankr. D. Md. Oct. 26, 2021) ("Virtually all have applied a liberal construction of the phrase in keeping with the SBRA's purpose and the language of § 1182(1)(A).")

ii) In re Ikalowych, 629 B.R. 261, 276 (Bankr. D. Colo. 2021) ("[T]he plain or ordinary meaning (i.e., the meaning understood by a typical speaker of the English language) of the phrase "commercial or business activities" is exceptionally broad."

iii) In re Hillman, Case No. 22-10175, 2023 WL 3804195 (Bankr. N.D.N.Y. June 2, 2023) (court found that finding that the debtor's defense of a state court action involving a defaulted commercial lease agreement by an entity in which the debtor had a 50% interest and the debtor's personal guaranty of such agreement was sufficient "winding down activity" for the debtor to satisfy the "engaged in commercial or business activities" requirement).

iv) In re Robinson, 2023 WL 2975630 (Bankr. S.D. Miss. Apr. 17, 2023) (finding that the debtor was eligible for subchapter V because he was engaged in commercial or business activities by winding down his poultry farming business which involved managing his farm assets, actively seeking buyers for the farm and its assets, and maintaining and inspecting the improvements on his property).

e) "[N]ot less than 50 percent" of the debtor's debt must have "ar[isen] from the commercial or business activities of the debtor." 11 U.S.C. § 1182(1)(A).

i) In re Hillman, 2023 WL 3804195, at *3 (Bankr. N.D.N.Y. June 2, 2023) (holding that a debtor must meet a "nexus requirement" by showing that that at least fifty percent debtor's aggregate debt arose from the same "commercial or business" activity as that which is considered for subchapter V eligibility).

ii) In re Reis, 2023 WL 3215833 (Bankr. D. Idaho May 2, 2023) ("By employing the verbiage it did, Congress left open the possibility that the commercial or business activities which gave rise to the debt might be different from the commercial or business activities the debtor was engaged in on the day the petition was filed").

f) Affiliate with greater than $7,500,000 not eligible.

i) "[A]ny member of a group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders)" cannot be a Subchapter V debtor. 11 U.S.C. § 1182(1)(B)(i).

ii) In re Dobson, 2023 WL 3520546 (Bankr. W.D. Va. Mar. 7, 2023) (holding that subchapter V eligibility under both 1182(1)(A) and (B) is determined as of the petition date and determining that the debtors were eligible for subchapter V).

iii) In re Free Speech Sys., LLC, 649 B.R. 729 (Bankr. S.D. Tex. 2023) (holding that the postpetition filing of an affiliate with debts in excess of the debt limits does not cause a subchapter V debtor to become ineligible for subchapter V).

Cramdown Confirmation

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I. Overview of Confirmation Options

A. Consensual Confirmation vs. Nonconsensual Confirmation – a/k/a Cramdown

1. *All Impaired Classes Accept.* A subchapter V plan may be confirmed consensually under 11 U.S.C. § 1191(a) if all of the requirements of § 1129(a) are satisfied, including paragraph (8) requiring all impaired classes to have accepted the Plan but not including paragraph (15).

2. *Section 1191(b) Option If Nonacceptance*. If any impaired class fails to vote to accept the plan (as would be required under § 1129(a)(8)), then the subchapter V plan may still be confirmed under the cramdown provisions of § 1191(b).

3. *Cramdown.* Confirmation of the Plan "nonconsensually" under 11 U.S.C. § 1191(b) is commonly referred to as confirmation by "cramdown," the requirements of which are summarized below.

§ 1191. Confirmation of plan

(a) Terms. The court shall confirm a plan under this subchapter [*11 USCS §§ 1181* et seq.] only if all of the requirements of section 1129(a) [*11 USCS § 1129(a)*], other than paragraph (15) of that section, of this title are met.

(b) Exception. Notwithstanding section 510(a) of this title [*11 USCS § 510(a)*], if all of the applicable requirements of section 1129(a) of this title [*11 USCS § 1129(a)*], other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

II. Cramdown Confirmation Requirements

A. Cramdown Requirements Generally.

1. *Two-part Test As to Impaired Classes*. Under the cramdown rules of 11 U.S.C. § 1191(b), if all other confirmation standards are met, a bankruptcy court shall confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan:

(a) does not discriminate unfairly, and

(b) is fair and equitable.

2. *Mirrors § 1129(b)(1) – No Unfair Discrimination*. The subchapter V conditions for cramdown confirmation are facially the same as the section § 1129(b)(1) requirements for cramdown confirmation in a non-subchapter V chapter 11 case.

> **1129 (b)**
>
> **(1)** Notwithstanding section 510(a) of this title [*11 USCS § 510(a)*], if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

3. *Differs from § 1129(b)(2) – Fair and Equitable Definition.* Section 1129(b), however, does not apply in a subchapter V case, and there is a rule of construction that replaces and differs from § 1129(b)(2) for purposes of applying the condition that the plan be fair and equitable in a subchapter V case.

B. Understanding Requirement of No Unfair Discrimination

1. *Unfair?* There can be "discrimination," so long as it is not "unfair." 7 *Collier on Bankruptcy* ¶ 1129.03 (16th 2023).

2. *Test For Unfair Discrimination.* In concluding that the bankruptcy court did not err in determining that the plan met the necessary requirements for court approval under 11 U.S.C. § 1129 (b)(1), the District Court (affirmed by the 4th Circuit by an unpublished *per curiam* opinion, *In re Jim Beck, Inc.*, 214 B.R. 305, 307 (W.D. Va. 1997), *aff'd*, 162 F.3d 1155 (4th Cir. 1998)) agreed with the use of the following four-part test to gauge "unfairness:"

a. whether there is a reasonable basis for the discrimination;

b. whether the plan can be confirmed and consummated without the discrimination;

c. whether the discrimination is proposed in good faith; and

d. the treatment of the classes discriminated against.

3. *Disparate Treatment Without Reasonable Basis.* A plan unfairly discriminates in violation of § 1129(b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment, or a class of claims receives consideration of a value that is greater than the amount of its allowed claims. *In re Health Diagnostic Lab., Inc*., 551 B.R. 218, 230 (Bankr. E.D. Va. May 12, 2016).

C. Understanding the Fair and Equitable Requirement.

1. *Generally*. Section 1191(c) provides a "rule of construction" that replaces the requirements in § 1129(b)(2) for a plan to be fair and equitable in subchapter V case. Importantly, the fair and equitable requirement in a subchapter V case does not include the absolute priority rule. 8 *Collier on Bankruptcy* ¶ 1191.03 (16th 2023).

§ 1191(c):

> **(c) Rule of construction.** For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:
>
> **(1)** With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title [11 USCS § 1129(b)(2)(A)].
>
> **(2)** As of the effective date of the plan—
>
> **(A)** the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or
>
> **(B)** the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.
>
> **(3)**
>
> **(A)** The debtor will be able to make all payments under the plan; or
>
> **(B)**
>
> **(i)** there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and
>
> **(ii)** the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.

2. *Fair and Equitable as to Secured Claims*. With regard to secured claims, however, the subchapter V fair and equitable requirement is the same as it is in a non-subchapter V chapter 11 case. Paragraph (1) of § 1190(c) states that the plan must meet the requirements of § 1129(b)(2)(A). 8 *Collier on Bankruptcy* ¶ 1191.03 (16th 2023).

§ 1129(b)(2)(A):

> **(2)** For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> **(A)** With respect to a class of secured claims, the plan provides—
>
> **(i)**
>
> **(I)** that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> **(II)** that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> **(ii)** for the sale, subject to section 363(k) of this title [*11 USCS § 363(k)*], of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> **(iii)** for the realization by such holders of the indubitable equivalent of such claims.

3. *Fair and Equitable with respect to Each Class of Claims*. Section 1191(c) provides a "rule of construction" for what is "fair and equitable" and describes three requirements to satisfy the condition that a plan be "fair and equitable" with respect to each class of claims or interests.

a. First, it requires the commitment of projected disposable income ("PDI"), or its value, for a period of three to five years, as the court determines under § 1191(c)(2)(A).

b. Second, it includes a "feasibility" requirement in § 1191(c)(3)(A).

c. Finally, the plan must provide "appropriate remedies" to protect holders of claims and interests if payments under the plan are not met in § 1191(c)(3)(B).

4. *Mandatory Cramdown Requirements*. So, regardless of how the plan satisfies subpart (a) above (with respect to projected disposable income or its value), § 1191(c)(3) requires that for a plan to be confirmed under the cramdown provisions, the Court must find EITHER:

a. "[t]he debtor will be able to make all payments under the plan" or

b. there is a reasonable likelihood the debtor will be able to make all payments under the plan and "the plan provides appropriate remedies . . . to protect the holders of claims or interests in the event that the payments are not made."

D. Understanding the Requirement of PDI or its Value Under § 1191(c)(2)(A)

1. *Entity Or Individual.* Paragraph (2) of § 1191(c) imposes a projected disposable income requirement, applicable in cases of corporations and other entities as well as of individuals. 8 *Collier on Bankruptcy* ¶ 1191.03 (16th 2023).

2. *Alternatives to Satisfy PDI Requirement.* The commitment of PDI under § 1191(c)(2)(A) as required under subchapter V may be satisfied in one of two alternate ways.

a. *Periodic Payment Alternative.* The first method requires that the plan provide that "all of the projected disposable income to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix . . . be applied to make payments under the plan." 11 U.S.C. § 1191(c)(2)(A). The statute does not state how the court is to fix or determine the length of the commitment period of the PDI (the "PDI Period"). Section 1191(c)(2)(A) does provide, however, that the PDI Period begins on the date that the first payment is due under the plan.

b. *Value Alternative.* The second alternative permits confirmation if "the value of the property to be distributed under the plan in [the PDI Period], beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor." 11 U.S.C. § 1191(c)(2)(B).

III. Projected Disposable Income

A. No PDI Definition. The Bankruptcy Code does not define "projected disposable income," but it defines "disposable income" in 11 U.S.C. § 1191(d) as income that is received by the debtor and that is not "reasonably necessary to be expended" for these specified purposes:

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

B. Is PDI Fixed or does it Float?

1. *Plain Language – Projected and Fixed.* When the statute's language is plain, the sole function of the courts is to enforce it according to its terms. *Lamie v. Treasury*, 540 U.S. 526, 534 (2004). The statute itself refers to "projected" disposable income, indicating that the debtor makes payments based on expectations of what its income and expenditures will be.

2. *But Compare*:

a. *Floats -- Must Pay Actual Disposable Income*. A cramdown plan (confirmed under § 1191(b)) in subchapter V can require an individual debtor to calculate disposable income every quarter and to increase payments automatically to unsecured creditors if actual disposable income turns out to be more than projected disposable income, according to District Judge John E. Steele, who affirmed Bankruptcy Judge Caryl E. Delano of Tampa, Fla. *Staples v. Wood-Staples (In re Staples)*, 22-157 (Bankr. M.D. Fla. Jan. 6, 2023).

b. *Fixed -- Must Pay What Is Projected At Effective Date*. The Supreme Court applies Chapter 13's "projected disposable income" requirement. The Supreme Court considers the plain meaning of the word "projected" and focuses on how disposable income is to be projected. The Supreme Court's opinion emphasizes that "projected disposable income" in § 1325(b)(1) requires a "forward-looking" calculation that's to be determined "as of the effective date of the plan.". *Hamilton v. Lanning*, 560 U.S. 505 (2010). Subchapter V's "projected disposable income" requirement (in § 1191(c)) is also to be determined "as of the effective date of the plan." Chapter 12, too, contains the same "effective date of the plan" language (in § 1225(b)(1)).

§ 1325(b)(1):

> (b)
>
> **(1)** If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
>
> **(A)** the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> **(B)** the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

§ 1225(b)(1):

> (b)
>
> **(1)** If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
>
> **(A)** the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim;
>
> **(B)** the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c) [11 USCS § 1222(c)], beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or
>
> **(C)** the value of the property to be distributed under the plan in the 3-year period, or such longer period as the court may approve under section 1222(c) [11 USCS § 1222(c)], beginning on the date that the first distribution is due under the plan is not less than the debtor's projected disposable income for such period.

3. *Remember – Postconfirmation Plan Modification Only By The Debtor*. Subchapter V does not permit postconfirmation modification at the instance of anyone except the debtor per § 1193. Thus, although a sub V debtor can seek postconfirmation modification to reduce payments if its actual results turn out to be worse than projected, creditors do not have a similar remedy to increase plan payments if the debtor does better than expected.

4. *Compare SubV to Chapters 12 & 13*. Under Chapter 13, § 1329(a) permits the trustee or an unsecured creditor to seek modification, and under Chapter 12, § 1229(a) similarly allows such parties to seek postconfirmation modification. As such, the trustee or an unsecured creditor can propose a modification to require the debtor to pay more money based on an increase in disposable income in Chapters 12 & 13.

§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments;

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that—

(A) such expenses are reasonable and necessary;

(B)

(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title [11 USCS § 1325(b)];

and upon request of any party in interest, files proof that a health insurance policy was purchased.

§ 1229. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, on request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments;

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) provide for the payment of a claim described in section 1232(a) [11 USCS § 1232(a)] that arose after the date on which the petition was filed.

(b)

(1) Sections 1222(a), 1222(b), and 1223(c) of this title [11 USCS §§ 1222(a), 1222(b), and 1223(c)] and the requirements of section 1225(a) of this title [11 USCS § 1225(a)] apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

(d) A plan may not be modified under this section—

(1) to increase the amount of any payment due before the plan as modified becomes the plan;

(2) by anyone except the debtor, based on an increase in the debtor's disposable income, to increase the amount of payments to unsecured creditors required for a particular month so that the aggregate of such payments exceeds the debtor's disposable income for such month; or

(3) in the last year of the plan by anyone except the debtor, to require payments that would leave the debtor with insufficient funds to carry on the farming operation after the plan is completed.

IV. Other Cramdown Issues

A. Three of Five Year Term / Commitment Period for Projected Disposable Income?

1. *Is There Cause to Extend?* "While at first blush the simple math of an extended plan term might seem to generate a higher payment to unsecured creditors, the inherent risks to the small business debtor of that extension could defeat the unsecured creditors' desire for greater recovery." *In re Urgent Care Physicians, Ltd.,* No. 21-24000-BEH, 2021 WL 6090985, at *9–11 (Bankr. E.D. Wis. Dec. 20, 2021).

2. *When Is It Appropriate For the Court To Extend The Commitment Period?* One example may be when the debtor elects to reserve funds as part of its budget for anticipated expansion of the business might be a reason to extend the term of the plan beyond the 3-year minimum commitment. See Hon. Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* at 121 (July 2021).

B. Payment of Administrative Expenses.

1. *Admin Claims.* With the exception noted below, §1129(a)(9)(A) requires a plan to provide for the payment in cash, on the effective date of the plan, of claims of the kind specified in §§ 507(a)(2) and 507(a)(3), unless the holder of the claim has agreed to different treatment.

a. Claims under § 507(a)(2) include administrative expenses allowable under § 503(b).

b. Claims under § 507(2)(3) are claims allowable under § 502(f), which are claims arising in the ordinary course of business after the filing of an involuntary petition but before appointment of a trustee or entry of an order for relief.

2. *Nonconsensual Plan Exception To Admin Claim Payment On Effective Date.* A consensual plan confirmed under § 1191(a) must comply with this requirement, but § 1191(e) permits cramdown confirmation of a plan that provides for payment of such claims over time through the plan. 8 *Collier on Bankruptcy* ¶ 1191.03 (16th 2023).

§1191(e):

> **(e) Special rule.** Notwithstanding section 1129(a)(9)(A) of this title [11 USCS § 1129(a)(9)(A)], a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title [11 USCS § 507(a)] may be confirmed under subsection (b) of this section.

3. *Can unpaid administrative rent be deferred and paid through the plan? In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.82 (Bankr. S.D. Fla. 2020) (stating that a small business plan is unconfirmable unless it provides for "payment in full of [landlord's] administrative rent claim on the effective date of the plan.").

C. Evidentiary Burden.

1. *Preponderance.* The debtor bears the burden of establishing that the plan confirmation requirements have been satisfied, by a preponderance of the evidence. *In re South Canaan Cellular Investments, Inc*., 427 B.R. 44, 61 (Bankr. E.D. Pa. 2010).

2. *Who May Be Heard?* Any party in interest has the right to appear and be heard on confirmation of the plan under § 1109 and may attack a witness's credibility at the hearing under Fed. R. Evid. 607.

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On the Edge

By David Cox and Caleb Chaplain

Must the Sub V Debtor's Debts Be Linked to Its Current Business?

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Editor's Note: *ABI's Subchapter V Task Force, launched in April, is studying practitioners' experiences with the three-year-old law, culminating in a final report to be released in 2024. Learn more at subvtaskforce.abi.org.*

Under § 1182(1), in order to properly elect to proceed under subchapter V, a debtor must not only be "engaged in commercial or business activities," but also "not less than 50 percent" of the debtor's "noncontingent liquidated secured and unsecured debts" must have "ar[isen] from the commercial or business activities of the debtor."[1] Reading these separate criteria together to establish eligibility seems straightforward, yet some courts have read the two elements closely together to require a nexus between the two, and a split of authority has emerged.

Some courts interpret the 50 percent requirement to mean simply that 50 percent of the debt as of the petition date arose from *any* of the debtor's commercial or business activities (not just from activities the debtor was actively engaged in on the petition date).[2] These courts keep the "engaged in business" and 50 percent inquiries separate, with the former analyzing the debtor's "present" as of the petition date and the latter examining the debtor's pre-petition past.[3] However, other courts have adopted an alternative reading and have enforced a "nexus requirement."[4] These courts require that 50 percent (or more) of the debtor's debts must have arisen from the *same* commercial or business activities that the debtor relied on to satisfy the "person engaged in commercial or business activities" requirement for subchapter V eligibility.

Does the language of § 1182 ecessitate a nexus requirement? If do, does this impediment to subchapter V eligibility also comport with the legislative goals in enacting subchapter V? This article explores whether the nexus requirement appropriately limits eligibility to those entities subchapter V was designed to help, or whether it unnecessarily restricts access to the bankruptcy system.

And "The" Has Made All the Difference

Bankruptcy courts imposing a nexus requirement require a "nexus," or significant connection, between 50 percent (or more) of the debtor's debts and the commercial and business activities the debtor was presently engaged in on the petition date. This reading is certainly not illogical. Because the phrase "commercial or business activities" is repeated in § 1182(1)(A)'s "debtor" definition, courts have "grouped the requirements together for legal scrutiny" and have concluded that "[t]he requirements must be read in tandem."[5]

These courts have emphasized the inclusion of the definite article "the" in the relative clause "of which arose from *the* commercial or business activities of the debtor." In English grammar, "[a] definite article points to a definite object"[6]; that is, "the" typically denotes that the noun following it is one that has already been referenced or that is readily identifiable. Had Congress *not* intended that there be a nexus requirement, it could have omitted the "the" and simply required that the debtor have at least 50 percent of its debt arising "from commercial or business activities."

1 11 U.S.C. § 1182(1)(A).
2 *See, e.g., In re Reis*, Case No. 22-00517-JMM, 2023 WL 3215833, 2023 Bankr. LEXIS 1169 (Bankr. D. Idaho May 2, 2023); *In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. 2021).
3 *Reis*, 2023 WL 3215833, at *4.
4 *In re Hillman*, Case No. 22-10175, 2023 WL 3804195, 2023 Bankr. LEXIS 1448 (Bankr. N.D.N.Y. June 2, 2023); *In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021).
5 *Ikalowych*, 629 B.R. at 275-76.
6 *The Chicago Manual of Style* ¶ 5.71 (17th ed. 2017).

One of the earliest reported decisions describing the nexus requirement for subchapter V eligibility is *In re Ikalowych* from the U.S. Bankruptcy Court for the District of Colorado. Following the failure of various business ventures, and in light of personal guarantees of debts for those ventures, John Ikalowych filed a chapter 11 case and elected to proceed under subchapter V.[7] The U.S. Trustee objected to Ikalowych's election.[8]

First, the court addressed whether the debtor was even "engaged in business" as of the petition date. The *Ikalowych* court adopted an "expansive view" of the "very broad and encompassing phrase" "commercial and business activity" for subchapter V eligibility, ultimately concluding that the debtor's wind-down work (and his employment by an insurance company) qualified.[9] The court then turned to the "not less than 50 percent" requirement.

Describing the nexus requirement, the court explained that "[f]or the debt to have 'ar[isen] from the commercial or business activities of the debtor,' the debt must be directly and substantially connected to the 'commercial or business activities' of the debtor."[10] In conducting such an analysis, the court "may also look back in time before the Petition Date to ascertain whether the debt arose from the same general types or categories of 'commercial or business activity' [that] the Debtor was engaged in as of the Petition Date."[11] Given that 86 percent of Ikalowych's debt came from the guarantee claims related to the business he was winding up as of the petition date, the court easily found that he met the 50 percent threshold, even applying the nexus requirement.

More recently, in *In re Hillman*, more than 50 percent of Michelle Hillman's debt arose from her personal guarantee of a defaulted commercial lease agreement originally entered into by an entity that no longer operated but in which she held a 50 percent equity interest.[12] The creditor, which was involved in commercial lease litigation against Hillman and the defunct entity, objected to the subchapter V election.[13]

The U.S. Bankruptcy Court for the Northern District of New York first found that the lease litigation was a sufficient "commercial or business activity" to satisfy the "engaged in business" requirement.[14] In adopting a nexus requirement, the court found the reasoning in *Ikalowych* "to be persuasive" and agreed that the use of the definite article "the" in § 1182(1)(A) was clearly intentional.[15] Fortunately for Hillman, there was a nexus between the wind-down litigation and most of her debt.[16] The court permitted her to proceed under subchapter V. However, the inquiry is not so nuanced in other jurisdictions.

There Is No "Those" There

Some bankruptcy courts that have considered the issue have not imposed a nexus requirement. In *In re Blue*, the U.S. Bankruptcy Court for the Middle District of North Carolina considered the case of an individual debtor who owned and operated a corporation providing information-transport consulting services that had ceased operating almost two years before the filing of her chapter 11 petition.[17]

At the time of the bankruptcy filing, Gwendolyn Blue was a salaried employee with a law firm but also offered services as an information-transport consultant for two other entities as an independent contractor.[18] Although the Bankruptcy Administrator and subchapter V trustee objected to the debtor's eligibility because the majority of her scheduled debt arose from her prior defunct business, the court concluded that the more "straightforward" reading of the statutory language would not implicate a nexus requirement between the commercial or business activities on the petition date and the commercial or business activities from which the debt arose.[19]

Under the court's analysis, to rule otherwise would "disqualify meritorious small businesses from the remedial purposes of subchapter V simply by having significant debts from former operations."[20] The court opted against the more narrow and limiting interpretation urged by the Bankruptcy Administrator and subchapter V trustee, and overruled their objections as to the debtor's subchapter V eligibility.[21]

In *In re Reis*, the U.S. Bankruptcy Court for the District of Idaho two years later joined in the *Blue* court's more expansive interpretation of § 1182. The *Reis* court concluded that eligibility under § 1182(1)(A) requires satisfaction of two distinct and separate tests: (1) Does the debtor have business activities on the petition date; and (2) has at least 50 percent of the debt arisen from commercial or business activities?[22] According to the *Reis* court, the first question "looks at the present — the petition date," but "[t]he latter determination is necessarily backward-looking, as it would be rare for all of a debtor's commercial or business debts to have been incurred on or around the petition date."[23]

The *Reis* court concluded that nothing in the statutory language requires a "direct linkage" between the commercial or business activities that led to the majority of the debt shown on schedules and the commercial or business activities engaged in by the debtor as of the petition date. Simply put, the commercial or business activities for purposes of the two tests could arise from distinctly different business ventures. According to the court, "[h]ad Congress intended to require an absolute nexus, it could have used the phrase 'not less than 50 percent of [the debt] ... arose from *those* commercial or business activities of the debtor.'"[24] Ultimately, the *Reis* court determined that the debt relied on by the debtor to support her subchapter V eligibility did not arise from commercial or business activity; plan confirmation was therefore denied based on the debtor's ineligibility for subchapter V.[25]

7 *Ikalowych*, 629 B.R. at 267.
8 *Id.*
9 *Id.* at 276-78.
10 *Id.* at 288.
11 *Id.*
12 *Hillman*, 2023 WL 3804195, at *1-*2.
13 *Id.*
14 *Id.* at *4.
15 *Id.* at *5.
16 *Id.*
17 *Blue*, 630 B.R. at 183.
18 *Id.*
19 *Id.* at 191.
20 *Id.*
21 *Id.* at 181, 196-97.
22 *Reis*, 2023 WL 3215833, at *4.
23 *Id.*
24 *Id.* at *5.
25 *Id.*

Intent in Enacting the SBRA

Plain-language arguments aside, "the brief legislative history of the [Small Business Reorganization Act of 2019 (SBRA)] indicates it was intended to improve the ability of small businesses to reorganize and ultimately remain in business."[26] One purpose underlying the SBRA was to "streamline the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs," because "small business chapter 11 cases continue[d] to encounter difficulty in successfully reorganizing" despite the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[27] However, does the imposition of a nexus requirement comport with such intention?

The *Ikalowych* court prefaced its nexus requirement discussion by noting that this eligibility criterion "is difficult to meet" and "severely limits the use of Subchapter V for individuals."[28] Although acting as a discerning gatekeeper, the nexus requirement arguably better emphasizes the reorganizational nature of chapter 11 cases. The enactment of subchapter V "establishe[d] an expedited process for small business debtors to *reorganize* quickly, inexpensively, and efficiently."[29] If a small business entity is burdened by debt from one unsuccessful commercial or business activity, perhaps reorganization is not in the best interests of all parties. Allowing a debtor that failed at one activity to try something else instead, to the detriment of its creditors, may go against the goals of subchapter V.

Small business debtors that wish to efficiently liquidate in subchapter V would remain generally unaffected by a nexus requirement. Because the winding up of business affairs qualifies as being "engaged in" that business, it seems that even nexus-requirement courts would permit a debtor to proceed under subchapter V and propose a liquidating plan. The debtors in *Ikalowych* and *Hillman* were both partly "engaged in" winding up corporate entities. If the majority of the business debt is from an unsuccessful venture, pursuit of a liqui dating subchapter V plan may prove optimal.

On the other hand, imposing a nexus requirement may "be far too limiting" and "disqualify meritorious small businesses from the remedial purposes of subchapter V simply by having significant debts from former operations."[30] That is, a more liberal reading may be more in line with the intent behind the SBRA by maximizing its benefits on a larger number of small businesses. Businesses would be free to engage in whichever commercial or business activities best ensure that operations do not completely shut down.

Enhanced flexibility in present engagement not only benefits creditors by providing sustainable revenue to pay debts, it also ensures that employees remain employed. Furthermore, a more expansive eligibility reading of § 1182 allows an entity to reorganize as a new business more quickly and efficiently under subchapter V, no matter how substantially related the resulting business reflects its prior operations.

Conclusion

Although nuanced, the question of whether the debts relied on for subchapter V eligibility arise from the same commercial or business activity engaged in by the debtor on the petition date is a significant issue and potential hurdle to obtaining relief. It is not uncommon for entrepreneurs and small business owners to start (and sometimes fail with) any number of businesses over the course of their careers. Should this group of potential nonconsumer debtors be foreclosed from subchapter V's reorganization opportunities simply because their new business is unrelated to the debts they are burdened with from their prior business ventures?[31]

As with so many Bankruptcy Code sections, the language of § 1182 arguably lends itself to two "plain meanings," each having a very different impact on determining the limits of the universe of potential debtors for whom subchapter V, with its many benefits and advantages, may be an option. With what appears to be such an even split in the reported opinions, the extent to which all parties test the boundaries of eligibility over the coming months and years will be important in developing a majority view from the courts.

Notwithstanding this tension as to how expansively the eligibility provisions should be read, subchapter V has generally been welcomed as a mechanism to eliminate many of the obstacles to small business reorganizations while also providing protection for the creditors of a small business debtor.[32] With time and the addition of case law, eligibility and other critical issues will become clearer, hopefully further encouraging the use of subchapter V. It may fulfill its goals of helping small businesses and their owners file for bankruptcy "in a timely, cost-effective manner" such that they might remain in business to benefit all impacted parties, not just "the owners, but employees, suppliers, customers, and others who rely on that business."[33] abi

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26 *In re Wright*, No. 20-01035-HB, 2020 WL 2193240, at *3 (Bankr. D.S.C. April 27, 2020).
27 H.R. Rep. No. 116-171, at 1, 4 (2019).
28 *Ikalowych*, 629 B.R. at 287.
29 *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 336 (Bankr. S.D. Fla. 2020) (emphasis added); *see also In re Progressive Solutions Inc.*, 615 B.R. 894, 900 (Bankr. C.D. Cal. 2020) ("But, the whole, the entire whole, of the legislative history and statements of Congress teaches the Court that the primary purpose of the SBRA is to promote successful reorganizations using the tools that are now available under current law.").
30 *Blue*, 630 B.R. at 191.
31 The Bankruptcy Code's structure, through chapter 7's rules limiting the application of the means test only to those with primarily consumer debt, arguably works to encourage those willing to start a business that may ultimately fail.
32 8 *Collier on Bankruptcy* ¶ 1180.01 (16th ed. 2023).
33 H.R. Rep. No. 116-171, at 4 (2019) (quoting comments of Rep. Ben Cline).

Top 15 Features of New Subchapter V

11 U.S.C. §§ 1181–1195

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

February 2020

These materials provide a summary of the Small Business Reorganization Act of 2019 that are discussed in more detail in *A Guide to the Small Business Reorganization Act of 2019*, available on Judge Bonapfel's chambers website, http://www.ganb.uscourts.gov/content/honorable-paul-w-bonapfel, under "General Information." References to the "*Guide*" are to that paper.

Introduction

The Small Business Reorganization Act of 2019 ("SBRA"), effective February 19, 2020, enacts a new subchapter V of chapter 11 and makes conforming changes in several provisions of the Bankruptcy Code and title 28. (*Guide* Part I).

New § 1181(a) states the sections of the Bankruptcy Code that do not apply in a subchapter V case, and new § 1181(b) states sections that do not apply unless the court orders otherwise. (*Guide* Appendix A). New § 1181(c) states that § 1141(d) (which deals with the effects of confirmation and discharge) does not apply if the court confirms a "cramdown" plan, except as stated in new § 1192, which governs timing and scope of the discharge in cramdown cases.

Interim Bankruptcy Rules and new Official Forms will apply in subchapter V cases. (*Guide* Appendix B).

1. ***New definitions of "small business debtor" and "small business cases" and election of subchapter V.*** New subchapter V of chapter 11 is available for a small business debtor who elects its application. § 103(*i*). The small business provisions of chapter 11 apply to a small business debtor who does not make the election. (*Guide* Part III).

> § 101(51D) has a revised definition of a "small business debtor." It retains the debt limit, currently $ 2,725,625, but now requires that 50 percent or more of the debt arise from commercial or business activities of the debtor. A debtor engaged in owning or operating real property may now be a small business debtor, unless the debtor owns or operates single asset real estate. It is no longer a requirement that no committee of unsecured creditors exist in the case.
>
> § 101(51C), as amended, provides that a "small business case" is a case in which the debtor is a "small business debtor" and has not elected application of subchapter V. (Thus, a subchapter V case is not a "small business case.")
>
> The debtor must state in its petition whether it is a small business debtor and whether it elects application of subchapter V. Interim Rule 1020(a).

2. ***Appointment of trustee.*** The U.S. Trustee will appoint a subchapter V trustee whose primary duties are to monitor and supervise the case and to facilitate confirmation of a consensual plan. New § 1183. (*Guide* Part IV).

The debtor remains in possession of assets and operates the business with the same rights and duties as an ordinary chapter 11 debtor in possession. New § 1184. (*Guide* Part V).

The court may remove the debtor from possession for cause. If it does, the trustee operates the business of the debtor. The court may also remove the debtor for failure to perform the obligations of the debtor under a confirmed plan. New § 1185(a). (*Guide* §§ IV(B)(3), V(C)).

The U.S. Trustee will appoint trustees on a case-by-case basis. (*Guide* § IV(A)). It appears that the trustee is entitled to reasonable compensation under § 330(a). (*Guide* § IV(E)). A possible issue is whether a trustee should or must employ an attorney or other professional. (*Guide* §§ IV(F)).

3. ***No committee of unsecured creditors.*** No committee of unsecured creditors will be appointed unless the court orders otherwise. SBRA amends § 1102(a)(3) to make the same rule applicable in a small business case (*i.e.,* the case of a small business debtor that does not elect subchapter V). (*Guide* § VI(A)).

4. ***No U.S. Trustee fees.*** The debtor does not pay U.S. Trustee fees. 28 U.S.C. § 1930(a)(6)(A), as amended. (*Guide* § VI(E)).

5. ***Subchapter V debtor has the same reporting requirements as small business debtor under existing law.*** New § 1187 specifies the duties and reporting requirements of a subchapter V debtor. Although § 1116 does not apply in a subchapter V case (new § 1181(a)), new § 1187 incorporates all its requirements. (*Guide* § V(B)).

6. ***Required status conference and debtor report.*** The court must hold a status conference within 60 days after the order for relief. New § 1188. The debtor must file a report not later than 14 days before the status conference that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." New § 1188(c). (*Guide* § VI(C)).

The trustee must appear and be heard at the status conference. New § 1183(b)(3).

In the Northern District of Georgia, the notice of bankruptcy filing will include the time for the status conference.

7. ***Property of the estate.*** § 1115 does not apply in a subchapter V case, but similar provisions become applicable in cases of individuals and entities if the court confirms a "cramdown" plan. (*Guide* Part XI).

§ 1115 provides that, in an individual case, property of the estate includes property that the individual acquires after the filing of the petition and earnings of the debtor from postpetition services.

New § 1186(a) provides that, if the court confirms a cramdown plan, property of the estate consists of property of the estate under § 541, property that the debtor acquired postpetition, and postpetition earnings from services.

8. ***Filing of plan and contents; no disclosure statement.*** Only the debtor may file a plan, new § 1189(a), and the debtor must do so within 90 days of the order for relief, new § 1189(b). (*Guide* § VI(D)). The plan must meet the content requirements of subchapter V. The content requirements of §§ 1122 and 1123 (with three exceptions) remain applicable in a subchapter V case, and new § 1190 states additional requirements. (*Guide* Part VII). Section 1125, which requires a disclosure statement, does not apply unless the court orders otherwise. (*Guide* § VI(B)). New § 1181(b).

The content requirements of § 1123(a)(8) and § 1123(c) do not apply. New § 1181(a). Section 1123(a)(8) requires the plan of an individual debtor to provide for payment to creditors of all or such portion of future earnings or other income as is necessary for execution of the plan. Section 1123(c) prohibits a plan filed by an entity other than the debtor from providing for the use, sale, or lease of exempt property unless the debtor consents. (*Guide* § VII(A)).

New § 1190(3) modifies the rule of § 1123(b)(5) that prohibits modification of a claim secured only by a security interest in the debtor's principal residence. New § 1190(3) permits modification of such a claim if the new value received in connection with the granting of the security interest was not used primarily to acquire the real property and was used primarily in connection with the small business of the debtor. (*Guide* § VII(B)).

New § 1190(1) requires that a plan contain: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan. (*Guide* § VII(B)).

New § 1190(2) requires that the plan provide for the submission of "all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." (*Guide* § VII(B)).

9. ***Payment of administrative expense claims under the plan.*** § 1129(a)(9)(A) requires that a plan must provide for the payment in full of administrative expense claims and "involuntary gap" claims, unless the holder agrees to different treatment. New § 1191(e) permits confirmation of a plan that provides for payment of such claims through the plan if the court confirms it under the "cramdown" provisions of new § 1191(b). Administrative expense claims include fees of the trustee and professionals employed by the debtor and the trustee. They also include § 503(b)(9) claims for goods received by the debtor within 20 days before the filing of the petition. (*Guide* § VIII(B)(6)).

10. ***Confirmation of consensual plan.*** New § 1191(a) provides that the court must confirm a plan if it meets all the requirements of § 1129(a) except the requirement of § 1129(a)(15) that, in an individual case, the debtor must pay projected disposable income to make payments under the plan for five years or the term of the plan, whichever is longer, if an unsecured creditor invokes it. (*Guide* § VIII(A)).

11. ***Cramdown confirmation: no accepting class required, no absolute priority rule; projected disposable income requirement applies to all debtors.*** New § 1191(b) states the rules for cramdown confirmation. Section 1129(b) does not apply in subchapter V cases. New § 1181(a). (*Guide* § VIII(B)).

The court may confirm a plan under new § 1191(b) if:

> (1) all of the requirements for confirmation in § 1129(a) are met except the requirements that all creditors accept the plan ((a)(8)), that at least one impaired class accept the plan ((a)(10)), and that an individual debtor commit projected disposable income ((a)(15));
>
> (2) the plan does not discriminate unfairly; and
>
> (3) the plan is "fair and equitable."

In the case of a class of secured creditors, the provisions of § 1129(b)(2)(A) govern determination of whether the plan is "fair and equitable." (*Guide* § VIII(B)(2)).

New § 1191(c) states a "rule of construction" for determining whether the plan is fair and equitable. The rule:

> (1) imposes a requirement that the debtor (whether an entity or an individual) use all of the debtor's projected disposable income for a three-year period, or such longer period not to exceed five years as the court may fix, to make payments under the plan (*Guide* § VIII(B)(4));
>
> (2) requires a finding that the debtor will be able to make all payments under the plan or that there is a reasonable likelihood that the debtor will be able to make them (*Guide* § VIII(B)(5)); and
>
> (3) requires the inclusion of "appropriate remedies" in the plan in the event of default, including the liquidation of nonexempt assets (*Guide* § VIII(B)(5)).

There is no absolute priority rule.

New § 1191(d) defines disposable income in essentially the same way as chapter 12, § 1225(b).

Key issues are how the court determines disposable income, whether the projected disposable income commitment period should be longer than three years, and how long it should be. The "means test" standards do not apply. Disputes may arise if a debtor wants to reserve funds for anticipated capital improvements or wants to spend money to grow the business. If the debtor is a "pass-through" entity for tax purposes (*e.g.,* an LLC or a subchapter S corporation), a question may be whether the debtor may make distributions to its owners to enable them to pay the tax that they owe individually as a result of the debtor's income. (*Guide* § VIII(B)(4)).

12. ***Payments under the plan.*** How creditors receive payments under the plan differs depending on whether the court confirms a consensual or cramdown plan.

If the court confirms a consensual plan, the service of the trustee terminates upon "substantial consummation." New § 1183(c)(1). The debtor must serve notice of substantial consummation on all parties in interest. New § 1183(c)(2). Substantial consummation generally occurs when distribution under the plan commences. § 1101(2). Thus, the debtor makes payments under the plan. (*Guide* § IX(A)).

New § 1194(b) requires trustee to make payments under a cramdown plan, unless the plan or confirmation order otherwise provides. A likely issue is whether, as in chapter 13 cases, the debtor may make postpetition installment payments on long-term debts that are being cured or reinstated. (*Guide* § IX(B)).

13. ***Discharge.*** The timing of the discharge and its scope depend on whether the court confirms a consensual or cramdown plan.

If the court confirms a consensual plan, § 1141(d) applies, except for paragraph (d)(5). Paragraph (d)(5) defers the discharge in an individual chapter 11 case until the debtor completes payments under the plan and also provides for a "hardship discharge." Because § 1141(d) applies, the debtor receives a discharge upon confirmation. § 1141(d)(1)(A). It does not discharge an individual debtor from any debt excepted under § 523(a). (*Guide* § X(A)).

If the court confirms a cramdown plan, § 1141(d) does not apply. New § 1181(c). Instead, new § 1192 governs the discharge. (*Guide* § X(B)). Significant features are:

(1) The debtor does not receive a discharge until completion of payments due within the first three years, or such longer period not to exceed five years as the court may fix.

(2) The discharge applies to all debts provided in § 1141(d)(1)(A) *and* all other debts allowed under § 503 (administrative expenses).

(3) The discharge does not apply to any debt on which the last payment is due after the first three years, or such longer period not to exceed five years as the court may fix.

(4) The discharge is subject to the exceptions in § 523(a). It is not clear whether the exceptions apply to a debtor that is not an individual.

14. ***Postconfirmation modification.*** The availability of postconfirmation modification depends on whether the court confirms a consensual plan or a cramdown plan. (*Guide* § VIII(C)).

If the court confirms a consensual plan, postconfirmation modification is not permitted after substantial consummation. New § 1193(b). Postconfirmation modification is permissible only if the circumstances warrant and the court confirms it under § 1191(a).

If the court confirms a cramdown plan, the debtor may seek its modification at any time within three years, or such longer period not to exceed five years as the court may fix. § 1193(c). Postconfirmation modification is permissible only if the circumstances warrant it and the court confirms it under § 1191(b).

15. ***Prepetition debt up to $10,000 to professional employed by debtor does not disqualify professional from representing subchapter V debtor.*** New § 1195 provides that a person is not disqualified from employment under § 327(a) solely because of a claim of less than $ 10,000 that arose prior to commencement of the case. (*Guide* § VI(F)).

Key Events in the Timeline of Subchapter V Cases[1]

Benjamin A. Kahn[2]
Samantha M. Ruben[3]

- Election to Have Subchapter V Apply

  - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).[4]

  - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor or a debtor as defined under § 1182(1), and if so, whether it elects to have subchapter V apply. Interim Rule 1020(a).[5]

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[1] A chart containing more detailed subchapter V deadlines follows.

[2] United States Bankruptcy Judge, Middle District of North Carolina.

[3] Law Clerk to Judge Benjamin A. Kahn. B.A., University of Miami, Departmental Honors in International Studies; J.D., Chicago-Kent College of Law, *magna cum laude*, Order of the Coif.

[4] All references to rules herein are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated. On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein.

[5] There is no deadline in the rules for a debtor to amend its statement or election, and Rule 1009 permits a debtor to amend any statement as a matter of course at any time before the case is closed. Nevertheless, § 1188 of subchapter V requires the court to hold a status conference no later than 60 days after the order for relief, and requires the debtor to serve and file a report detailing efforts to attain a consensual plan no later than 14 days prior to the status conference. The court may extend the period of time for holding the status conference only "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." Similarly, § 1189(b) requires a debtor under subchapter V to file a plan no later than 90 days after the order for relief, and permits the court to extend this period only "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." If the debtor does not elect subchapter V, but seeks to amend its statement to elect subchapter V more than 30 days after the order for relief, the court and the debtor will not be able to comply with the time requirements under §§ 1188 and 1189, unless the court extends these periods, and the court only may do so if the need to do so is attributable to circumstances for which the debtor should not justly be held accountable.

- Status Conference

  - Not later than 60 days after the order for relief the court shall hold a status conference "to further the expeditious and economical resolution of a case under this subchapter." 11 U.S.C. § 1188(a).

  - 14 days BEFORE the status conference under 11 U.S.C. § 1188(a), the debtor shall file and serve on all parties in interest "a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." 11 U.S.C. § 1188(c).

- Filing Plan of Reorganization

  - Not later than 90 days after the order for relief, the debtor shall file a plan. The court may extend this period if the need for an extension "is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b).

- Confirmation Hearing[6]

  - 28 days' notice must be given for the deadline to accept or reject and file objections to a proposed plan, and for the hearing to consider confirmation of the proposed plan.[7] Rule 2002(b). The court fixes the date for the confirmation hearing. Rule 3017.2(c).

- Appointment and Termination of Service of Trustee

  - The United States Trustee shall appoint a standing trustee for subchapter V cases, appoint one disinterested person to serve as trustee, or may serve as trustee. 11 U.S.C. § 1183(a).

  - If the plan is consensually confirmed under 11 U.S.C. § 1191(a), the service of the trustee is terminated when the plan is substantially consummated. However, the United

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[6] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

[7] Section 1129(e), which requires that the court confirm a plan in a small business case within 45 days after the plan is filed, does not apply to cases under subchapter V. See 11 U.S.C. § 1181(a); see also 11 U.S.C. 101(51C) (excluding any case in which a debtor elects to have subchapter V apply from the definition of "small business case").

States Trustee may reappoint the trustee for modification of the plan or if the debtor is removed from possession. 11 U.S.C. § 1183(c)(1).

- If the plan is non-consensually confirmed, the trustee will make all payments under the plan, unless the plan or the order confirming the plan provides otherwise. 11 U.S.C. § 1194(b).

- Discharge

  - Consensually Confirmed Plans Under 11 U.S.C. § 1191(a). If a plan is consensually confirmed under 11 U.S.C. § 1191(a), then the general discharge provisions under 11 U.S.C. § 1141(d)(1)-(4) shall apply. See 11 U.S.C. § 1181(a), (c). Therefore, in a non-liquidating subchapter V case, discharge will occur on confirmation of a consensual plan. See 11 U.S.C. § 1141(d)(1).[8]

  - Non-consensually Confirmed Plans Under 11 U.S.C. § 1191(b). If a plan is confirmed under 11 U.S.C. § 1191(b), then the timing provisions for entry of discharge under 11 U.S.C. § 1141(d) shall not apply. See 11 U.S.C. § 1181(c). In such a case, discharge will be entered after completion of all payments due "within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix . . . ." 11 U.S.C. § 1192.[9]

- Modification of a Plan

  - The debtor may modify a plan at any time prior to confirmation. 11 U.S.C. § 1193(a).

  - After confirmation, the debtor may modify a plan consensually confirmed under § 1191(a) prior to substantial consummation of the plan. 11 U.S.C. § 1193(b).[10]

  - After confirmation, the debtor may modify a plan confirmed under § 1191(b) at any time within 3 years, or such longer period not to exceed 5 years, as fixed by the court. 11 U.S.C. § 1193(c).

- Plan Term

  - Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a

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[8] Section 1141(d)(5), which delays discharge until the completion of payments under a plan in an individual case unless otherwise ordered by the court, does not apply in subchapter V cases. 11 U.S.C. 1181(a).

[9] Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.

[10] A consensually confirmed plan only may be modified by consent. 11 U.S.C. § 1193(b).

non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

- Timing of Payments

  - The court may authorize the trustee to make payments to the holder of a secured claim prior to confirmation for purposes of providing adequate protection. 11 U.S.C. § 1194(c).

Subchapter V Deadlines[11]

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	**Deadline**	**Act to Be Performed**	**Code or Rule**[12]
Voluntary debtor	Petition Date	State whether the debtor is a small business debtor or a debtor as defined under § 1182(1) and, if so, whether the debtor elects to have subchapter V apply	Interim Federal Rule of Bankruptcy Procedure 1020(a)
Subchapter V DIP, or Trustee if debtor removed from possession	As soon as possible after the commencement of the case	Give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor	Federal Rule of Bankruptcy Procedure ("Rule") 2015(a)(4)
Subchapter V debtor	Upon electing to proceed under subchapter V	Append to its petition its most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return; or a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no federal tax return has been filed	11 U.S.C.A § 1187(a); 11 U.S.C. § 1116(1)(A), (B)[13]
Involuntary debtor	14 days after the entry of the order for relief	File a statement indicating whether the debtor is a small business debtor and, if so,	Rule 1020(a)

[11] On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein. Deadlines and notations set forth herein that existed under the Federal Rules of Bankruptcy Procedure prior to enactment of subchapter V and that have not been modified by the proposed interim rules have been excerpted from COLLIER PAMPHLET EDITION 2018 Supplement, Time Periods Prescribed by the Bankruptcy Rules (Richard Levin & Henry Sommer eds., Matthew Bender) (the "Collier Supplement").

[12] With respect to deadlines under title 11, only those time periods and deadlines arising under subchapter V of title 11 are included herein. Time periods relating to adversary proceedings, appeals, and claims are not included. For comprehensive deadlines generally applicable to all cases, including subchapter V, see the Collier Supplement.

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

		whether the debtor elects to have subchapter V apply	
Chapter 11 parties in interest	30 days after the conclusion of the meeting of creditors or 30 days after any amendment to the debtor's statement under Rule 1020(a), whichever is later	File objection to the chapter 11 debtor's designation as a small business debtor	Rule 1020(b)[14]
Involuntary debtor	7 days after entry of the order for relief	File a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H	Rule 1007(a)(2)
Chapter 11 debtor	14 days after entry of the order for relief	File a list of the debtor's equity security holders, with the number and kind of interests, and the last known address or place of business of each holder	Rule 1007(a)(3)
Voluntary debtor	14 days after filing petition	File the schedules, statements and other documents required by 1007(b)(1)	Rule 1007(c)
Individual chapter 11 debtor	14 days after filing the petition	File a statement of current monthly income	Rule 1007(c)
Voluntary individual debtor	14 days after entry of the order for relief	File a certificate of credit counseling if debtor filed a statement that debtor received counseling but did not have the certificate on the filing date	Rule 1007(c)
Petitioning creditor(s) in an involuntary case	7 days after issuance of the summons	Serve the summons and a copy of the petition on the debtor	Rule 1010(a); Rule 7004(e)
Involuntary debtor	14 days after entry of the order for relief	File the schedules, statements, and other documents required by Rule 1007(b)(1)	1007(c)
Involuntary chapter 11 reorganization on debtor	2 days after entry of the order for relief	File a list of creditors holding the 20 largest unsecured claims	Rule 1007(d)

[14] Any objection is governed by Rule 9014. See F.R.B.P 1020(c).

Involuntary debtor	21 days after service of the summons, unless made by publication on a party not residing or found within the state in which the court sits	File and serve defenses and objections to an involuntary petition	Rule 1011(b)
U.S. Trustee in a chapter 11 health care business case	21 days after the commencement of the case	File motion to appoint a patient care ombudsman	Rule 2007.2(a)
Debtor's attorney	14 days after the order for relief	File statement whether the attorney has shared or agreed to share the compensation with any other entity	Rule 2016(b)
The court	60 days after entry of the order for relief	Hold a status conference to further the expeditious and economical resolution of a case under subchapter V[15]	11 U.S.C. § 1188(a)
Subchapter V debtor	14 days before the date of the § 1888(a) status conference	Debtor file and serve on the trustee and all parties in interest a report that details the efforts debtor has undertaken and will undertake to attain a consensual plan of reorganization	11 U.S.C. § 1188(c)

TIME PERIODS RELATED TO PLANS

Entity	**Deadline**	**Act to Be Performed**	**Code or Rule**
Subchapter V debtor	90 days after the order for relief	File a chapter 11 plan[16]	11 U.S.C. § 1189
Chapter 11 plan proponent	With the plan or within a time fixed by the court	File a disclosure statement or evidence of prepetition acceptance of a plan <u>if</u> the court has ordered that 11 U.S.C. 1125 will apply[17]	Rule 3016(b)

[15] Under §1188(b), the court may extend the time for holding a status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

[16] The court may extend the 90-day period if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.

[17] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility

Class Including Secured Creditor	Date fixed by the court	Make the election under § 1111(b)	Rule 3014
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time fixed for filing objections and the hearing to consider approval of a disclosure statement, if applicable. See note 17, infra.	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of hearing on disclosure statement and objections in a chapter 11 case, if applicable. See note 17, infra.	Rule 3017(a)
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of time for filing objections to an injunction provided in a chapter 11 plan	Rule 3017(f)(1)
The court	No deadline	Fix a date for the hearing on confirmation.	Rule 3017.2(c)
Holders of claims or interests	Time fixed by the court	Accept or reject the plan	Rule 3017.2(a)
Equity security holder	Time fixed by the court	Record date for eligibility to accept or reject the plan	Rule 3017.2(b)

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

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

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

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

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

DEADLINES THROUGHOUT THE CASE

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

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

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

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

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

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

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

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

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

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

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

Note: The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act referenced herein for an additional year.

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13
Prepared by Mary Jo Heston's Chambers
(Updated July 6, 2020)

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1] No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person who primary activity is the business of owning single asset real estate or operating real property or	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than $7,500,000 (will return to $2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below $10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); §

[1] Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

	conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is "an affiliate of an issuer" under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over $2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a "small business debtor" hinges, at least in part, upon whether a creditor's committee is appointed, and on how much that creditor's committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor's committee thereby extinguishing	§ 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below $10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B). Family farmer must be engaged in a farming operation, including "farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." § 101(21).	1113, CARES Act.

	debtor's small business status. The UST appoints any such committee. *Id.* Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.			
Filing Fees	$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is $325 for disbursements up to $15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first $450,000 paid under the plan, and 3% of any payments in excess of $450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

	final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.			
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11	A disinterested trustee is appointed in every ch. 13 case. § 1302.

	Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the	A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."

Trustee Fees	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for "cause." Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).
Estate Property **Estate Property Post-confirmation**	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	Section 1186 augments § 541 and parallels § 1115 in ch. 11. No separate rule.	Section 1207 augments § 541 and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Section 1306 augments § 541, and parallels § 1115 in ch. 11. Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).

Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b).	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order.	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.

	§ 1123(b)(3)(B).			
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.
Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d). Small Business Debtors: Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes.	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.

Status Conference	Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f). None required.	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).	None required.	None required.
Commencement of Plan Payments	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.		Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019).	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1).
Plan Content	Plans *must*: 1) designate classes of	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2)	Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all

	claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123. Plans *may*: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2). Plans *may*: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222. Under § 1222(b)(1)-(12), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322. Under § 1322(b)(1)-(11), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 *debtors in possession* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable		Ch. 12 debtors in possession *and* trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which	Ch. 13 *debtors* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of

	nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		applies only in ch. 12, allows *trustees* under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017.	

			Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants.	

Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. *In re Rogers*, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income.	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).

	as their larger ch. 11 counterparts.		Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has

				experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch.	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the

	requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).		12 based on the motion date, not the petition date). There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	conversion. § 1307(f).
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523.	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from

	Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1). An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.			discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement, or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328.

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Small Businesses, Big Challenges

A review of options available to small business owners under Chapters 7 and 13, as well as Subchapter V, of the Bankruptcy Code and the challenges associated with those cases.

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I. Introduction

Resolving debt issues for small businesses and their owners is uniquely challenging in the bankruptcy context. In the all-too-common context of a sole proprietor or the small business entity owned by a single member, the tools of bankruptcy are not always easily applied and require special care and consideration from the very first contact with the client. This paper will address issues an attorney should consider in handling small business cases utilizing Chapters 7, 13, and Subchapter V of Chapter 11 of the Bankruptcy Code.

II. Initial Contact with the Small Business Client

Small business owners often misunderstand how bankruptcy works and what assistance a debtor's attorney may be able to provide. Typically, such clients expect simply to "bankrupt" the business to resolve all of their problems. For these reasons it is helpful to handle any potential small business cases with a slightly different process than a conventional consumer case. Prior to setting an initial in-person appointment, consider scheduling a phone conference to clear conflicts and begin the process of establishing appropriate expectations for the client.

A. Initial Phone Call

At the initial phone call, evaluate the objectives of the client and whether this is a case that you are suited to handle. If the size or complexity of the business is not a good fit for the types of cases you have experience handling, use this first call to determine whether you should proceed further or whether a referral is needed. Also, determine whether the small business owner has already decided to conclude his or her business, whether the continuation of the business is expected, or whether the client remains uncertain. As you consult further with the client, this decision may change, of course, but it is helpful to know early on what the client is

thinking. Most importantly, during this first call begin to consider what documents you may need to analyze and identify clearly for the client everything you require that the client bring to the next meeting, with an email or letter as a follow up reminder to the client.

Utilize the first phone call to set expectations about fees, even if you are not able to provide an expected total fee for the case. Unlike the typical "free initial consultation" commonly used for cases on a normal consumer track, consider charging for the initial in-person meeting for your small business clients because of the complexity of the work and to encourage the clients to value your time and advice. Knowing they are being charged a fee will also encourage these clients to take the time to gather all documents that you have requested in order to maximize the value of the appointment and the likelihood of the most complete advice.

B. Initial Client Meeting

Ensuring a productive first in-person meeting with a business client depends almost entirely on the preparedness of the client. Identifying the documents needed to analyze any small business case requires going through a litany of issues. Keep a checklist that you review when identifying the documents you require in order to ensure you have a complete file. Below is a list of the most common documents that should be considered before you can properly advise a client of options for dealing with business related debt.

1. Documents Related to Business Debts

What is Needed	Why Needed	Other Comments
Gather all loan documents from the client: • Notes • Lines of credit • Security agreements • Mortgages or deeds of trust • "Family/Friend" loans • Factoring agreements	These documents will begin to show you who needs assistance by determining whether the individual and/or the entity is actually obligated under the notes. You will also be able to determine: • Who signed any guaranties?	The client's reaction to a request for these documents will give you insight into the client's state of affairs, level of organization and sophistication. Although I always start with requesting these documents

What is Needed	Why Needed	Other Comments
• Payables list • Credit report Other claims: • Lawsuit complaints • Pleadings • Settlement agreements • Counterclaims • Demand letters • Workers Comp claims • Unpaid payroll • Environmental issues • Any potential claims of employees, past or present • Other regulatory proceedings	• The limitation of the guaranties, if any • Identity of any pledged collateral – and does it still exist • Payments terms • Cross-collateralization or cross-default terms It is highly likely, of course, that any "business" credit card is not owed solely by the business but is also owed by the individual as well. However, in some cases you may determine that only the individual is obligated on what he or she thought was a "business" card.	from the client, it is important to also find the available documents in the public records by searching: • Current owner search in the land records (to include deeds, transfers of property, mortgages, judgments, financing statements, tax liens, etc.) • UCC Lien search with the state • Pending or prior lawsuits in the court records • PACER search

2. Documents Related to the Business Formation

What is Needed	Why Needed	Other Comments
Entity documentation: • Articles of incorporation • By-laws • Membership or partnership agreements • Shareholder agreements • Stock certificates • Corporate minute book Any sale transaction documents, including: • Asset purchase agreements • Bills of sale • Security agreements • Guaranty agreements	What is the entity's structure? Is it a corporation, LLC, partnership, sole proprietor, or other? Has the entity been attentive to corporate formalities? Who maintains those records? Who are the owners? Who may bind the entity? What are the limits of the authority of the individual to act on behalf of the entity?	If these documents are missing, determine whether a professional formed the entity, as he or she may have copies. Be sure to check the status of the entity with the secretary of state. Is the entity in good standing with its corporate registration? If not, may the status be reinstated? No matter the course of action, you will likely want the entity in good standing, even if that requires reinstatement.

3. Lease Documents

What is Needed	Why Needed	Other Comments
Leases related to the business property Subleases related to the business property Personal property leases, to include: • Vehicles • Equipment • Software licenses • Copier leases, etc.	Who are the parties to the lease? Is there a personal guaranty? What are the payment terms, is it in default, has it been terminated?	It is vital to determine the relationship with the landlord early in representing the client. Will the landlord cooperate with plans to liquidate or is he or she ready to lock the doors? Have any special "deals" been made (e.g., pledge of equipment in building). If not a "true lease" then perhaps the "financing" may be restructured in bankruptcy. Often times the landlord is a related entity or individual, and may also be a co-obligor on some of the debt. This situation presents additional issues to consider.

4. Tax Documents

What is Needed	Why Needed	Other Comments
Tax documents to include: • Last filed business & personal tax returns (3 years) • K-1s • 1040, 940, 941, etc. Tax debt information including: • Tax notices • Collections • Tax levies • Any correspondence with any tax authority	What are the outstanding tax liabilities? Identify assets of the business Have the entity's payroll taxes been assessed against any individuals? Tax liens filed or threatened?	Consider having the individual sign an IRS Form 8821 so that you may determine current income tax liabilities and whether Trust Fund Recovery Penalty has been assessed. Are all returns filed? Clients in trouble with their businesses rarely seem to be in compliance with their income and payroll tax returns.

What is Needed	Why Needed	Other Comments
		Remember to file "final" returns and report the closing of the business should that occur to ensure that liabilities do not continue to be assessed.

5. Financial Statements

What is Needed	Why Needed	Other Comments
Financial statements of the business, including: • 12 months profit and loss statements • Balance sheet • Inventory lists with values • Accounts receivable • Cash flow projections • Any financial statements provided to a lender Banking account documents, including: • Year to day bank statements from all accounts • Prior year's statements	What is the viability of the business? How is the owner being paid (or not)? Are the documents consistent with one another? Does the P&L match bank account activity? Are assets on the balance sheet consistent with the inventory list? Any conflicts issues?	It can be helpful to have a bookkeeper to refer these clients to in order to clean up recordkeeping issues of the past and set up good procedures going forward. Is this client keeping his or her personal expenses and accounts separate from the business or are there commingling issues?

III. Analysis of Options for the Small Business Owner

Once you have the details and documents from the client, you can begin the process of evaluating that information to determine what relief may be appropriate. Consider carefully the goals of the client. Does the client want to continue the business or is the client ready to end operations? If an owner is ready to close down the business, then determine what he or she is

planning for the future. Knowing, for example, whether an individual client has a wage job lined up, as opposed to starting another business venture, may impact the course of action you advise.

Small business owners typically meet with a bankruptcy attorney with the expectation that they will be "bankrupting" their businesses. They have often been referred by another attorney with little understanding of the different types of bankruptcy options. In many cases, a bankruptcy to shut down the business is not necessary and will not actually solve the client's real problem: his or her personal liability on the business obligations. Most clients, and many lawyers referring these cases to bankruptcy attorneys, do not realize that business entities like corporations and limited liability companies do not receive discharges in Chapter 7 bankruptcies[1] or that the only way to discharge corporate liabilities is through a Chapter 11,[2] which until the enactment of Subchapter V was often cost prohibitive . In addition, most clients and many referring lawyers do not realize that an individual's liability is not extinguished or resolved as a result of a corporate filing. Both the obligations of the entity and the individual owner must be addressed.

Although a corporation or limited liability company may not be a debtor under Chapter 13[3], self-employed individuals doing business as sole proprietors are eligible if their debt does not exceed certain limitations: $465,275.00 in noncontingent, liquidated, unsecured debt and $1,395,875.00 in noncontingent, liquidated, secured debt.[4] With the exception of some debts

[1] Businesses are not entitled to a discharge under chapter 7, although individuals are. See 11 U.S.C. § 727(a)(l).
[2] A discharge may be available under chapter 12 to entities that qualify. However, a discussion of chapter 12 is beyond the scope of this article.
[3] 11 U.S.C. §109(e).
[4] 11 U.S.C. § 109(e). As of the date of the submission of these materials, April 13, 2022, however, legislation is pending on this issue. On April 11, 2022, the Senate passed the amended S.3823, the "Bankruptcy Threshold Adjustment and Technical Corrections Act," via unanimous consent. Sen. Charles Grassley introduced the legislation to raise the debt limits for individual chapter 13 filings to $2.75 million and to remove the distinction between secured and unsecured debt for that calculation. All provisions of the legislation will sunset two years after enactment. The legislation next moves to the House of Representatives for consideration.

that are nondischargeable,[5] the self-employed, sole proprietor individual debtor in a Chapter 13 will receive his or her discharge upon the completion of plan payments.[6]

Subchapter V of Chapter 11 can provide relief to business entities and their owners, whose debts may exceed the Chapter 13 debt limits. Subchapter V may be selected by a Small Business Debtor whose aggregate noncontingent, liquidate, secured and unsecured debts do not exceed $3,024,725.00.[7] The definition of Small Business Debtor includes an individual, partnership or corporation, engaged in commercial or business activities with not less than 50 percent of its debt having arisen from the commercial or business activities of the debtor.[8] Subchapter V should be considered if the business operation is viable and would benefit from a reorganization or if a controlled liquidation presents advantages. The streamlined process of subchapter V makes it a very good option for many businesses that previously would have found Chapter 11 cost-prohibitive and cumbersome.

Ultimately a number of options exist for the failing small business owner, and each must be analyzed. Keep in mind that it may not make sense to file a bankruptcy of any kind for the business. For example, if the corporation will be ceasing operations, perhaps only the individual needs legal protection from the claims of creditors. Remember, however, that when filing solely for the individual owner, creditors can continue to collect against the separate business entity

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[5] *See* 11 U.S.C. §§ 523(a) and 1328(a).
[6] 11 U.S.C. § 1328.
[7] Effective April 1, 2022, as adjusted. The debt limits of Subchapter V were previously temporarily increased to $7,500,000.00 by the CARES Act (signed into law March 27, 2020 and extended by the COVID-19 Bankruptcy Relief Extension Act of 2021). All changes to the SBRA by the CARES Act and the COVID-19 Bankruptcy Relief Extension Act of 2021 then expired by sunset provision on March 27, 2022. As of the date of the submission of these materials, April 13, 2022, however, legislation is pending on this issue. On April 11, 2022, the Senate passed the amended S.3823, the "Bankruptcy Threshold Adjustment and Technical Corrections Act," via unanimous consent. Sen. Charles Grassley introduced the legislation to raise the debt limit back to $7.5 million for small businesses electing to file for bankruptcy under subchapter V of chapter 11. All provisions of the legislation will sunset two years after enactment. The legislation next moves to the House of Representatives for consideration..
[8] Eligible entities to file a Subchapter V also include any affiliate of such individual, partnership, or corporation that is also a debtor under this title and exclude an individual, partnership or corporation whose primary activity is the business of owning single asset real estate. 11 U.S.C. § 101(50D).

even if they are prohibited from doing the same against the individual debtor or his or her assets protected by 11 U.S.C. § 362(a). A co-debtor stay for non-consumer debts does not exist in any chapter of the Bankruptcy Code.

If separate bankruptcies for the business and the individual each need to be filed, consider whether you can (or should) serve as the attorney in both cases, and how should the timing of those filings be strategically managed? For such situations, it is helpful to have another bankruptcy attorney that you can refer one party to in order to avoid potential conflicts of interest. Of course, in some cases, consideration should be given to the idea of doing nothing beyond closing the doors and explaining the risks of judgments and collections. Such a simple approach may be appropriate for the business owner who may be "judgment proof" (that is, more accurately, protected from collections) and the business has no unencumbered assets. Or, do you have a case where a simple workout agreement may be negotiated with key creditors? There may even be appropriate circumstances when the business debts be addressed through a cost-effective Chapter 13 with some careful prebankruptcy planning to ensure eligibility.

The remainder of this paper will address the various options available to small business owners and evaluate when each may be most appropriate.

A. Options to Consider When Ceasing Operations

1. Cease Operations and File Chapter 7 for the Business Entity

The decision to file a Chapter 7 bankruptcy for an entity should be made with great care as the relief available is limited and the risks may be high. The entity will not receive a discharge under Chapter 7.[9] The Chapter 7 filing simply permits the orderly liquidation of the entity's assets by the Chapter 7 Trustee. An entity like a corporation or limited liability company

[9] 11 U.S.C. § 727(a)(l).

has no exemptions, so all assets of the business may be liquidated for the benefit of creditors. The extent of the assets of the estate, though, is not limited to the entity's receivables and inventory. The filing of the bankruptcy permits the Chapter 7 Trustee to examine the books and records of the entity, potentially exposing owners and others to actions to void transfers of property or preferential payments made to them.[10]

Once the bankruptcy estate of the corporation or limited liability company has been fully administered, the bankruptcy Court will close the case.[11] At that point, or sooner if the stay is lifted by motion, the entity remains subject to lawsuits and state court collection remedies. In theory, no assets of significance should remain for creditors, so the likelihood of further legal proceedings against the entity may be low. However, in many cases, the Chapter 7 Trustee may have simply abandoned the assets from the estate, determining they are of *de minimus* value or too risky to pursue. Under these circumstances, the assets would remain owned by the entity and subject to the claims of creditors even after the conclusion of the bankruptcy.[12]

Good reasons can exist, though, for the filing of a small business Chapter 7 bankruptcy. For example, when a corporation or limited liability company owns unencumbered assets and the owner has concern about how best to distribute those assets to creditors, the Chapter 7 provides an orderly and open process for this purpose. In such cases, the proceeding should help to assure even the most skeptical creditors that there has been no fraud or improper action by the business owners. Or, the entity may have unpaid payroll taxes that would be satisfied as priority claims under 11 U.S.C. § 507(a)(8)(C) by the filing of the Chapter 7 and the liquidation of assets, thereby reducing the risk that the owner or others will be assessed the Trust Fund Recovery

[10] See, e.g., 11 U.S.C. §§ 547 and 548.
[11] 11 U.S.C. § 350.
[12] This is a concept you will want to be sure to discuss with your business owner clients as it will likely come as quite a surprise.

Penalty. Perhaps there are even assets that may be recovered from a third party, such as preferences under 11 U.S.C. § 547, that would be used to satisfy those tax liabilities. In other cases, even without assets, the filing of the bankruptcy filing itself may be a sufficiently significant event that aggressive creditors elect cease collection efforts notwithstanding the lack of the entry of a discharge. The notice of the bankruptcy filing alone is often enough for some of the noisiest collectors to close a file and move on.[13]

If the decision to pursue a Chapter 7 bankruptcy is made, ensure you have the authority to file the petition. Bankruptcy courts must look to state law and the entity's governing documents to determine who has authority to commence a bankruptcy case on behalf of a corporation or limited liability company.[14] The source of authority to file a voluntary petition on behalf of a corporation is found in the corporation's bylaws and in accordance with authorization of the corporation's board of directors according to most state laws.[15] Similarly, most limited liability company operating agreements will control the process for filing a bankruptcy petition and the appropriate voting procedures among members of the entity.[16] Be aware, though, that the absence of such authority is a defect that cannot be cured.

> Absent proper authority to file a voluntary petition, the debtor cannot rely on equitable grounds to proceed with a bankruptcy case. Federal Rule of Bankruptcy Procedure 9011 permits sanctions to be imposed on a person who files a voluntary petition on behalf of a corporation without the requisite authority.[17]

[13] This can feel a little like a form of "bankruptcy theater," but often the notice of the bankruptcy filing is just the "message" the creditors need to discontinue collections.
[14] 2 *Collier on Bankruptcy* ¶ 301.04 (16th 2019).
[15] *Id*.
[16] *Id*.
[17] *Id*.

2. Cease Operations and file Subchapter V for the Business Entity

If discontinuing the business is determined to be the best option, but reasons exist that make Chapter 7 undesirable, subchapter V of Chapter 11 should be considered if there are assets remaining to be liquidated. Reasons that may cause a business owner to prefer subchapter V over Chapter 7, in addition to reasons having to do with potential problematic transfers, include, but are certainly not limited to, the ability to control the timing of closure of the business and collection of final assets, greater flexibility in liquidating assets through a subchapter V plan, and owner involvement in the ultimate sale of the assets. These benefits increase dramatically depending on the complexity of the business operation and the difficulty that a Chapter 7 Trustee may have in liquidating assets.

The same considerations outlined above concerning proper authority for filing the petition exist for filing under subchapter V. In addition, while beyond the scope of this article, you will want to have working knowledge of subchapter V and how your particular court is handling subchapter V cases prior to filing the case, so that you can properly advise the client as to what to expect and how best to prepare.

3. Cease Operations without filing a Bankruptcy for the Business

a. Doing Nothing as an Option

If discontinuing the business proves to be the best option, such decision does not necessarily need to result in an actual bankruptcy filing for the business. When considering alternatives outside of bankruptcy, always remember the "do nothing" option, particularly if the business is organized as a limited liability company or corporation. Sometimes there is not enough at stake to do anything beyond simply shutting down operations. Clients should be advised of the consequences of such "inaction," though, including continued collections,

judgments, foreclosures, repossessions, and potential bank offsets. The business owner may find it helpful simply to continue to renew the entity's registration annually with the state and then wait to see if any creditors ever seek collection from the owner personally. If such collections occur, the owner can consider his or her own options, including bankruptcy, at that time.

While this "do nothing" option may provide to be best decision for the business entity, the individual business owner may still need to consider his or her bankruptcy options to deal with individual or guarantied debts.

b. An Alternative Non-bankruptcy Procedure to Consider When Shutting Down a Business

Ideally a business that closes should be dissolved in accordance with state law procedures for winding down corporations and limited liability companies. Many of these state statutes, however, require certification that all claims against the entity have been satisfied, a feat not likely realistic for the company in such financial distress that it finds itself meeting with a bankruptcy attorney. In those cases, you might consider a simple "alternative process" to winding down the business under state law or liquidating in a bankruptcy. While not always ideal, such a process offers many of the same benefits of a bankruptcy to the business owner in a simple and cost-effective manner. The following are some basic steps to consider as a simplified business closing procedure.

As an initial matter, review the organizational documents to ensure authority to terminate business and follow any corporate formalities to do so. Next, focus on the assets of the business. Create an inventory of all business assets and consider a "walk through" video record these items. Remove the owner's personal property items from the premises, keeping a record of which items are deemed owned personally and why. Note the value of the business assets and

determine whether any are subject to a lien. Remember some assets may be subject to a statutory lien even if not voluntarily pledged as collateral as part of a security agreement. Notify the secured lenders of the termination of the business and coordinate the return of their collateral.

From the group of unencumbered assets, develop a plan to liquidate those in order to satisfy business debt. In some cases, it may be appropriate to sell certain assets to the owner for fair value or as part of a loan repayment. From the cash that is generated, ensure any anticipated legal fees are satisfied through the conclusion of the matter, as well as any accounting fees for final tax returns or other accounting work that may be necessary.

Prepare a letter to be mailed to all creditors that the business is terminating and that, if appropriate, the owner is contemplating filing a personal bankruptcy. Invite the creditors to submit to you any final invoices for the business and proof of the personal liability of the owner, if any.[18] These letters sometimes go unnoticed, so be sure to send them multiple times, as needed. Also be sure to respond to the reasonable inquiries of creditors. A little time and courtesy during this process often goes a long way to avoiding aggressive legal actions by a scorned and ignored creditor.

Plan the end date for the business and notify utilities of the day you want them discontinued. Coordinate this final date with the landlord to permit it the opportunity to continue the utilities. Work with the insurance agent to discontinue premiums for any policies no longer needed. On the final day of operations, pay the employees, ideally with certified funds, or advise them to cash their checks immediately.

Even after the business has closed, keep the corporate registration active with the state for several years while you wait for either the statutes of limitations to expire or the corporate

[18] If the owner ultimately files his or her own bankruptcy, be sure to list all such creditors in the schedules.

creditors to tire of collections. Along the same lines, be sure to continue to retain and designate a registered agent for the entity. Thereafter, simply monitor any lawsuits, demands or assessments to determine if claims are made against the individual and to ensure the owner's compliance with any appearance requirements for court or other regulatory hearings, even if only as a corporate representative.

4. Cease Operations and File Bankruptcy for the Individual or Individual Sole Proprietor

Matters are simplified significantly when the business owner operates as a sole proprietor and seeks to terminate the business and relieve his or her personal liability through bankruptcy. In these situations, there is no entity to deal with. In many of these cases, or in cases where a decision was made to "do nothing" with respect to the business, but the owner still needs to resolve his or her debts, the owner may avoid the means test if the majority of the debt is from the business. If the majority of the owner's debt is nonconsumer, then the means test of 11 U.S.C. § 707(b) does not apply.[19] If the owner is satisfied that sufficient of his or her assets may be exempted, a Chapter 7 will offer significant relief to the owner quickly so that owner might move on the rest of his or her life or maybe even develop another business. In such cases, be sure to include the business name as an alias (e.g., John Doe t/a Doe's Lawncare) to ensure

[19] *Janvey v. Romero*, 883 F.3d 406 (4th Cir. 2018). The *Janvey* Court repeatedly cited with approval *In re Bushyhead*, 525 B.R. 136 (Bankr. N.D. Okla., 2015), which contrasts § 707(a) to 707(b):

> Section 707(a) stands in stark contrast to § 707(b), which provides a mechanism for dismissal of a Chapter 7 case where the debts at issue are primarily consumer debts. Section 707(b) contains a detailed mathematical formula that courts are to utilize to determine whether the debtor has the ability to pay a significant portion of the debtor's unsecured claims.… If the math fits, there is a presumption of abuse, and the debtor has a choice: either rebut the presumption, convert the case to Chapter 13, or face dismissal. Not so under § 707(a).

Similarly, most courts have held that a Chapter 7 debtor's ability to repay his or her debts does not, standing alone, support dismissal under Code § 707(a) for "cause," although it may be one factor considered by the court. *Perlin v. Hitachi Capital America Corp.*, 497 F.3d 364 (3rd Cir., August 3, 2007).

maximum benefit and relief from the process. Of course, the owner may accomplish the same goals of discharging the business debts through a Chapter 13 if that course of action is preferred or required due to prior bankruptcies, asset issues, or specific advantages of Chapter 13, such as the ability to cure mortgage defaults or resolve tax liabilities. If the owner's debts exceed the debt limits for Chapter 13, subchapter V should be considered as it can often provide the same (or greater) advantages of Chapter 13 with increased debt limits and flexibility in terms of plan structure and payments.

B. Options to Consider When Continuing Operations

1. Continue Operations with Debtor as Sole Proprietor

Business owners operating as sole proprietors have the option of reorganizing their business debts under Chapter 13 as long as they qualify as a debtor with regular income under 11 U.S.C. § 109(e). Often the bigger challenge for sole proprietors seeking Chapter 13 relief is ensuring they satisfy the debt limits by having noncontingent, liquidated, unsecured debts under $465,275.00 and noncontingent, liquidated, secured debts under $1,395,875.00.[20]

In addition, there are special rights and responsibilities for a Chapter 13 filer that qualifies as a debtor engaged in business. Section 1304(b) of the Bankruptcy Code gives such a business Chapter 13 debtor, exclusive of the Trustee, the rights and powers of a Trustee under 11 U.S.C. §§ 363(c) and 364 regarding the use, sale or lease of property in the ordinary course of business and the incurring of unsecured debt in the ordinary course of business without court permission.

[20] 11 U.S.C. § 109(e). But see Footnote No. 4 explaining the pending legislation related to Chapter 13 debt limits.

2. Continue Operations with the Individual *Owner* of an LLC or Corporation Filing Chapter 13

Business owners that otherwise qualify for Chapter 13 may file such a bankruptcy even if they own a business operating as a corporation or limited liability company, and such entities may continue to operate without disruption by the bankruptcy. This approach can be a particularly effective strategy when the owner has incurred significant debt in his or her own name outside of the business while trying to manage the business. The challenge, though, for many such business owners is dealing with those unsecured creditors, such as business credit cards, that are jointly obligated by the business and the individual. If the business will continue to operate and can manage all such business debts, consider proposing a Chapter 13 plan that classifies the joint business debt to be paid by the cosigned business. Some lenders, though, may cite the individual's bankruptcy as an event of default and call the obligation due. As a practical matter, this is rare as long as the business continues to make the regular payments on the debt, although further borrowing will likely be restricted.

3. Continue Operations and File Chapter 7 for the Individual *Owner* Only

Complicated issues may arise when an owner of a limited liability company or corporation files a Chapter 7. In such a case, the debtor's rights in the entity, both economic and management rights, become property of the estate.[21] Section 721 permits the Chapter 7 Trustee to "operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate," upon the approval by the Court.[22] The Trustee would have several other options as well, including abandoning the asset

[21] *In re B & M Land & Livestock, LLC*, 498 B.R. 262, 267 (Bank. D. Nev. 2013); *Fursman v. Ulrich* (*In re First Protection, Inc.*), 440 B.R. 821, 830 (B.A.P. 9th Cir. 2010).
[22] *In re Dzierzawski*, 528 B.R. 397, 410, 2015 Bankr. LEXIS 1252, *28-29 (Bankr. E.D. Mich. 2015).

(the debtor's interest in the company), dissolving the company, selling the company or the debtor's interest in the company, or place the company into bankruptcy with the approval of the Court.[23] As a practical matter, the Trustee will require and the debtor should be prepared to produce a balance sheet promptly in order for the Trustee to determine if there is any net benefit to the debtor's estate if the entity were liquidated.

How such cases are handled as a practice matter varies significantly by jurisdiction and even by trustee. Many trustees may simply consider the liquidation value of the business and abandon any interest in it if a sale would not produce a reasonable distribution to creditors. Such is typically the case when an individual's business is based on his or her personal and professional services but the business is structured as a corporation or limited liability company. However, such analysis may be very different if a willing buyer, for example, a competitor of the business, were to approach the Trustee with a viable offer. Such a purchase may be particularly appealing to another party when there is a valuable business location, a list of customers, intellectual property, unique assets, an established website address or phone number. Some Trustees take a much more active position in these cases and immediately apply for permission from the Court to terminate the entity's operations.

A related issue arises in the context a business owner's Chapter 7 filing and the impact of such action on the owner's guaranty of the corporation or limited liability company's open account with a vendor. In a recent case from the Western District of Virginia, two partial owners of a corporate business filed for Chapter 7 relief and listed, among other debts, the debts of their corporation that they had guaranteed to a vendor.[24] They received their discharges and the

[23] *See, e.g., Fowler v. Shadel*, 400 F.3d 1016, 1018 (7th Cir. 2005); *In re A-Z Electronics, LLC*, 350 B.R. 886, 891 (Bankr. D. Idaho 2006); *In re Albright*, 291 B.R. 538, 541 (Bankr. D. Colo. 2003).
[24] *Dulles Elec. & Supply Corp. v. Shaffer (In re Shaffer)*, 585 B.R. 224 (Bankr. W.D. Va. February 27, 2018).

business continued to operate after the bankruptcy. The vendor continued to extend credit to the business, and eventually the business defaulted. The vendor asserted that the owners remained liable for the debts incurred to the vendor by the corporation after the bankruptcies and sued the owners to recover. The owners reopened their bankruptcies to allege discharge violations, but the Court sided with the vendor.[25] Finding that the guaranties were "continuing guaranties," that were never revoked or rescinded, the Court concluded, each new purchase was a distinct debt and that the postpetition transactions were new extensions of credit. The new extensions of credit were not binding prepetition and were not therefore discharged.[26]

4. Continue Operations but Change the Form of the Entity (to sole proprietorship) and File Chapter 13 for the Individual

Another approach to reorganizing a business under Chapter 13 requires careful prepetition planning and should be used with some caution as it would not be appropriate for all situations. In fact, with the advent of Subchapter V cases and its debt limits (likely to be increased again), the need for this strategy is diminished.[27] In some cases, though, if a business owner is otherwise well-suited for an otherwise relatively straight-forward Chapter 13 but the business is a corporation or limited liability company with business debts intertwined with the personal debts, the owner may consider changing the form of the business to a sole proprietorship. Once the business structure is changed, the owner might file a Chapter 13 and propose a plan addressing all debts, including those of the business. This is a complicated area to navigate. Before pursing such a course of action, special care should be taken to ensure that

[25] *Id*., at 230.
[26] *Id*.
[27]

the owner confers with his or her accountant and seeks legal advice on the tax implications of such a transfer of assets and change of structure.

Ideally, to change the form of the company, the owner would purchase the assets for fair consideration. Since any transfer for less than reasonably equivalent value may be subject to avoidance, care should be taken to document the value of all assets. Corporate formalities should be followed, and notice of the new entity should be provided to all continuing vendors and suppliers of the business.

Another approach some attorneys attempt is to assign all business assets of the entity to the business owner in exchange for the assumption of all business liabilities. Such as transfer would need to be disclosed in any potential bankruptcy filing of the individual and subjects the individual to the objection of a business creditor who might assert that the value of the entity's assets as to the business creditors has been diminished by the addition of the individual's nonbusiness creditors. As such, this tactic may work best in situations where the assets are of little value to anyone but the business or where the assets are fully encumbered by liens. New bank accounts should be opened, and the transaction should be properly documented with a bill of sale transferring all assets of the entity, including goodwill.

These transactions are subject to scrutiny, of course, but may be most effective as a practical matter in the common small business scenario where there is little, if any, unencumbered value to the assets and where the creditors would receive some distribution in the Chapter 13 that would be unlikely in a normal liquidation.

5. Continue Operations and Reorganize the Entity Under the New Subchapter V

The new Subchapter V of chapter 11 offers a relatively inexpensive opportunity to file for the business entity itself, particularly for those debtors with debts in excess of what would be allowed in Chapter 13.[28] While Chapter 13 eligibility is limited to an "individual" with noncontingent, liquidated, unsecured debts of less than $465,275.00 and noncontingent liquidated, secured debts of less than $1,395,875.00, a Subchapter V may be selected by a Small Business Debtor whose aggregate noncontingent, liquidate, secured and unsecured debts do not exceed $3,024,725.00.[29] Under the 101(51D), the Small Business Debtor may include an individual, partnership or corporation, engaged in commercial or business activities with not less than 50 percent of its debt having arisen from the commercial or business activities of the debtor.[30]

Although Subchapter V offers an excellent opportunity for debt reorganization and relief for the small business that might otherwise not be able to afford a traditional Chapter 11, its costs still must be considered, along with other limitations.[31] For example, Subchapter V does not include any codebtor stay, so if a business owner intends to file for his or her corporation or limited liability company, the owner will also likely need to file to obtain protection from any guaranteed debts of the business.[32] Such dual filings increase the complexity of the case, as well as the expense, because separate counsel should be utilized. The cost of a Subchapter V would include not only the debtor's attorney's fees, but also the expense of the Subchapter V trustee

[28] 11 U.S.C. § 109(e).
[29] But see Footnote No. 7 on pending legislation related to Subchapter V debt limits.
[30] Eligible entities to file a Subchapter V also include any affiliate of such individual, partnership, or corporation that is also a debtor under this title and exclude an individual, partnership or corporation whose primary activity is the business of owning single asset real estate. 11 U.S.C. § 101(50D).
[31] Consumer practitioners may be shocked by the filing fee alone $1738.00 for a Chapter 11.
[32] Of course, Chapter 13 also does not include a codebtor stay for nonconsumer debts. 11 U.S.C. § 1301.

which must be paid as an administrative claim. Depending on how the plan is confirmed, those administrative fees may need to be paid in full at confirmation.[33]

Notwithstanding the costs and procedural complexities of a Subchapter V, such a plan offers enormous benefits to the small business owner. With the help of the Subchapter V trustee and sensible, realistic debtor's counsel, many small businesses will achieve the confirmation of their plans of reorganization by consent, allowing for the early entry of a discharge, termination of the Subchapter V trustee's services, and the closing of the case. However, even when confirmation is without the consent of the creditor classes, the debtor retains his or her cramdown opportunity and may confirm a plan that provides for application of all projected disposable income during the 5 year nonconsensual plan term and that pays the present value to which the creditors are entitled during the plan.[34] Better still, the absolute priority rule does not apply in Subchapter V as the owners of the business are permitted to retain their ownership even when claimants are paid less than in full.[35] Although debtor's counsel must balance the cost and complexity of the Subchapter V option, in many cases this new path of reorganization will provide a much more attainable outlet for relief to struggling small businesses.

IV. Conclusion

With the addition of Subchapter V to the debtor's counsel's toolbox of Chapters 7 and 13, small businesses seeking help with debt have a wide variety of viable relief options that are less expensive and cumbersome than a traditional Chapter 11. As this paper seeks to make clear, each small business case requires careful consideration of a client's options and no "one-size-

[33] Under 11 U.S.C. § 1129(a)(9), if a Subchapter V plan is confirmed consensually, then all administrative claims must be paid at confirmation, unless otherwise agreed.
[34] 11 U.S.C. § 1191(b).
[35] 11 U.S.C. § 1181(a).

fits-all" solution exists. However, with careful planning and attention to the details of a client's situation, a bankruptcy attorney can be effective at resolving the needs of a many struggling small business owners.