SUBCHAPTER V UPDATE

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

References in these materials to the "SBRA Guide" are to Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (June 2022 rev. ed.), *available at* https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

SUBCHAPTER V UPDATE

TABLE OF CONTENTS

I. How Is Subchapter V Working?

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

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

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

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

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

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

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

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

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

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

For subchapter V cases through June 30, 2023, the report shows that confirmation occurred in 55 percent of them and that confirmation was consensual in nearly 70 percent of them. Conversion occurred in 29% of the cases, and 11% were dismissed. The remaining six percent were pending without a confirmed plan. It reports the median months to confirmation as 6.5 and the median months to dismissal as 4.7.

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

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

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

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

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

The following summarizes the changes:

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) but does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter

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[4] *Id.*

[5] The author has presented more than 20 continuing legal education programs on subchapter V since its enactment. Although some have expressed reservations or problems with subchapter V, most conclude that it is working as intended to expedite reorganization of smaller businesses that should be reorganized and to expedite dismissal or conversion of cases where reorganization is not feasible.

V (unless committee has been appointed) and instead requires service on 20 largest creditors.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under subchapter V.

Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) – (e) renumbered as Rule 2015(c)—(f). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

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

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in "small business case" also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a "small business case.")

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for

transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – Rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

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

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

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

SBRA Guide § X(D)(2) discusses a number of bankruptcy court decisions that conclude that the § 523(a) exceptions do not apply to the discharge under § 1192 of an entity after cramdown confirmation under § 1191(b)[6] and the Fourth Circuit's opinion in *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), reversing one of them, that the exceptions are applicable.

[6] Jennings v. Lapeer Aviation, Inc. (*In re* LaPeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021); Cantwell-Cleary Co. v. Cleary Packaging, LLC (In *re* Cleary Packaging, LLC), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc., Crabcake Factory USA (*In re* Satellite Restaurants, Inc., Crabcake Factory USA), 626 B.R. 871, 876 (Bankr. D. Md. 2021). Two bankruptcy courts reached the opposite conclusion in unreported decisions. *In re* Duntov Motor Co., LLC. Docket No. 21-40348-MXM-11, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021); Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), ECF No. 15, Docket No. 20-4064-BTR (Bankr. E.D. Tex. Sep. 16, 2020). Another bankruptcy court ruled that a judgment for patent infringement against a corporation in a subchapter V case was excepted from discharge under § 523(a)(6) as a willful and malicious injury without addressing whether § 523(a) exceptions apply to the discharge of a corporation or citing the applicable subchapter V discharge provision, 11 U.S.C. § 1192(2). Concrete Log Systems, Inc. v. Better Than Logs, Inc. (*In re* Better Than Logs, Inc.), 631 B.R. 670, 688–89 (Bankr. D. Mont. 2021).

Three more bankruptcy courts[7] and the Bankruptcy Appellate Panel for the Ninth Circuit[8] have ruled that the § 523(a) exceptions do not apply to the discharge of an entity, rejecting the Fourth Circuit's interpretation. The Fifth Circuit[9] and the Eleventh Circuit[10] have accepted direct appeals.

In addition to the text of the two statutes, the debate involves analysis of the context of the statutes, chapter 11 policy, and legislative history. For a detailed discussion of the reasons that support each of the competing interpretations and why the interpretation of the bankruptcy courts is the better one, see SBRA Guide § X(D)(2).

IV. Postconfirmation Modification

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

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

The key difference between the subsections is one of timing. A consensual plan may only be modified before the plan is "substantially consummated,"[11] whereas a nonconsensual plan may be modified at any time during the three to five year period for the payment of projected disposable income.

In *In re Samurai Martial Sports*, 644 B.R. 667 (Bankr. S.D. Tex. 2022), the debtor sought to modify its plan after cramdown confirmation when its business suffered due to air

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[7] BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC). 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, Eleventh Circuit Case No. 23-90015 (July 19, 2023), notice of appeal filed, Eleventh Circuit Case No. 23-12342 (July 19, 2023); Nutrien Ag Solutions v. Hall (*In re* Hall), 651 B.R. 62 (Bankr. M.D. Fla. 2023); Avion Funding LLC v. GFS Industries, LLC (*In re* GFS Industries, LLC), 647 B.R. 337 (Bankr. W.D. Tex. 2022), certified for direct appeal to Fifth Circuit, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023), leave for direct appeal granted, Fifth Circuit Case No. 23-50237 (Apr. 7, 2023).

[8] Lafferty v. Off-Spec Solutions, LLC (*In re* Off-Spec Solutions, LLC), 2023 WL 4360311 (B.A.P. 9th Cir. July 6, 2023).

[9] Avion Funding LLC v. GFS Industries, LLC (*In re* GFS Industries, LLC), 647 B.R. 337 (Bankr. W.D. Tex. 2022), certified for direct appeal to Fifth Circuit, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023), leave for direct appeal granted, Fifth Circuit Case No. 23-50237 (Apr. 7, 2023).

[10] BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC). 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, Eleventh Circuit Case No. 23-90015 (July 19, 2023), notice of appeal filed, Eleventh Circuit Case No. 23-12342 (July 19, 2023).

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

conditioning problems—a significant problem for an athletic facility operating in the Texas summer—and after defaulting on a few payments. The modification proposed to pause payments for three months and cure the arrearage near the end of the plan. The primary creditor and the subchapter V trustee objected.

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

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

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

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

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

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

But the court concluded that the debtor's intentional failure to make plan payments, rather than the air conditioning problems, was the cause of the need for modification. The derailing of the confirmed plan "could only be attributed to Debtor's deliberate and conscious decision to disregard this Court's order directing Debtor to make all payments under the Plan, and not [to] any unforeseen circumstance rendering the Plan unworkable." *Id.* at 683.

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

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

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

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

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

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

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

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

After considering conversion to chapter 7 and dismissal under § 1112, the court concluded that the interests of creditors and of the estate would best be served by permitting the debtor to remain in chapter 11 but revoking the debtor's subchapter V designation so that the trustee or other parties could file a plan.[12]

Although nothing in the Code specifically permits the revocation of a Subchapter V election, the court noted, courts permitted pre-SBRA chapter 11 debtors to amend their petitions pursuant to Bankruptcy Rule 1009 to take advantage of the newly effective subchapter V provisions. "[I]f a petition may be amended to elect to proceed under Subchapter V post-

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

petition, logically it follows that the opposite must also be an option for debtors and courts." *Id.* at 348.

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

The court accordingly revoked the Subchapter V designation and directed that the United States Trustee immediately appoint a chapter 11 trustee to manage the estate.

In *In re ComedyMX*, *LLC,* 2022 WL 17742295 (Bankr. D. Del. 2022), the court addressed whether revocation of the debtor's subchapter V designation was permissible but did not decide the issue, deciding that the proper remedy was removal of the debtor from possession.

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

In considering the "close" question of whether a court could permissibly revoke the subchapter V designation over a debtor's objection, the court noted that the *National Small Business Alliance* result was the right one on policy grounds, *id.* at *4, and that the cases permitting debtors in pending cases to elect subchapter V after its enactment support that result.[13]

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

Because non-debtor parties in interest may not force a debtor into subchapter V over the debtor's objection, the *ComedyMX* court reasoned, "it cannot be argued that parties in interest have *carte blanche* to . . . move debtors in or out subchapter V as they see fit." *Id.* at *5. Further,

[13] The court elaborated on the argument: "Indeed, the argument can be taken a step further. Because Rule 1009(a) states that a petition may be amended 'on a motion of a party in interest,' while Rule 1009(b) permits the statement of intention to be amended only by 'the debtor,' one might draw an inference that the Advisory Committee, at least, made an express determination to permit parties in interest other than just the debtor move the Court to amend a bankruptcy petition." *In re* ComedyMX, LLC, 2022 WL 17742295, at *4.

the court noted, Rule 1020[14] implies that the debtor's subchapter V designation controls unless the court finds the debtor statutorily ineligible to proceed. *Id.* at *5.

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

VI. Does the Projected Disposable Income Requirement Require Payment Based on Actual Results?

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

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

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

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

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

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

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

When chapter 12 was enacted as a temporary measure in 1986, it used the same language as the chapter 13 PDI test (and subparagraph (A) in subchapter V cases), which had come into

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

the Bankruptcy Code in 1984. But in chapter 12 cases, courts began requiring that the debtor show, at the end of the case and in connection with an application for a discharge, that the debtor had paid all disposable income during the plan period to creditors. The court would then determine whether the debtor had paid all disposable income retroactively, and a debtor would have to either pay that amount or the case would be dismissed. *E.g., Rowley v. Yarnall (In re Rowley),* 22 F.3d 190 (8th Cir. 1994).

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

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

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

First, it made chapter 12 permanent.

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

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

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

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

$493,000 over five, but the plan provided that creditors might receive less, based on actual earnings.[15]

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

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

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

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

The court then concluded, "Requiring all the disposable income to be reported and distributed does not violate" these rules. *Id*. at *3. The court added that the bankruptcy court's requirements were within its authority under the All Writs Act[16] and § 105(a) because they "were clearly necessary and appropriate under the facts of this case." *Id.* at *4.

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

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

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

[16] 28 U.S.C. § 1651(a) provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

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

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

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

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

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

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

The court concluded that the plan did not contain a third-party release or permanent bar to the assertion of claims on the guaranty. Although the injunction was not a permanent bar order, the court evaluated the requested injunction by evaluating the factors identified in *In re Dow Corning Corp.,* 280 F.3d 648, 658 (6th Cir. 2002), with regard to a plan's bar order, in accordance with the Eleventh Circuit's decision in *In re Seaside Eng's & Surveying, Inc.,* 780 F.3d 1070, 1079 (11th Cir. 2015), *Global Travel,* 2022 WL 17581986 at *3:

> 1. Whether an identity of interests exists between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> 2. Whether the non-debtor has contributed substantial assets to the reorganization;

3. Whether the injunction is essential to the reorganization, namely whether the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;

4. Whether the impacted class has overwhelmingly accepted the plan;

5. Whether the plan provides a mechanism to pay for all, or substantially all, of the class members affected by the injunction;

6. Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full.

The *Global Travel* court noted, 2022 WL 17581986 at *3, that the list is nonexclusive and flexibly applied, *Seaside,* 780 F.3d at 1079, that bar orders must be essential to a successful reorganization, *id.* at 1078, and that the bankruptcy court must make specific factual findings to support entry of a bar order, with discretion to determine which *Dow Corning* factors are relevant in each case. *Id.* at 1079.

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

First, with regard to identity of interests, the court noted that, although no indemnity obligation existed, the principal was the debtor's primary asset and that without him the business would suffer. The court credited his testimony that the arbitration was "massively consuming" and that he would have to be replaced at an annual cost of $100,000 to $150,000 while he defended the arbitration. The court concluded that "the proposed injunction is essential to the reorganization due to the identity of interests" between the debtor and the principal. 2022 WL 17581986 at *4.

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

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

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

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

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

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

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

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

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

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

VIII. Role of the Trustee in Subchapter V Cases

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

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

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

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

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

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

In *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), an objector attacked the projections attached to the debtor's plan. The court noted that the subchapter V trustee "testified convincingly that he not only had a hand in preparing the financial projections but has also reviewed them and concludes they show a viable path forward for Debtor."

The court continued, *id.* at 6:

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

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

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

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

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

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

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

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

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

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

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

Concerned that "the result of removing the debtor as debtor-in-possession could very well lead to the failure or collapse of the business," the court instead expanded the powers of the

subchapter V trustee to include investigation of the debtor under § 1183(b)(2). *Id.* at 234. The court noted that further relief, such as removal of the debtor from possession, dismissal, or conversion might be required, based on the outcome of the investigation. *Id.* at 234.

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

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

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

The court in *In re Rosa Mosaic & Tile Company*, 643 B.R. 865 (Bankr. W.D. Ky. Aug. 11, 2022), permitted the debtor to reject a collective bargaining agreement after an extensive factual analysis of the debtor's negotiations with the union to determine whether § 1113(c) permitted the rejection. The subchapter V trustee participated in the negotiations and testified at the hearing on the debtor's application for approval of the rejection.

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

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

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

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

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

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

A common thread in subchapter V cases considering dismissal, conversion, or removal of the debtor from possession is inaccurate or incomplete disclosure of required information, failure to file proper operating reports, or both. Cases may also involve questionable transactions with, or transfers to, insiders and failure to disclose information about them or conflicts of interest arising from them. They often involve a noncooperative relationship with the subchapter V trustee that may border on hostility, failure to timely comply with court orders, and feasibility issues. Gross mismanagement of the estate or continuing losses may also be issues. *E.g., In re Coeptis Equity Fund, LLC,* 2002 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished); *In re California Palms Addiction, Recovery Campus, Inc.,* 2023 WL 2664284 (D. N.D. Ohio Mar. 27, 2023); *In re Duling Sons, Inc*., 650 B.R. 579 (Bankr. D. S.D. April 10, 2023); *In re East Coast Diesel*, 2022 WL 19078763 (Bankr. M.D. N.C. Dec. 29, 2022)**;** *In re No Rust Rebar, Inc*., 641 B.R. 412 (Bankr. S.D. Fla. 2022). *In re Hao,* 644 B.R. 339 (Bankr. E.D. Va. 2022); *In re Corinthian Communications, Inc.,* 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re KLMKH, Inc.,* 2022 WL 4281478 (Bankr. W.D.N.C. 2022).

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

Courts have been faced with the question of deciding whether to convert the case to chapter 7, dismiss it, or remove the debtor from possession when cause for any of them exists. For example, in *In re Duling Sons, Inc.*, 650 B.R. 579 (Bankr. D. S.D. April 10, 2023), the court concluded that cause for dismissal, conversion, or removal existed because of incurable conflicts of interest between the individual who held all corporate positions of the debtor and the debtor arising from prepetition conduct.

Because the debtor intended to market and sell its assets to fund a liquidating plan, the *Duling Sons* court concluded that the best remedy was removal of the debtor in possession. Liquidation by the subchapter V trustee, the court reasoned, would be better than conversion to chapter 7 because trustee fees would be lower, the subchapter V trustee was already familiar with the case, and the "natural learning curve" for a chapter 7 trustee would require duplicative work and delay distributions to creditors.

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

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

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

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

X. Payment of Trustee Fees As Condition of Dismissal

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

The court in *In re New York Hand & Physical Therapy PLLC*, 2023 WL 2962204 (Bankr. S.D. N.Y. Apr. 14, 2023), concluded that § 349(b) permits a structured dismissal and that payment of professional fees as a condition to dismissal is appropriate. The court required payment of the trustee's fees within 45 days, in the absence of which the case would be converted to chapter 7.

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

XI. Deadline for Filing Plan; Modification After Denial of Confirmation

Section 1198(b) requires the debtor to file a plan within 90 days of the order for relief, but subchapter V contains no deadlines for a confirmation hearing or entry of a confirmation order. *See* SBRA Guide § VI(D). Section 1193(a) permits preconfirmation modification of a plan at any time.

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

The court ruled that, after denial of confirmation, no plan existed that the debtor could modify and that the fourth plan was not timely. *Id.* at *5. The court noted that chapter 12 cases had permitted modification after denial of confirmation. *Id.* at *5, n. 36 (Citing *Novak v. DeRosa*, 934 F.2d 401, 403-04 (2d Cir. 1991) (providing that a chapter 12 plan may still be modified after denial of confirmation); *In re Mortellite*, No. 17-21818-ABA, 2018 WL 388966, at *1 n.3 (Bankr. D.N.J. Jan. 11, 2018) (same)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Under these circumstances where the objecting unsecured creditor bears a disproportionate amount of risk, Debtor could offer options such as expedited liquidation of nonexempt assets, or a truncated process for declaring a default and allowing collections to begin, or immediate conversion to allow a chapter 7 trustee to take over business operations and possibly conduct a winddown and liquidation.

The *Channel Clarity* court noted that two cases had concluded that an adequate remedy was the availability of relief in the bankruptcy court to enforce the plan or seek relief available under federal or applicable state law. *In re Ellingsworth Residential Cmty. Ass'n, Inc.,* 2021 WL

6122645, at *2 (Bankr. M.D. Fla. 2020); *In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985, at * 11 (Bankr. E.D. Wis. 2021).

In contrast, the court in *Samurai Martial Sports, Inc.,* 644 B.R. 667, 691 (Bankr. S.D. Tex. 2022), concluded that a similar provision was "marginally sufficient." It provided that, if the debtor failed to cure a default after 30 days' notice, a creditor could proceed to collect "all amounts owed pursuant to state law without further recourse to the Bankruptcy Court." *Id.* at 691.

Hamilton v. Curiel (In re Curiel), 2023 WL 4146017 B.A.P. 9th Cir. 2023), did not directly involve the issue of appropriate remedies. Rather, the Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's cramdown confirmation of the debtor's plan over the objection of a secured creditor because the BAP concluded that the evidence did not establish feasibility under § 1129(a)(1). Nevertheless, the court's remand to the bankruptcy court is relevant to the adequate remedies issue for two reasons.

First, the court in remanding for further proceedings regarding feasibility specifically directed the bankruptcy court to determine whether the objecting secured creditor could invoke the subchapter V feasibility requirement for cramdown confirmation in § 1191(c)(3). *Id.* at *1. The same issue arises with regard to a secured creditor's objection to cramdown confirmation based on the adequate remedies requirement in § 1191(c)(3).

Second, the court commented on the question of whether the remedies in the plan were adequate, although that issue was not before it. The court stated, *id.* at *10, n. 11:

> [The debtor's] Plan provided that in the event of a default [the creditor] could serve a notice of default and give [the debtor] at least sixty days to cure the default. If the default was material, the creditor "may: (i) take any action permitted under bankruptcy or non-bankruptcy law to enforce the terms of the Plan; (ii) seek liquidation of nonexempt assets pursuant to § 1191(c)(3)(B); (iii) seek to remove the Debtor as a DIP; and/or (iv) move to dismiss this case or to convert this case to Chapter 7 pursuant to § 1112(b)." We note the dearth of cases discussing what are, or are not, appropriate remedies under § 1191(c)(3)(B)(ii). But we agree with the bankruptcy court's observation in *In re Channel Clarity Holdings LLC,* 2022 WL 3710602 at *16 [(Bankr. N.D. Ill. 2022], that merely allowing creditors to "pursue remedies under applicable law if Debtor should default is a toothless remedy." The requirement under § 1191(c)(3)(B)(ii) that the remedies provided be "appropriate" suggests that they should be tailored to the situation. [The debtor] could bolster the default remedies to provide for a prompt auction of the Properties, a stipulated foreclosure, or an automatic deed in lieu of foreclosure. The prospect of an immediate, certain, and inexpensive remedy would increase [the debtor's] incentive to obtain funding for the balloon payment and decrease the prejudice to [the creditor] if she is not successful.

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

XIV. Plan Provisions Inconsistent With Statutory Provisions

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

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

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

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

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

In *In re Cesaretti,* 2023 WL 3676888 (Bankr. D. Nev. Feb. 24, 2023), the debtor had paid prepetition credit card and tax debts without court approval. The court concluded that the unauthorized postpetition payment of prepetition debt violated § 363 and that the violation of this provision of the Bankruptcy Code precluded confirmation under § 1129(a)(2). The court also concluded that the plan was not confirmable for several other reasons. The court did not address whether the payments, made from postpetition earnings, did not violate § 363 because an individual's postpetition earnings are not property of the estate. *See* SBRA Guide § XI(B)(2).

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

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

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

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

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

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

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

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

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

Following *In re Ruti-Sweetwater, Inc.,* 836 F.2d 1263, 1267-68 (10th Cir. 1988), the court in *In re Jaramillo*, 2022 WL 4389292 (Bankr. D.N.M. Sept. 22, 2022), ruled that a class is deemed to accept a plan when no one votes or objects. The court noted, however, that affirmative acceptance is required for compliance with § 1129(a)(10), which requires that at least one impaired class of creditors accept the plan if any class of claims is impaired. Section

1129(a)(10) applies in the case of consensual confirmation in a subchapter V case under § 1191(a), but not to cramdown confirmation under § 1191(b). (Section 1129(a)(10) is somewhat superfluous for consensual confirmation because, by definition, all impaired classes have accepted the plan.)

The court in *In re Creason,* 2023 WL 2190623 (Bankr. W.D. Mich. Feb. 23, 2023), concluded that *Ruti-Sweetwater* was wrongly decided and ruled that a class that had not voted had not accepted the plan. The court, therefore, confirmed the plan under the cramdown provision in § 1191(b).

In *In re Vega Cruz,* 2022 WL 2309798 (Bankr. D. P.R. June 27, 2022), the court had confirmed a consensual plan but had deferred entry of a discharge order because the court wanted briefing regarding whether the cancellation of junior liens under the plan would occur upon discharge. The court concluded that the individual was entitled to discharge upon confirmation and to an order discharging and cancelling the junior liens. It appears that the junior lienholders had not objected to confirmation, but it is not clear whether they had affirmatively accepted the plan. The court did not address the issue of whether their acceptance would be required for consensual confirmation.

D. Whether balloting is required

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

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

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

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

E. Feasibility (§ 1129(a)(11))

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

In *Hamilton v. Curiel (In re Curiel)*, 2023 WL 4146017 (B.A.P. 9th Cir. 2023), the court considered feasibility in a subchapter V case under § 1129(a)(11). The bankruptcy court had confirmed the debtor's plan over the objection of a secured creditor that the plan was not feasible. Concluding that the debtor had not established feasibility under the requirement of § 1129(a)(11), the court remanded for further proceedings.

In the course of its opinion, the court summarized the feasibility standard as follows, *id.* at *10:

> It is [the debtor's] burden, as the Plan proponent, to present concrete evidence to establish that she has sufficient cash flow to maintain her ongoing personal expenses while funding all Plan payments. *See In re Pizza of Haw., Inc.,* 761 F.2d [1374,] 1382 [(9th Cir. 1985)]; 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2023). And while feasibility under § 1129(a) presents a relatively low threshold, it still depends on adequate evidence. *Legal Serv. Bureau, Inc. v. Orange Cnty. Bail Bonds, Inc., (In re Orange Cnty. Bail Bonds, Inc.),* 638 B.R. 137, 148 (9th Cir. BAP 2022) (citing *In re Brotby*, 303 B.R. [177,] 191 [B.A.P. 9th Cir. 20030]). To this end, "[f]actual support must be shown for the Debtor's projections." *In re Hobble-Diamond Cattle Co.*, 89 B.R. 856, 858 (Bankr. D. Mont. 1988). "The use of the word 'likely' in Section 1129(a)(11) requires the Court to assess whether the plan offers a reasonable 'probability of success, rather than a mere possibility.' " *In re Sanam Conyers Lodging, LLC*, 619 B.R. 784, 789 (Bankr. N.D. Ga. 2020) (quoting *In re Aspen Vill. at Lost Mountain Memory Care, LLC*, 609 B.R. 536, 543 (Bankr. N.D. Ga. 2019)). Thus, "[t]he mere fact that the bare numbers in the income and expense projections provided in the plan demonstrate an apparent surplus to adequately fund the plan is not enough to meet the burden on feasibility." *In re Kowalzyk*, 2006 WL 3032145, at *5 (Bankr. D. Minn. 2006).
>
> The court concluded that the debtor had not met her burden, *id.* at * 12:
>
> > We agree with the bankruptcy court that if one were to accept [the debtor's] projected income and expenses, feasibility would be a very close question. We also understand that we must give due deference to the bankruptcy court's findings. *See Cardenas v. Shannon (In re Shannon)*, 553 B.R. 380, 387 (9th Cir. BAP 2016). But "sheer optimism and hopefulness, without more, is not sufficient to support a finding of feasibility." *In re Om Shivai, Inc.*, 447 B.R. 459, 463 (Bankr. D. S.C. 2011); *see also In re Walker*, 165 B.R. 994, 1004 (E.D. Va. 1994) ("sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are visionary promises" (cleaned up)). [The debtor's monthly operating reports] undermine her projections. They similarly undermine the bankruptcy court's inference based on the projections that Curiel's income was reasonably sufficient to support performance of her Plan. Her calculations suggest

> that if everything were to go as projected, she initially would have just enough to perform her Plan obligations. However, her monthly reporting cannot be reconciled with the projections or the bankruptcy court's feasibility findings. More specifically, there is no reliable, concrete evidence to support that [her business venture] will be able to fund the necessary income—that [the debtor] will be able to contribute $4,500 in gross monthly income from her wages and receive $3,000 from [a third party]. *See In re Aurora Memory Care, LLC,* 589 B.R. [631,] 642 [(Bankr. N.D. Ill. 2018)] ("Optimistic but hollow declarations from a debtor's principal about hopes for funding do not do the job." (cleaned up)).

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

XVI. Cramdown Confirmation: "Indubitable Equivalent" Treatment of Secured Claim

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

In *In re Creason,* 2023 WL 2190623 (Bankr. W.D. Mich. Feb. 23, 2023), a creditor held a security interest in personal property, but it was avoidable under § 544(a) because the financing statement did not have the correct name for the debtor. The debtor's plan put the creditor in a separate class and treated the creditor as an unsecured creditor.

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

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

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

XVII. Eligibility for Subchapter V

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

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

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

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

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

The creditor alleged that the operations of the other entity were not enough to constitute being presently involved in business or commercial activity, characterizing it as a "hobby." The court rejected the contention that "little or scarce business activity is insufficient for subchapter V eligibility," noting that the company had completed a sale of goods for profit within 60 days of the bankruptcy filing. *Id.* at *4 n. 7.

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

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

The court concluded that, under the "totality of circumstances" approach, the debtor's continued management of farm assets, his efforts to sell the farm or parts of it, and his

maintenance and inspection of improvements on the farm were sufficient wind-down activities to satisfy the "engaged in" commercial or business activities requirement. The court reasoned, "[T]he totality of the circumstances standard does not dictate a quantum of activities or time engaged in them." *Id.* at *4.

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

B. Debt limit: debts of affiliates

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

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

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

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

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

In *In re Dobson,* 2023 WL 3520546 (Bankr. W.D. Va. March 31, 2023), the sole shareholder of a construction company and his spouse filed a joint subchapter V petition. The next day, the corporation filed a chapter 7 case. The U.S. Trustee contested the eligibility of the individuals for subchapter V because the total of their debts and the corporation's debts exceeded

the debt limit. The court agreed with *Free Speech* and ruled that the debtors' correct statement of eligibility on the petition date did not become incorrect based on a later event.

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

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

C: Debt limit: whether debt is contingent or unliquidated

Debts for purposes of determining the debt limit for subchapter V eligibility do not include contingent or unliquidated debts. § 1182(1)(A). In *In re Parking Management, Inc.,* 620 B.R. 544 (Bankr. D. Md. 2020), the court concluded that claims for damages arising from the rejection of unexpired leases were contingent and that the debtor's obligations under a note pursuant to the Paycheck Protection Funding Program of the CARES Act were both contingent and unliquidated. Excluding those debts from the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In *In re Macedon Consulting, Inc.,* 2023 WL 400484 (Bankr. E.D. Va. June 14, 2023), the court ruled that the entire, uncapped liability of the debtor for rent for the remainder of the lease term was noncontingent and liquidated. The court reasoned, *id.* at *4:

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

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

The court concluded that, under *United States v. Verdunn*, 89 F.3d 799 (11th Cir. 1996) ("vigorously disputed" tax penalties are liquidated), the existence of the dispute did not render the creditor's claim unliquidated. The debtors' pending adversary proceeding contesting the

claim based on fraud in the inducement, intentional misrepresentation, negligent misrepresentation, and equitable subordination did not make the claim unliquidated.

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

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

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

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

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

In *In re Reis,* 2023 WL 3215833 (Bankr. D. Idaho May 2, 2023), the U.S. Trustee challenged debtor's eligibility because almost all of her debt was for student loans incurred to enable her to go to medical school.

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

The court agreed with the courts that reject the proposition that working as an employee constitutes "commercial or business activities."[17] The court reasoned, *id.* at * 6:

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

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

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

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

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

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

Two additional courts addressing the issue have reached opposite conclusions. The court in *In re Reis*, 2023 WL 3215833, at *4-5 (Bankr. D. Idaho May 2, 2023), concluded that no nexus is required but found the debtor was ineligible because the debt in question was not a business or commercial debt. *In re Hillman,* 2023 WL 3804195, at *4-5 (Bankr. N.D.N.Y. June 2, 2023), concluded that a nexus is required and that it existed in the case.

F. Single asset real estate debtor

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

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[17] *E.g., In re Rickerson,* 639 B.R. 416, 426 (Bankr. W.D. Pa. 2021); *In re Johnson,* 2021 WL 825156, at *7-8 (Bankr. N.D. Tex. 2021). *But see In re Ikalowych,* 629 B.R. 261 (Bankr. D. Colo. 2021). SBRA Guide § III(C)(2) discusses the cases.

fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto."

The court in *In re Evergreen Site Holdings*, 2023 WL 4503880 (Bankr. S.D. Ohio June 21, 2023), found from the evidence that a debtor who owned two adjacent properties was not using the properties together in a common scheme and that the debtor would likely conduct substantial business on the properties other than leasing them and collecting rent. Accordingly, the court concluded that the debtor had established its eligibility for subchapter V.

XVIII. Conversion of Chapter 12 Case to Subchapter V

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

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

The court in *In re Leonaggeo* 2023 WL 3638053 (Bankr. S.D.N.Y. May 24, 2023), denied the chapter 12 debtor's request to convert to subchapter V, which she sought as an alternative to dismissal based on ineligibility for chapter 12. The court reasoned, *id.* at *4:

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

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

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

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

XIX. Modification of Residential Mortgage in Subchapter V Cases

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

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

If § 1190(c)(3) is inapplicable, then the usual rule of § 1123(b)(5) governs. In a non-subchapter V case, the court in *In re Jacobs,* 644 B.R. 883 (Bankr. D. N.M. Oct. 14, 2022), considered whether a chapter 11 plan, like a chapter 13 plan, can provide for the postconfirmation cure of arrearages and reinstatement of maturity. Noting that courts have disagreed on this issue, the court concluded that the only way for a chapter 11 plan to deal with defaults under a residential mortgage subject to § 1123(b)(5) is for the claim to be unimpaired under § 1124, which requires the cure of all arrearages prior to the effective date of the plan. The court discussed and rejected the view of some courts that permit the postconfirmation cure of arrearages under a residential mortgage in a chapter 11 case.

XX. Technical Amendments to Eligibility Requirements

As originally enacted by SBRA, paragraph (B)(iii) of the eligibility requirement for subchapter V (then § 101(51D), now § 1182(1) until June 20, 2024) provided that a small business debtor did not include "an affiliate of a debtor." SBRA § 4(a)(1). For a discussion of the issues relating to this provision, *see* Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 Bankr. Law Letter, no. 10, Oct. 2019, at 7.

The CARES Act made a technical correction to (B)(iii). The revised (B)(iii) excluded "any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c))."

Section 3(8) of the Securities Exchange Act defines an "issuer" as "any person who issues or proposes to issue any security." 15 U.S.C. § 78c(a)(8). Section 3(10) broadly defines "security" as including, among other things, any "stock," "certificate of interest or participation in any profit-sharing agreement," or "investment contract." 15 U.S.C. § 78c(a)(10).

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

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

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

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

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

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

XXI. Miscellaneous Matters of Interest

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

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

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

4. Payment of debtor's counsel upon dismissal. In *In re Bartley*, 2023 WL 1768415 (Bankr. W.D. Okla. 2023)**,** the court allowed attorney's fees to debtor's counsel and "authorized and directed" the debtor to pay them in connection with the dismissal of the debtor's case. When the debtor did not pay the fees, the lawyer sought to collect the fees by filing a motion for the court to hold the debtor in contempt for failure to pay the fees. The court abstained from considering the motion, concluding that the order was essentially a monetary judgment for which contempt is not an appropriate remedy and that enforcement was more appropriately a matter for the state courts.

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

6. Reasonable expenditures of an individual in determining projected disposable income. SBRA Guide § VIII(B)(1) discusses determination of disposable income under § 1191(d) for purposes of the projected disposable income requirement in § 1191(c)(2) for cramdown confirmation under § 1191(b). *In re Cesaretti,*2023 WL 3676888 (Bankr. D. Nev. Feb. 4, 2023), concludes that appropriate guidance for determining an individual's reasonable expenditures in a subchapter V case is in chapter 13 case law in cases prior to enactment of the "means test" by the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005 and in cases of below-median debtor s after its enactment (in which the means test standards do not apply). The opinion reviews the case law.

7. Adequacy of debtor's financial projections. "Nothing in the Code requires an audit or independent verification of a debtor's financial projections. 'The creation of a liquidation analysis and financial projections is not an exact science, so the Courts typically defer to the

debtors' projections, subject to cross-examination and/or a competing set of projections.'" *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), *quoting In re Lost Cajun Enters., LLC,* 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021). .

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

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

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

10. Reported confirmation orders entered after resolution of objections. A number of confirmation orders have been reported that do not resolve objections but address confirmation requirements. Some include other provisions (such as releases and exculpations). *In re Bitter Creek Water Supply Corp*., 2023 WL 2962206 (Bankr. N.D. Tex. Apr. 14, 2023) (consensual plan confirmation; order provides that, if case is converted, all property will automatically vest in chapter 7 estate); *In re Jess Hall's Serendipity, LLC*, 2023 WL 3635068 (Bankr. N.D. Tex. 2023) (consensual plan confirmation order including provisions for third party releases and approval of insider settlement); *In re SRAK Corp*., 2023 WL 2589252 (Bankr. N.D. Tex. Mar. 21, 2023) (consensual confirmation); *In re Associated Fixture Manufacturing, Inc.*, 2023 WL 1931301 (Bankr. D. Utah 2023) (consensual confirmation); *In re* Higgins AG, LLC*,* 2023 WL 3745100 (Bankr. N.D. Tex. 2023) (consensual plan confirmation; includes provisions for third party releases); *In re iVidex,* 2022 WL 5264710 (Bankr. W.D.N.Y. Oct. 6, 2022) (Cramdown confirmation; trustee to make payments); *In re ActiTech,* 2022 WL 6271936 (Bankr. N.D. Tex. 2022) (plan attached to order; order provides for approval of settlement, releases, and exculpation); *In re North Richland Hills Alamo, LLC,* 2022 WL 2975121 (Bankr. N.D. Tex. 2022); *In re Logistics Giving Resources, LLC,* 2022 WL 2760126 (Bankr. D. Utah 2022).

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

In *Hawkes v. Automated Recovery Systems of New Mexico, Inc. (In re Automated Recovery Systems of New Mexico, Inc.),* 2022 WL 17184548 (Bankr. D. N. Mex. Nov. 22, 2022), the subchapter V debtor removed from the state court a class action that alleged that its filing of

collection actions in its own name, even though it did not own the claims, was the unauthorized practice of law. The plaintiffs requested that the bankruptcy court abstain. The court determined that the lawsuit was a core proceeding so that mandatory abstention was not required. The court decided that permissive abstention was not appropriate, in part because of the need for a prompt resolution of the dispute. The court noted that subchapter V cases are intended to proceed expeditiously.

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

12. Debtor as disbursing agent after cramdown confirmation. SBRA Guide § IX(C) notes that some courts permit the debtor to make plan payments after cramdown confirmation under § 1191(b). Section 1194(b) requires the trustee to make disbursements after cramdown confirmation, unless the plan or confirmation order provides otherwise. In *In re Creason,* 2023 WL 2190623 (Bankr. W.D. Mich. Feb. 23, 2023), the court permitted the debtor to serve as the disbursing agent after cramdown confirmation.

13. Third-party releases. For a discussion of third-party releases and procedures in a subchapter V context, see *In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023) (Discussing procedures for creditors to "opt in" or "opt out" of provisions for third party releases).

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

15. Material default under confirmed plan. The provisions of the debtor's plan, extensively negotiated with the creditor, provided for payments to be made electronically and received by a date certain. The debtor missed the first plan payment, and the creditor declared a default, which the debtor attempted to cure with a check. The subchapter V trustee and the debtor filed a motion for the court do require the creditor to accept the payment. The creditor stated it would agree to accept the payment if it received prompt payment of its attorney's fees.

The debtor contended that attorney's fees should not be required because the default was not material.

The court determined that the default was material and awarded attorney's fees. *In re Ace Holding, LLC*, 2023 WL 4412184 (Bankr. N.D.N.Y. July 7, 2023**).** The court reasoned:

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