Practical Tips on Using Subchapter V to Assist Your Clients

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A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

Revised and Updated July 2020

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Sections III(A) and (B) – discussion of changes in the debt limit for a subchapter V debtor under the CARES Act

Part VI – additional discussion of how bankruptcy courts are implementing procedures for subchapter V cases

Section VII(B) – expanded discussion of exception in §1190(3) to general prohibition of modification of residential mortgage

Part XIII – discussion of case law on retroactive application of subchapter V and its availability in pre-enactment case

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Addition of Appendices C (Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13) (revised August 2020) and D (Key Events in the Timeline of Subchapter V Cases)

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A Guide to the Small Business Reorganization Act of 2019

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I. Introduction

The Small Business Reorganization Act of 2019 (the "SBRA"),[1] signed by the President on August 23, 2019, enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and made conforming amendments to several sections of the Bankruptcy Code and statutes dealing with appointment and compensation of trustees in title 28.[2] SBRA also revised the definitions of "small business case" and "small business debtor" in § 101(51C) and § 101(51D), respectively.[3] It took effect on February 19, 2020, 180 days after its enactment.

Under § 101(51D), as amended, a debtor could not qualify as a small business debtor if its debts (with some exceptions) exceeded $ 2,725,625. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"),[4] enacted and effective March 27, 2020, amended

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[1] Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.).

[2] Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code. Sections of the Bankruptcy Code added by the SBRA are referred to as "New § ___" in the text of this paper.

Section 3 of SBRA also enacts changes relating to prosecution of preference actions under 11 U.S.C. § 547 and to venue for certain proceedings brought by a trustee. These amendments apply in all bankruptcy cases.

SBRA § 3(a) amends § 547(b) to require that a trustee seeking to avoid a preferential transfer must exercise "reasonable due diligence in the circumstances of the case" and must take into account a party's "known or reasonably knowable" affirmative defenses under § 547(c). SBRA § 3(a).

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than $ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was $ 13,650.

[3] SBRA § 4(1)(A)-(B).

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

the SBRA to increase the debt limit to $ 7.5 million for purposes of subchapter V for one year and made certain technical corrections.

Appendix A is a chart that lists sections of the Bankruptcy Code that SBRA affected and summarizes the changes, as affected by the CARES Act.

The purpose of SBRA is "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs."[5] A sponsor of the legislation stated that it allows small business debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business," which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."[6] Courts have taken the legislative purpose of SBRA into account in their application of the new law.[7]

It is likely that SBRA will have a significant impact. A preliminary estimate is that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would qualify as a small business debtor and that about 25 percent of individuals in chapter 11 cases would qualify as a small business.[8] The economic circumstances arising from the

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[5] H.R. REP. NO. 116-171, at 1 (2019), *available at* https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf.

For a summary of small business reorganizations under the Bankruptcy Code, see Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 BANKRUPTCY LAW LETTER, no. 10, Oct. 2019, at 1-4.

[6] H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc*, 2020 WL 975464, at *1-3 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. Blackmon, *Revising the Debt Limit for "Small Business Debtors": The Legislative Half-Measure of the Small Business reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339, 344-45 (2020).

[7] *In re* Ventura, 615 B.R. 1 , 6, 12-13 (Bankr. E.D.N.Y. 2020); *In re* Progressive Solutions, Inc, 2020 WL 975464, at *1-3 (Bankr. C.D. Cal. 2020).

[8] Brubaker, *supra* note 5, at 5-6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?*, CREDIT SLIPS (Sept. 14, 2019), http://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html. Professor Brubaker points out that the percentage may ultimately be higher because pre-SBRA law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under pre-SBRA law because of its obstacles might now do so.

Covid-19 pandemic and the temporary increase of the debt limit under the CARES Act can only increase the number of small business cases.[9]

New subchapter V applies in cases in which a qualifying debtor elects its application. In the absence of an election, the existing provisions of chapter 11 that govern a small business debtor apply with one change. SBRA amends § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in any case of a small business debtor unless the court orders otherwise.[10]

Subchapter V resembles chapter 12 in some aspects.[11] It provides for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee has oversight and monitoring duties and the right to be heard on certain matters. In some cases, the trustee may make disbursements to creditors.

But subchapter V differs from chapter 12 in significant ways. For example, whereas chapter 12 confirmation standards (§ 1225) are similar to those in chapter 13 (§ 1325), subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a). Unlike chapter 12, subchapter V does not provide for a codebtor stay.

Enactment of SBRA required revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") had authority to make changes in the Official Forms prior to the effective date of the SBRA. Changes to the Bankruptcy Rules,

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[9] For a discussion of strategies for creditors in view of the enactment of subchapter V, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 Am. Bankr. Inst. L. Rev. __ (forthcoming 2020).

[10] SBRA, § 4(a)(11), 133 Stat. at 1086.

[11] As the court observed in *In re Trepetin*, 2020 WL 3833015, at *5 n. 14 (Bankr. D. Md. 2020):

> Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

however, take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require.

To take account of the new law, the Rules Committee made changes to the Official Forms and promulgated interim rules (the "Interim Rules") that amend the Federal Rules of Bankruptcy Procedure.[12] The changes to the Official Forms became effective as of the effective date of SBRA. The Rules Committee has recommended that each judicial district adopt the Interim Rules as local rules or by general order. Enactment of the CARES Act required technical revisions in Interim Rule 1020 in and the Official Forms for voluntary petitions.[13] Appendix B summarizes the changes that the Interim Rules make.

SBRA does not repeal existing provisions that govern small business debtors in chapter 11. Those provisions continue to apply to small business debtors who do not elect to proceed under subchapter V. The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee proposes to call cases

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[12] On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure ("Interim Rules") to address provisions of SBRA for adoption in each judicial district by local rule or general order and new Official Forms. The proposed Interim Rules and Official Forms reflected changes in response to comments received. ADVISORY COMMITTEE ON BANKRUPTCY RULES, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption, and approved the new Official Forms. The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

The Interim Rules are located on the *Current Rules of Practice & Procedure* page of the U.S. Courts public website (USCOURTS.GOV). The new Official Forms are posted on the *Forms* page of the website, under the *Bankruptcy Forms* table.

[13] On April 6, 2020, the Advisory Committee on Bankruptcy Rules proposed one-year technical amendments to Interim Rule 1020 to take account of the revised definition of "debtor" under the CARES Act, which Sections III(A) and (B) discuss. The Advisory Committee also proposed conforming technical changes to official forms, including Official Forms 101 and 202, which are the forms for the filing of a voluntary petition by an individual and a non-individual, respectively.

On April 20, 2020, the Committee on Rules of Practice and Procedure approved the amendments and recommended their local adoption. It also approved the one-year technical change to the Official Forms.

under the existing provisions "small business cases" and to call cases of electing debtors "cases under subchapter V of chapter 11."

This terminology is technically accurate. Under the SBRA amendments, a "small business debtor" is not necessarily a debtor in a "small business case." Rather, a "small business case" is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case.

The distinction is important for at least one reason. Section 362(n) makes the automatic stay inapplicable in certain circumstances when the debtor in the current case is or was a debtor in a pending or previous small business *case*. Because a subchapter V debtor is not in a small business *case*, § 362(n) will not apply in a later case of the subchapter V debtor.

Bankruptcy judges and lawyers will inevitably adopt shorthand expressions to distinguish the three types of cases that are now possible under chapter 11: a non-small business case; a subchapter V case for a small business debtor who elects it; and a non-subchapter V small business case – a "small business case" – for one who does not. This paper refers to a non-small business case as a "standard" chapter 11 case; to the case of an electing small business debtor as a "sub V case;" and to the case of a non-electing small business debtor as a "non-sub V case." And, of course, debtors are either "standard," "sub V" or "non-sub V."

II. Overview of Subchapter V

For electing small business debtors, subchapter V: (1) modifies confirmation requirements; (2) provides for the participation of a trustee (the "sub V trustee") while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) changes several administrative and procedural rules; and (4) alters the rules for the debtor's discharge and

the definition of property of the estate with regard to property an individual debtor acquires postpetition and postpetition earnings (which has implications for operation of the automatic stay of § 362(a)). Only the sub V debtor may file a plan or a modification of it.

This Part provides an overview of these provisions. Later Parts discuss these and other provisions in more detail. Appendix C is a chart that compares provisions of subchapter V with those that govern non-sub V chapter 11, chapter 12, and chapter 13 cases.

A. Changes in Confirmation Requirements

The court may confirm a plan even if all classes reject it. Moreover, the "fair and equitable" requirement for "cramdown" confirmation does not include the absolute priority rule. Instead, the plan must comply with a new projected disposable income requirement (applicable in cases of entities as well as those of individuals). The cramdown requirements for a secured claim are unchanged. (Part VIII).

A plan may modify a claim secured only by a security interest in the debtor's principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor. Such modification is not permitted in standard or non-sub V chapter 11 cases or in chapter12 or 13 cases. (Section VII(B)).

B. Subchapter V Trustee and the Debtor in Possession

Subchapter V provides for the debtor to remain in possession of assets and operate the business with the rights and powers of a trustee, unless the court removes the debtor as debtor in possession. (Part V).

The United States Trustee appoints the sub V trustee. The role of the sub V trustee is to oversee and monitor the case, to appear and be heard on specified matters, to facilitate a

consensual plan, and to make distributions under a nonconsensual plan confirmed under the cramdown provisions. (Part IV).

C. Case Administration and Procedures

Subchapter V modifies the usual procedures in chapter 11 cases in several respects. Appendix D summarizes the key events in a subchapter V case and the timeline for them.

No committee of unsecured creditors. A committee of unsecured creditors is not appointed unless the court orders otherwise. (SBRA also makes this the rule in a non-sub V case.) (Section VI(A)).

Required status conference and report from debtor. The court must hold a status conference within 60 days of the filing "to further the expeditious and economical resolution" of the case. Not later than 14 days before the status conference, the debtor must file a report that details the efforts the debtor has undertaken and will undertake to achieve a consensual plan of reorganization. (Section VI(C)).

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

No disclosure statement. Section 1125, which states the requirements for a disclosure statement in connection with a plan and regulates the solicitation of acceptances of a plan, does not apply in a sub V case, unless the court orders otherwise. Although no disclosure statement is required, the plan must include: (1) a brief history of the business operations of the debtor; (2) a

liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan. (Sections VI(B), VII(B)).

No U.S. Trustee fees. A sub V debtor does not pay U.S. Trustee fees. (Section VI(E)).

D. Discharge and Property of the Estate

1. Discharge – consensual plan

If the court confirms a consensual plan, a sub V debtor (including an individual debtor) receives a discharge under § 1141(d)(1)(A) upon confirmation. The provision in § 1141(d)(5) for delay of discharge in individual cases until completion of payments does not apply in a sub V case. In the case of an individual, the § 1141(d)(1)(A) discharge does not discharge debts excepted under § 523(a).[14] One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

2. Discharge – cramdown plan

If the court confirms a cramdown plan, § 1141(d) does not apply, and confirmation does not result in a discharge. Instead, new § 1192 provides for a discharge, which does not occur until the debtor completes plan payments for a period of at least three years or such longer time not to exceed five years as the court fixes. (Section X(B)).

Under new § 1192, the discharge in a cramdown case discharges the debtor from all debts specified in § 1141(d)(1)(A) and all other debts allowed under § 503 (administrative expenses), with the exception of: (1) debts on which the last payment is due after the first three years of the plan or such other time not exceeding five years as the court fixes; and (2) debts excepted under § 523(a). (Section X(B)). Under § 362(c)(2), the automatic stay remains in effect after

[14] § 1141(d)(2).

confirmation of a cramdown plan until the case is closed or dismissed, or the debtor receives a discharge.

3. Property of the estate

Section 1115 provides that, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. Section 1115 does not apply in a subchapter V case.[15] If the court confirms a plan under the cramdown provisions of new § 1191(b), however, property of the estate includes (in cases of both individuals and entities) postpetition assets and earnings.[16] (Part XI(B)).

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

A. Debtor's Election of Subchapter V

The provisions of subchapter V apply in cases in which a small business debtor elects them.[17] If a small business debtor does not make the election, the current provisions of Chapter 11 governing small business cases apply.

The operative statutory provision is new § 103(i). As amended by the CARES Act, it provides:

> Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of title 11 shall apply.[18]

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[15] New § 1181(a).
[16] New § 1186(a).
[17] One commentator has suggested that a creditor may want to attempt to limit the availability of subchapter V by including in the credit agreement a commitment from the debtor not to make the election or to waive it, noting that such a contractual provision may not be enforceable. Bradley, *supra* note 9, manuscript at 11-12. Professor Bradley suggests alternatively that a creditor could require a "springing" (sometimes referred to as a "bad boy") guarantee from a debtor's insider that would arise if the debtor elected subchapter V. *Id.*
[18] SBRA inserted new subsection (i) in § 103 and renumbered existing subsections (i) through (k) as (j) through (*l*). SBRA § 4(a)(2). Before enactment of the CARES Act, new § 103(*i*) provided:

SBRA added new § 1182, which defined "debtor" in subsection (1) as meaning a "small business debtor,"[19] a term defined in § 101(51D). As the next Section discusses, SBRA also revised the § 101(51D) definition of "small business debtor." The CARES Act amended § 1182(1) so that its definition of "debtor" is the same as the definition of "small business debtor" in revised §101(51D), with a technical correction that it also made,[20] except that the amount of the debt limit is increased to $ 7.5 million.[21] The debt limit in revised § 101(51D) is unchanged.

The CARES Act amendment to new § 1182(1) is effective for only one year after enactment of the statute on March 27, 2020.[22] At that time, the CARES Act provides for the amendment of § 1182(1) to return to its original language, so that "debtor" will mean "a small business debtor."

The effect of all these provisions is that, for one year after the enactment of the CARES Act, new (and amended) § 1182(1) states the definition of a debtor eligible to be a sub V debtor. After that, new § 101(51D) will state the definition. The only difference in the language of the two statutes is the higher debt limit in the temporary CARES Act version of § 1182(1). (Because the CARES Act does not change the definition of "small business debtor," a debtor with debts in excess of the § 101(51D) limit but below $ 7.5 million that does not elect subchapter V cannot be a small business debtor.)

Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of title 11 shall apply.

[19] SBRA § 2(a).

[20] The technical correction involves the exclusion of public companies. See text accompanying note 39 *infra*.

[21] CARES Act § 1113(a)(1).

[22] CARES Act § 113(a)(5).

The statute does not state when or how the debtor makes the election. Bankruptcy Rule 1020(a) requires a debtor to state in the petition whether it is a small business debtor.[23] In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order for relief. The case proceeds in accordance with the debtor's statement unless and until the court enters an order finding that the statement is incorrect.

Interim Rule 1020(a) as originally promulgated added the requirement that the debtor state in the petition whether the debtor elects application of subchapter V and provided that the case proceed in accordance with the election unless the court determined that it is incorrect. In an involuntary case, the Interim Rule required the debtor to state whether it is a small business debtor and to make the election within 14 days after the order for relief.[24] In response to the CARES Act amendment of new § 1182(1), the revised Interim Rule provides in both instances for the debtor to state whether the debtor is a small business debtor or a debtor as defined in § 1182(1) and, if the latter, whether the debtor elects application of subchapter V.

Revisions to the Official Forms for voluntary chapter 11 cases require the debtor to state whether it is a small business debtor or a § 1182(1) debtor and whether it does or does not make the election.[25] Revised Official Forms also provide for creditors to receive notice of the debtor's statement of its status and the election that it makes.[26]

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[23] FED. R. BANK. P. 1020(a).
[24] INTERIM RULE 1020.
[25] OFFICIAL FORM B101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); OFFICIAL FORM B102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).
[26] OFFICIAL FORM B309E2 is the form for individuals or joint debtors under subchapter V, and OFFICIAL FORM B309F2 is the form for corporations or partnerships under subchapter V. Existing OFFICIAL FORMS B309E (individuals or joint debtors) and B309F (corporations or partnerships) are renumbered as B309E1 and B309F1. Both new forms contain the same information as the existing notices but provide additional information applicable in subchapter V cases.

The new forms require inclusion of the trustee and the trustee's phone number and email address. The new notices state that the debtor will generally remain in possession of property and may continue to operate the business and advise that, in some cases, debts will not be discharged until all or a substantial portion of payments under the plan are made.

Parties in interest may object to a debtor's election to proceed as a small business debtor. Bankruptcy Rule 1020(b) requires an objection to a debtor's statement as to whether it is a small business debtor within 30 days after the later of the conclusion of the § 341(a) meeting or amendment of the statement. Interim Rule 1020(b) makes the same requirement applicable to the statement regarding the election.

Bankruptcy Rule 1009(a) gives a debtor the right to amend a voluntary petition, list, schedule, or statement "as a matter of course at any time before the case is closed." A question is whether a debtor may amend the small business designation or the subchapter V election that the voluntary petition includes. Current Bankruptcy Rule 1020 does not address whether a debtor can amend the small business designation, and Interim Rule 1020 likewise does not address the issue of whether a delayed election should be allowed and, if so, under what circumstances.[27] Part XIII discusses the cases that have considered whether a debtor in a case pending before enactment of SBRA may amend the petition to elect application of Subchapter V.

One problem with permitting a debtor to change the election is that deadlines for conducting a status conference[28] and for filing a plan[29] run from the date of the order for relief. The Advisory Committee in its Report observed, "Should a court exercise authority to allow a delayed election, it is likely that one of the court's prime considerations in ruling on a request to make a delayed election would be the time restriction imposed by subchapter V. . . ."[30]

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[27] The Advisory Committee Note to Interim Rule 1020 states, "The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions."
[28] *See infra* Section VI(C).
[29] *See infra* Section VI(D).
[30] REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES, *supra* note 12, at 3.

B. Revised Definitions of "Small Business Debtor" and "Small Business Case"

Under pre-SBRA law, paragraph (A) of § 101(51D) defined a "small business debtor" as a person (1) engaged in commercial or business activities, (2) excluding a debtor whose principal activity is the business of owning or operating real property, (3) that has aggregate noncontingent liquidated secured and unsecured debts[31] as of the date of the filing of the petition or the date of the order for relief in an amount not more than $ 2,725,625,[32] (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor. Paragraph (B) of former § 101(51D) excluded any member of a group of affiliated debtors that has aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

As the previous Section discusses, SBRA amended the § 101(51D) definition of "small business debtor," and the CARES Act made amendments that temporarily increase the debt limit for a sub V debtor to $ 7.5 million and make a technical correction to the exclusion of certain public companies from the definition.

The CARES Act effects the debt limit change through an amendment to new § 1182(1) that lasts only one year. The language of revised § 1182(1) is identical to the language of § 101(51D), with the technical correction that the CARES Act also makes. Specifically, subparagraphs (A) and (B) of new § 1182(1) are exactly the same as subparagraphs (A) and (B) of § 101(51D), as amended by both SBRA and the CARES Act. For convenience, this paper

[31] § 101(51D)(A). Debts owed to one or more affiliates or insiders are excluded from the debt limit. *Id.*
[32] The amount is revised every three years. § 104. The current amount became effective to cases filed on or after April 1, 2019.

discusses these provisions by reference to § 101(51D) because it continues to apply to a small business debtor that does not elect subchapter V.

SBRA did not change the requirement in § 101(51D) that the debtor be engaged in "commercial or business activities"[33] or the aggregate debt limit, but it modified each of the other requirements.[34] First, revised subparagraph (A) of § 101(51D) requires that 50 percent or more of the debt must arise from the commercial or business activities of the debtor.[35]

Second, amended § 101(51D)(A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real estate.[36]

Third, the requirement that no committee exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in the case of a small business debtor unless the court orders otherwise.)

Finally, SBRA added two additional types of debtors to those that subparagraph (B) excludes from being a small business debtor. One exclusion (in (B)(ii), as amended) was for a corporate debtor subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act of 1934.[37] The second (in (B)(iii), as amended) was for a corporate debtor subject

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[33] In *In re Wright*, 2020 WL 2193240 (Bankr. D. S.C., April 27, 2020), the court held that nothing in the definition limits it to a debtor currently engaged in business and ruled that an individual who had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. *Accord*, *In re* Bonert, 2020 WL 3635869, at *5 (Bankr. C.D. Cal. 2020); *see In re* Blanchard, Case No. 12440, Doc. No. 137 (Bankr. E.D. La., July 16, 2020).

[34] SBRA § 4(a)(1).

[35] For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor's income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B).

[36] Section 101(51B) defines "single asset real estate" as "real property constituting a single property of project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto." § 101(51B).

[37] § 101(51D)(B)(ii).

to the reporting requirements of those sections that is an affiliate of a debtor.[38] The CARES Act made a technical correction[39] to eliminate the second provision and to insert a new (B)(iii) to exclude "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))."[40]

SBRA amended the definition of "small business case" in § 101(51C) to exclude a subchapter V debtor. Thus, a "small business case" is a case in which a small business debtor has *not* elected application of subchapter V. In other words, the case of a sub V debtor is *not* a "small business case," even though a sub V debtor necessarily is a "small business debtor." And as a result of the CARES Act amendments increasing the debt limits, a debtor may be a subchapter V debtor under § 1182(1) (until its expiration) but not a "small business debtor."

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases.[41] The trustee is a standing trustee, if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. SBRA § 4(b) amends 28 U.S.C. § 586 to make its provisions for the appointment of standing chapter 12

[38] SBRA § 4(a)(1)(B)(i)(III), amending § 101(51D)(B)(iii).
[39] For a discussion of the issues relating to this provision, *see* Brubaker, *supra* note 5, at 7. Because the issues are of limited or no interest to most practitioners and judges, they are beyond the scope of this paper. The author will address the issues if they arise and readers must do likewise.
[40] CARES Act § 1113(a)(4)(A).
[41] § 1183(a). SBRA § 4(a)(3) amends § 322(a) to provide for a sub V trustee to qualify by filing a bond in the same manner as other trustees.

and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.[42]

The United States Trustee Program has selected a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.[43] The appointment of a sub V trustee in each case instead of a standing trustee appears to be contrary to the expectations of proponents of the SBRA. In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated, "There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee."[44]

B. Role and Duties of the Subchapter V Trustee

The role of the sub V trustee is similar to that of the trustee in a chapter 12 or 13 case. But as later text discusses, a sub V trustee has the specific duty to "facilitate the development of a consensual plan of reorganization." New § 1183(b)(7). Sub V trustees may, therefore, confront issues that are quite different from those that trustees in other cases deal with.[45]

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[42] New § 1181(a). Section 1104, which governs the appointment of a trustee in a non-sub V case, does not apply in sub V cases. In a sub V case, the U.S. Trustee's appointment of the trustee is not subject to the court's approval as it is under § 1104(d).

[43] *See* Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP's Implementation of the HAVEN Act and the SBRA*, 38 AMER. BANKR. INST. J. 12 (Oct. 2019).

[44] *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), *available at* https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

[45] The United States Trustee Program has promulgated its expectations with regard to the duties of the sub V trustee and the trustee's role in the case. U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials [hereinafter SUBCHAPTER V TRUSTEE HANDBOOK]. For a discussion of the sub V trustee's duties and role in the case, and strategic considerations for creditors, see Bradley, *supra* note 9, manuscript at 8-9, 14-17.

New § 1183 enumerates the trustee's duties. Section 1106, which specifies the duties of the trustee in a standard chapter 11 case, does not apply in sub V cases.[46] New § 1183, however, makes many of its provisions applicable in some circumstances. As in chapter 12 and 13 cases, the debtor remains in possession of assets and operates the business. If the court removes the debtor as debtor in possession under new § 1185(a), the trustee operates the business of the debtor.[47]

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

In general, the role of the trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan.[48] This role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

First, the sub V trustee has the duty to "facilitate the development of a consensual plan of reorganization."[49] No other trustee has this duty, although a chapter 13 trustee has the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan."[50] One practitioner has suggested that the sub V trustee should be a "financial wizard" who can work with all parties on cash flows, interest rates, payment requirements, and "all the numbers puzzles

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[46] New § 1181(a).
[47] New § 1183(b)(5).
[48] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 1-1, provides an overview of the sub V trustee's duties:

> In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor's payments under the confirmed plan of reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor's bankruptcy estate for the benefit of creditors.

The Handbook notes, "The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case." *Id.* at 2-2. For a summary of the U.S. Trustee Program's views of the sub V trustee's duties, see *id.* at 1-5 to 1-7.
[49] New § 1183(b)(7).
[50] § 1302(b)(4).

that comprise a plan," and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.[51] The United States Trustee Program expects sub V trustees to be proactive in the plan process.[52]

Second, the trustee must appear and be heard at the status conference that new § 1188(a) requires.[53] Although § 105(d) (which does not apply in a sub V case under new § 1181(a)) provides for a status conference in any case on the court's own motion or on the request of a party in interest, it does not require one. Thus, a status conference is not required in any other type of case. Section VI(C) discusses the status conference.

Finally, the trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.[54]

Although the responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor's property, business, and financial condition, a sub V trustee, like a chapter 12 trustee, does not have the duty to investigate the financial affairs of the debtor. Section 704(a)(4) imposes such a

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[51] Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 AMER. BANKR. INST. J. 8 (Nov. 2019). *See also* Bradley, *supra* note 9, at manuscript 8-9 ("Trustees seem likely to play the role of mediator.").

[52] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-9, states:

> As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor's counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

When the plan is filed, the Handbook advises the sub V trustee to "review the plan and communicate any concerns to the debtor about the plan prior to the confirmation hearing." *Id.*

[53] New § 1183(b)(3). *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-8 ("The trustee should review the debtor's report carefully. . ." and "should be prepared to discuss the debtor's report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.").

[54] New § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all of these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a standard chapter 11 or a non-sub V case has a broad duty of investigation under § 1106(a)(3), unless the court orders otherwise.

The court may impose the investigative duties that § 1106(a)(3) specifies on the sub V trustee. Under new § 1183(b)(2), the court (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) may order that the sub V trustee perform certain duties of a chapter 11 trustee under § 1106(a). The specified duties are: (1) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3)); (2) to file a statement of the investigation, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate, and to transmit a copy or summary of it to entities that the court directs (§ 1106(a)(4)[55]); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).[56] The same procedures apply to a chapter 12 trustee's duty to investigate under § 1202(b)(2).

[55] Section 1106(a)(4)(B) directs a chapter 11 trustee to transmit the copy or summary to any creditors' committee, equity security holders' committee, and indenture trustee. Committees do not exist in a small business case unless the court orders otherwise under § 1102(a)(3) as amended, and a small business debtor is unlikely to have an indenture trustee as a creditor.

[56] New § 1183(b)(2). In *In re AJEM Hospitality, LLC*, 2020 WL 3125276 (M.D.N.C. 2020), the court on motion of the bankruptcy administrator, and with the consent of the debtor and sub V trustee, authorized the trustee to conduct an investigation limited to the investigation of potential intercompany claims. The court noted, "The language of [§ 1106(a)(3)] specifically allows the Court to limit the scope of an investigation 'to the extent that the court orders . . . .'" *Id*. at *2.

2. Other duties of the trustee

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),[57] a sub V trustee under new § 1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine proofs of claim and object to allowance of any claim that is improper, if a purpose would be served (§ 704(a)(5)); (3) to oppose the discharge of the debtor, if advisable (§ 704(a)(6)); (4) to furnish information concerning the estate and the estate's administration that a party in interest requests, unless the court orders otherwise (§ 704(a)(7)); and (5) to make a final report and to file it (§ 704(a)(9)).[58] Under new § 1183(b)(4), the sub V trustee also has the same duty as chapter 12 and 13 trustees to ensure that the debtor commences timely payments under a confirmed plan (§§ 1202(b)(4), 1302(b)(5)).[59]

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees.[60] The U.S. Trustee Program has developed procedures for reporting by sub V trustees to enable U.S. Trustees to evaluate and monitor their performance.[61]

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[57] Chapter 12 (§ 1202(b)(1)) and chapter 13 (§ 1302(b)(1)) trustees also have the duty of a chapter 7 trustee under § 704(a)(3) to ensure that the debtor performs the debtor's intentions under § 521(a)(2)(B) to surrender, redeem, or reaffirm debts secured by property of the estate. The imposition of this duty in chapter 12 and 13 cases is curious in that § 521(b)(2)(B) applies only in chapter 7 cases. SBRA does not impose this anomalous duty on the sub V trustee.

[58] New § 1183(b)(1).

[59] New § 1183(b)(4).

[60] 28 U.S.C. § 586(a)(3). SBRA § 4(b)(1)(A) amended 28 U.S.C. § 586(a)(3) to include sub V cases within the types of cases that the U.S. Trustee supervises.

[61] SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, ch. 8. *See also* U.S. DEP'T OF JUSTICE, 3 UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL: CHAPTER 11 CASE ADMINISTRATION (Feb. 2020) §§ 3-17.16, 3-17.16.1, 3.17.1.2, 3.17.16.3, 3.17.16.5, 3.17.16.6, https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra*, directs sub V trustees to consult with the U.S. Trustee before filing an objection to confirmation (*id.* at 3-9, 3-10, 3-12), objecting to a claim (*id.* at 3-15), or filing a motion to dismiss or convert (*id.* at 3-17).

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

Under new § 1185(a), the court may remove the debtor as debtor in possession. If the court does so, the sub V trustee has the duties of a trustee specified in paragraphs (1), (2), and (6) of § 1106.[62] New § 1183(b)(5) specifically directs the sub V trustee to operate the debtor's business when the debtor is not in possession. Similar provisions apply in chapter 12 cases.[63]

Under paragraph (1) of § 1106(a), the trustee must perform the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These duties are: (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); (3) to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); (4) to file reports (§ 704(a)(8)); (5) to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9)); (6) to provide required notices with regard to domestic support obligations (§ 704(a)(10)); (7) to perform any obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and (8) to use reasonable and best efforts to transfer patients from a health care business that is being closed (§ 704(a)(12)).[64]

Paragraph (2) of § 1106(a) requires the trustee to file any list, schedule, or statement that § 521(a)(1) requires if the debtor has not done so. Paragraph (6) requires the trustee to file tax returns for any year for which the debtor has not filed a tax return.

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[62] New § 1183(b)(5). New § 1183(b)(5) also requires the sub V trustee to perform duties specified in § 704(a)(8). The specification of the duty is duplicative because the § 704(a)(8) duty is one of the duties listed in § 1106(a)(1) that the sub V trustee must perform.

[63] The court may remove a chapter 12 debtor from possession under § 1204. Under § 1202(b)(5), the chapter 12 trustee then has the duties of a trustee under § 1106(a)(1), (2), and (6). §§ 1106(a), 1202(b).

[64] § 1106(a)(1).

C. Trustee's Disbursement of Payments to Creditors

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

Paragraphs (a) and (c) of new § 1194 contain provisions dealing with the trustee's disbursement of money prior to confirmation. It is not clear, however, how they can have any operative effect. Nothing in subchapter V requires preconfirmation payments to the trustee or authorizes the court to require them.

New § 1194(a) states that the trustee shall retain any "payments and funds" received by the trustee until confirmation or denial of a plan.[65] Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph's direction for their disbursement based on whether the court confirms a plan or denies confirmation indicates that it deals only with money the trustee receives prior to confirmation.

If a plan is confirmed, new § 1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee. The provision is effectively the same as the provisions that govern disbursement of preconfirmation payments in chapter 12 and 13 cases.[66]

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[65] New § 1194(a).

[66] New §§ 1194(a), 1226(a), 1326(a)(2). The chapter 12 provision, § 1226(a), does not specifically provide for fees of a trustee who is not a standing trustee and does not permit a deduction for adequate protection payments. The fees of a non-standing chapter 12 trustee are allowable as an administrative expense and as such are within the scope of the deduction.

The chapter 13 provision, § 1326(b)(2), does not specifically provide for fees of the chapter 13 trustee. It does provide for the trustee to deduct adequate protection payments.

A standing chapter 13 trustee collects a percentage fee as the debtor makes payments. 28 U.S.C. § 586(e)(2) (2018); *see* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, CHAPTER 13 PRACTICE AND PROCEDURE § 17:5 (2019). Thus, the funds a standing chapter 13 trustee has upon denial of confirmation are net of the trustee's fee that has already been paid. A non-standing chapter 13 trustee's fee is included in the deduction because it is an administrative expense.

Provisions for a trustee's disbursement of preconfirmation funds make sense in a chapter 13 case because a chapter 13 debtor must begin making preconfirmation payments to the trustee, adequate protection payments to creditors with a purchase-money security interest in personal property, and postpetition rent to lessors of personal property within 30 days of the filing of the chapter 13 case.[67] If the court denies confirmation in a chapter 13 case, therefore, it is possible that the chapter 13 trustee will be holding money that the debtor paid.

No such provisions for preconfirmation payments exist in a sub V case. Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the court to require the debtor to make preconfirmation payments to the trustee.

Nevertheless, paragraph (c) of new § 1194 authorizes the court, prior to confirmation and after notice and a hearing, to authorize the trustee to make payments to provide adequate protection payments to a holder of a secured claim.[68] But a court can hardly require a sub V trustee to make adequate protection payments as new § 1194(c) contemplates if the trustee has no money to make them.

It is perhaps arguable that the new § 1194(a) and (c) provisions impliedly authorize the court to require a debtor to make preconfirmation payments to the trustee, particularly if the court orders the trustee to make adequate protection payments. But the concept of the sub V debtor remaining in possession of its assets and operating its business includes the debtor retaining control of its funds. It is more appropriate (and simpler) for a court to require the debtor, not the trustee, to make whatever adequate protection or other payments the court orders.

[67] § 1326(a).
[68] New § 1194(c).

2. Disbursement of plan payments by the trustee

Whether the sub V trustee makes disbursements to creditors under a confirmed plan depends on the type of confirmation that occurs. Under new § 1194(b), the trustee makes payments under a plan confirmed under the cramdown provisions of new § 1191(b), unless the plan or confirmation order provides otherwise.[69] If a consensual plan is confirmed under new § 1191(a), however, the trustee's service terminates under new § 1183(c) upon "substantial consummation," and the debtor makes plan payments.[70] Part IX discusses payments under the plan.

D. Termination of Service of the Trustee and Reappointment

1. Termination of service of the trustee

When termination of the trustee's service occurs depends on whether the court confirms a consensual plan under new §1191(a) or confirms a plan that one or more impaired classes of creditors have not accepted under the cramdown provisions of new § 1191(b).

When the court confirms a consensual plan under new § 1191(a), the trustee's service terminates upon substantial consummation,[71] which ordinarily occurs when distribution commences.[72] Confirmation of a plan under the cramdown provisions of new § 1191(b) does not terminate the trustee's service. As just discussed, the trustee continues to serve and makes payments under the plan as new § 1194 requires.

Part IX further discusses these provisions.

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[69] New §1194(b).
[70] New § 1191(a).
[71] Section IX(A) discusses substantial consummation in the context of payments under a consensual plan.
[72] New § 1183(c).

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.[73]

2. Reappointment of trustee

New § 1183(c)(1) provides for the reappointment of a trustee after termination of the trustee's service in two circumstances.

First, new § 1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee's duty under new § 1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.[74] The reason for this provision is unclear. If a debtor seeks modification after cramdown confirmation, the trustee continues to serve, so reappointment is unnecessary. When confirmation of a consensual plan has occurred, the trustee's service terminates upon substantial consummation, after which new § 1193(b) prohibits modification. Perhaps the purpose of the reappointment provision is to make sure that someone appears at the hearing to point this out to the court if a debtor attempts to modify a confirmed consensual plan after its substantial consummation.

Second, new § 1183(c) permits reappointment of the trustee if necessary to perform the trustee's duties under new § 1185(a). New § 1185(a) provides for the removal of the debtor in possession, among other things, for "failure to perform the obligations of the debtor under a plan confirmed under this chapter."[75] Because new § 1185(a) contemplates the postconfirmation removal of the debtor in possession, a trustee must be available to take charge of the assets and

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[73] Section 701(a) directs the U.S. Trustee to appoint an interim trustee promptly after entry of an order for relief under chapter 7. In a converted case, the U.S. Trustee may appoint the trustee serving in the case immediately before entry of the order for relief.

Sections 1202 and 1302 provide for a standing trustee to serve in cases under those chapters, if one has been appointed, or for the U.S. Trustee to appoint a disinterested person to serve as trustee.

[74] New § 1183(c)(1).

[75] New § 1185(a).

the business. Section XII(B) further discusses the postconfirmation removal of the debtor in possession.

E. Compensation of Subchapter V Trustee

If the trustee in a sub V case is a standing trustee, the trustee's fees are a percentage of payments the trustee makes to creditors under the same provisions that govern compensation of standing chapter 12 and chapter 13 trustees.

If the sub V trustee is not a standing trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of § 330(a), without regard to the limitation in § 326(a) on compensation of a chapter 11 trustee based on money the trustee disburses in the case. As Section IV(E)(2) discusses, some observers expect that technical amendments will impose a limit on compensation of five percent of payments under the plan, which is the rule for a non-standing chapter 12 or 13 trustee.[76]

1. Compensation of standing subchapter V trustee

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586.[77] As amended, § 326(a) excludes a subchapter V trustee from its provisions governing compensation of a chapter 11 trustee, and § 326(b) provides that the court may not allow compensation of a standing trustee in a subchapter V case under § 330.

Under SBRA's amendments to 28 U.S.C. § 586(e),[78] the U.S. Trustee Program establishes the compensation for a standing sub V trustee in the same manner it does for standing chapter 12 and 13 trustees.[79] Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12

[76] The observers are bankruptcy judges, lawyers, and professors who have followed and supported enactment of SBRA with whom the author has discussed the issue.
[77] SBRA § 4(a)(4).
[78] SBRA § 4(b)(1)(D).
[79] 28 U.S.C. § 586(e).

and 13 cases are extended to cover subchapter V standing trustees. Thus, the standing subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.

If the service of a standing trustee is terminated by dismissal or conversion of the case or upon substantial consummation of a consensual plan under new § 1181(a) (as Section IX(A) discusses, the trustee does not make payments under a consensual plan), new 28 U.S.C. § 586(e)(5) provides that the court "shall award compensation to the trustee consistent with the services performed by the trustee and the limits on the compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."[80] The limits require reference to the standing trustee's maximum annual compensation, 28 U.S.C. § 586(e)(1)(A), and to the maximum percentage fee, 28 U.S.C. § 586(e)(1)(B).

2. Compensation of non-standing subchapter V trustee

Questions have arisen concerning the provisions of the new statute for compensation of a subchapter V trustee who is not a standing trustee.

Section 330(a) permits the court to award compensation to trustees. Sections 326(a) and (b) impose limits on compensation of trustees. SBRA does not amend § 330(a), but it does amend §§ 326(a) and (b). Under a "plain meaning" interpretation of these provisions as amended, a non-standing sub V trustee is entitled to "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" under § 330(a), and §§ 326(a) and (b) do not impose any limits on compensation.

[80] 28 U.S.C. § 586(e)(5).

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error.[81] The drafters of subchapter V intended that provisions for compensation of non-standing sub V trustees be the same as those for non-standing chapter 12 and 13 trustees.

Specifically, § 326(b) limits compensation of a non-standing chapter 12 or chapter 13 trustee to "five percent upon all payments under the plan." Although it appears the drafters intended this limitation to apply to compensation of sub V trustees, the language of the SBRA amendments to § 326(b) do not make this limitation applicable to a non-standing sub V trustee.[82] Observers close to the legislative process expect a technical amendment to resolve this issue by

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[81] See *supra* note 76.

[82] A full understanding of the issue requires further elaboration.

Section 330(a) provides for the allowance of compensation to "trustees," subject to § 326 (and other sections). SBRA does not amend § 330(a).

SBRA did not change the provisions of subsections (a) and (b) of § 326(a) with regard to compensation of trustees other than sub V trustees. Thus, § 326(a) limits the compensation of a chapter 11 (and chapter 7) trustee to a percentage of moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor.

Section 326(b) deals with compensation of trustees in chapter 12 and 13 cases in two ways. First, it provides that a standing chapter 12 or 13 trustee is not entitled to compensation under § 330(a); instead, a standing chapter 12 or 13 trustee receives compensation, and collects percentage fees, under 28 U.S.C. § 586(e). Second, § 326(b) limits the compensation of a non-standing chapter 12 or 13 trustee to "five percent upon all payments under the plan." § 326(b). The exact language of § 326(b) is that the limitation applies to a "trustee appointed under section 1202(a) or 1302(a) of this title." *Id.*

Generally, then, pre-SBRA § 326(a) dealt with chapter 7 and 11 cases and § 326(b) dealt with chapter 12 and 13 trustees. Without an amendment, a sub V trustee would be a chapter 11 trustee, and § 326(a) would apply. Similarly, unamended §326(b) would not apply because it is for chapter 12 and 13 cases.

SBRA § 4(a)(4)(A) amended § 326(a) by excluding sub V trustees from its application. SBRA § 4(a)(4)(B) amended § 326(b) to prohibit a standing sub V trustee from receiving compensation under § 330. SBRA's amendments to 28 U.S.C. § 586(e) provide for compensation of a standing sub V trustee under its provisions, so the same provisions that govern compensation of standing chapter 12 and 13 trustees apply. SBRA § 4(b)(1).

What the SBRA amendments did <u>not</u> do was add "§ 1183" (the new subchapter V section that calls for the appointment of a sub V trustee) before "§ 1202(a) and 1302(a)" (the sections under which chapter 12 and 13 trustees are appointed) in the language quoted above. Without this insertion, amended § 326(b) does not limit the compensation of a non-standing sub V trustee. As the next footnote discusses, one reading of amended § 326(b) is that nothing authorizes compensation of a non-standing sub-V trustee.

making the five percent limitation also applicable to sub V trustees.[83] Technical corrections in the CARES Act, however, did not address this issue.[84]

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

A standing sub V trustee receives compensation as a percentage of payments the trustee makes from funds paid by the debtor under a plan. The percentage fees of a standing trustee are necessarily deferred until payments are made.

A non-standing trustee's compensation is allowable as an administrative expense, which has priority under § 507(a)(2) subject only to claims for domestic support obligations. Under § 1129(a)(9)(A), a plan must provide for payment of administrative expenses in full on or before the effective date of the plan.[85] This requirement applies in subchapter V cases to confirmation of a consensual plan under new § 1191(a).[86]

New § 1191(e) permits payment of administrative expense claims through the plan if the court confirms it under the cramdown provisions of new § 1191(b).[87] Accordingly, a non-standing sub V trustee faces deferral of payment of compensation for services in the case.

As Section IV(E)(2) discusses, it is possible that a technical amendment to § 326(b) will impose a limitation on a non-standing trustee's compensation to five percent of payments under

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[83] Such an amendment would also clarify that a non-standing trustee is entitled to compensation. As amended, § 326(b) applies to cases under subchapter V, chapter 12, and chapter 13. Before and after the amendment, § 326(b) states that the court "may allow reasonable compensation under section 330 of this title to a trustee appointed under section 1202(a) or 1302(a) of this title," but it does not state that the court may allow compensation under § 330 of a trustee appointed under new § 1183. § 326(b). Because § 330(a) is subject to § 326, and § 326(b) does not provide for compensation of a non-standing sub V trustee, it may be arguable that a sub V trustee is not entitled to compensation. The position of the United States Trustee Program is, "Case-by-case trustees are compensated through § 330(a)(1) which allows for 'reasonable compensation for actual, necessary services rendered by the trustee . . . and by any paraprofessional person employed by such person.'" SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-21.

[84] The technical corrections in the CARES Act involved the exclusion of public companies from the definition of a small business debtor and unclaimed funds in subchapter V cases. CARES Act § 1113(a)(4).

[85] § 1129(a)(9)(A).

[86] New § 1191(a).

[87] New § 1191(e).

the plan. If this occurs, a non-standing trustee's compensation may arguably be limited to five percent of payments as they are made.

F. Trustee's Employment of Attorneys and Other Professionals

Section 327(a) permits a bankruptcy trustee to employ attorneys and other professionals "to represent or assist the trustee in carrying out the trustee's duties." SBRA does not modify this provision for subchapter V cases. If a standing sub V trustee is appointed, the standing trustee presumably would follow the practice of standing trustees in chapter 12 and 13 cases and not retain counsel or other professionals except in exceptional circumstances.

A non-standing sub V trustee's employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances.[88] In this regard, a person serving as a sub V trustee should have a sufficient understanding of applicable legal principles to perform the

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[88] *See In re* Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 (E.D.N.C. 2020). The court declined to approve the sub V trustee's application to approve the employment of the trustee's law firm, stating, "[A]uthorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA." *Id.* at *2. In a footnote, the court cautioned that "overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved." *Id.* at *2 n. 2.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-17 to 3-18, states:

> Although the trustee may employ professionals under section 327(a), SBRA is intended to be a quick and low cost process to enable debtors to confirm consensual plans in a short period with less expense while returning appropriate dividends to creditors. Therefore, the services required of outside professionals, if any, will be limited in many cases. This is especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. See 11 U.S.C. § 1184. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether the employment of the professional is warranted under the specific circumstances of each case.

trustee's monitoring and supervisory duties, and appear and be heard on specified issues, without the necessity of separate legal advice.

A question exists whether a trustee who is not an attorney may appear and be heard in a bankruptcy case. Section 1654 of title 28 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.[89]

The statute applies only to natural persons; it does not permit a corporation or other entity to appear in federal court except through licensed counsel.[90]

Courts have applied the rule to prohibit an individual who serves as the trustee for a trust or as the personal representative of an estate from representing the trust or estate unless the trust or estate has no creditors and the individual is the sole beneficiary.[91] Because a bankruptcy trustee acts as the representative of the estate[92] and creditors have an interest in the estate, the same rule would appear to require a non-attorney trustee to retain a lawyer in order to appear and be heard in a bankruptcy court.

The nature of reorganization proceedings in bankruptcy courts and the facilitative, advisory, and monitoring role that subchapter V specifically contemplates for the trustee suggest that the rule applicable in a federal lawsuit between discrete parties should not be extended to apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

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[89] 28 U.S.C. § 1654.

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

[91] *E.g.*, Guest v. Hansen, 603 F.3d 15 (2d Cir. 2010) (estate); Knoefler v. United Bank of Bismarck, 20 F.3d 347 (8th Cir. 1994) (trust); C.E. Pope Equity Trust v. United States, 818 F.2d 696 (9th Cir. 1987) (trust).

[92] § 323(a).

In this regard, 28 U.S.C. § 1654 and the case law establishing the rule have their roots in 18th and 19th century practice in federal courts[93] when the availability of bankruptcy relief was either nonexistent or short-lived.[94] The statute could not have contemplated a reorganization case involving many parties and many inter-related moving parts that involve business issues and often require negotiations and compromise to achieve a successful outcome for all the parties. In other words, a bankruptcy reorganization is quite different from a lawsuit that involves discrete parties asserting claims and defenses to establish their rights and obligations.

This distinction is particularly important in a subchapter V case. Specific duties of the sub V trustee are to facilitate the development of a consensual plan of reorganization,[95] and to appear and be heard on confirmation and other significant issues that relate to confirmation.[96] The statute makes it clear that the trustee's primary role is to work with the parties and then to *report* to the court, not to engage in litigation with them.

A nonlawyer trustee does not need an attorney to work with the parties on business issues, to investigate and obtain information about the debtor and its business, to facilitate confirmation, and to report to the court. When the time comes to report to the court, the trustee should be permitted to perform the reporting function without a lawyer.

Assuming that the nonlawyer trustee is knowledgeable about reorganization law and practice (and a sub V trustee who is not knowledgeable should not be a sub V trustee), neither

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[93] Section 35 of the Judiciary Act of 1789 is the statutory predecessor to 28 U.S.C. § 1654 (2018) and contained substantially the same language. *See* United States v. Dougherty, 473 F.2d 1113, 1123 n. 10 (D.C. Cir. 1972).

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), provided "that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

[94] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 12-23 (1995). *See also* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 1:2.

[95] New § 1183(b)(7).

[96] New § 1183(b)(3).

the debtor, creditors, nor the court need a lawyer to present the trustee's reports and views to the court. In short, unless a sub V trustee needs to *litigate* something, the trustee does not need counsel. The statute and case law governing federal *litigation* should not be extended to the trustee's appearance in court to *report*.

The subchapter V trustee's primary role is analogous to the role of an examiner in a standard chapter 11 case,[97] or an expert witness that a court appoints.[98] Such parties provide information to the court and the parties and may do so without counsel. A sub V trustee with similar advisory duties should similarly be permitted to provide information to the court without the necessity of having to do so through a lawyer.[99]

Finally, the trustee is an officer of the court. The court need not insist that its officer hire a lawyer to hear what the officer has to say.

If a nonlawyer is the sub V trustee, the trustee's ability to appear in court without a lawyer is critical to accomplishment of the objective of subchapter V of providing debtors – and creditors – with the opportunity to accomplish an expeditious and economic reorganization, hopefully on a consensual basis. A requirement for employment of counsel adds an additional layer of expense that should not ordinarily be necessary and that threatens accomplishment of

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[97] § 1106(b). Although bankruptcy courts often authorize an examiner to employ counsel or other professionals, § 327(a) does not provide authority for an examiner to employ a professional person. *See generally* 5 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 99:29 (3d ed. 2019). *See also In re* W.R. Grace & Co., 285 B.R. 148, 156 (Bankr. D. Del. 2002) ("[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings. The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals." (citation omitted)).

[98] FED. R. EVID. 706.

[99] In some jurisdictions, some chapter 7 panel trustees are not lawyers. The author's informal discussions with bankruptcy judges indicate that in some courts nonlawyer trustees appear without counsel when the matter does not require actual litigation.

subchapter V's primary objective.[100] Moreover, if a nonlawyer trustee must have a lawyer, the additional expense may as a practical matter preclude the appointment of a nonlawyer trustee.

If a court determines that the rule prohibiting a nonlawyer trustee from appearing in federal court requires the trustee to retain counsel in order to be heard, economic considerations may lead the court to limit the services that will be compensated to those for which a lawyer is legally required. Non-compensable services might include, for example, work in connection with the investigation of the debtor and its business or negotiations or development of business information to facilitate a consensual plan. And because it is the trustee, not the lawyer, who is to be heard, any written report concerning confirmation and other matters would seem to be the responsibility of the trustee, not the lawyer.

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

The debtor, as debtor in possession, remains in possession of assets of the estate.[101] A sub V debtor in possession has the rights, powers, and duties of a trustee that a standard chapter 11 debtor in possession has, including the operation of the debtor's business.[102] The court may

[100] This consideration suggests that a court may invoke § 105(a) to permit a nonlawyer to appear without counsel as being "necessary or appropriate" to carry out the provisions of the Bankruptcy Code.
[101] New § 1186(b).
[102] New § 1184. Section 1107(a), which provides for the debtor to remain in possession with the rights, powers, and duties of a trustee, is inapplicable in a sub V case. New § 1181(a). New § 1184 replaces § 1107(a) in sub V cases.

remove the debtor as debtor in possession under new § 1185(a). The court may reinstate the debtor in possession.[103]

B. Duties of Debtor in Possession

Upon the filing of a voluntary case, a small business debtor must file documents required of a small business debtor under §§ 1116(1)(A) and (B).[104] If a small business debtor elects to proceed as a sub V debtor, §1116 is inapplicable, but new § 1187(a) requires the sub V debtor to comply with §§ 1116(1)(A) and (B) upon making the election.[105]

The timing of the election does not change the time for the debtor to file the required documents from the date of the filing of the petition. If the debtor makes the election in the petition (as Interim Rule 1020(a) requires), § 1187(a) requires the debtor to file the documents at that time. If the debtor does not make the election in the petition, § 1116(1) is applicable and requires the debtor to append the documents to the petition. In an involuntary case, the debtor must file the documents within seven days after the order for relief.[106]

The documents that § 1116(1) requires are: the debtor's most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.[107]

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[103] New § 1185(b).
[104] New. § 1187(a).
[105] Section 1116 does not apply in a sub V case, § 1181(a), but new § 1187 incorporates all its requirements. In view of this, it is unclear why § 1116 does not apply in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee.
[106] Section 1116(1) requires a small business debtor in an involuntary case to file the required documents within seven days after the order for relief. Interim Rule 1020(a) permits a debtor to make the subchapter V election within 14 days after entry of the order for relief in an involuntary case. New § 1187(a) requires compliance with the requirements of § 1116(1) upon the debtor's election to be a subchapter V debtor.

Unless and until the debtor makes the election, § 1116 applies. Accordingly, the debtor must comply with § 1116(1) and file the required documents within seven days after the order for relief, regardless of when the debtor makes the election.
[107] § 1116(1).

SBRA does not change a small business debtor's duty under § 308 to file periodic reports.[108] Under § 308(b), the periodic reports must contain information including: (1) the debtor's profitability; (2) reasonable approximations of the debtor's projected case receipts and cash disbursements; (3) comparisons of actual case receipts and disbursements with projections in earlier reports; (4) whether the debtor is in compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and (5) if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.[109]

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7).[110] Thus, the debtor's senior management personnel and counsel must: (1) attend meetings scheduled by the court or the U.S. Trustee (including initial debtor interviews, scheduling conferences, and § 341 meetings, unless waived for extraordinary and compelling circumstances[111]); (2) timely file all schedules and statements of financial affairs (unless the court after notice and a hearing grants an extension not to exceed 30 days after the order for relief, absent extraordinary and compelling circumstances); (3) file all postpetition financial and other reports required by the Bankruptcy Rules or local rule of the district court;[112] (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other

[108] New § 1187(b).
[109] § 308.
[110] New § 1187(b).
[111] As in non-sub V cases, the debtor and counsel must attend the initial debtor interview scheduled by the U.S. Trustee and must attend the § 341 meeting of creditors, at which the U.S. Trustee presides. *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-3, 3-5. The U.S. Trustee expects the sub V trustee to participate in both. *Id.*
[112] That is not a typo. The statute specifies local rule of the district court.

government filings and pay all taxes entitled to administrative expense priority; and (6) allow the U.S. trustee to inspect the debtor's business premises, books, and records.[113]

A sub V debtor in possession has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).[114]

The duties under § 1106(a)(1) include the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a).[115] These provisions include duties: to be accountable for all property received; to examine and object to proofs of claim if a purpose would be served; to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise; to file reports; to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee; to provide required notices with regard to domestic support obligations; to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.

Other § 1106(a) duties applicable to the sub V debtor under new § 1184 are the duties under § 1106(a)(5) through (a)(8): to file a plan;[116] to file tax returns for any year for which the

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[113] § 1118.
[114] New § 1184.
[115] § 1106(a)(1).
[116] The duty under § 1106(a)(5), applicable to the sub V debtor under new § 1184, is to "as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case." New § 1184.

The § 1106(a)(5) language is somewhat problematical in a sub V case. First, § 1121 (dealing with who may file a plan) does not apply in a sub V case because only the debtor may file a plan. Second, the statutory deadline of 90 days for the debtor to file a plan, new § 1189(b), is inconsistent with the "as soon as practicable" direction in § 1106(a)(5). § 1106(a)(5).

Nevertheless, the clear import of the statutory scheme is that the sub V debtor has a duty to file a plan.

debtor has not filed a tax return; to file postconfirmation reports as are necessary or as the court orders; and to provide required notices with regard to any domestic support obligations. [117]

C. Removal of Debtor in Possession

New § 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.[118] "Cause" includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case." This language is identical to § 1104(a),[119] which provides for appointment of a trustee in a standard or non-sub V chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case.

New § 1185(a) also provides for removal of the debtor in possession "for failure to perform the obligations of the debtor" under a confirmed plan, as Sections V(C) and XII(B) discuss. Sections 1104(a) and 1204(a) do not contain this ground for removal of a debtor in possession.[120]

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[117] § 1106(a)(5-8).

[118] New § 1181(a). Sections 1104 and 1105, which deal with appointment of a trustee and termination of the trustee's appointment, are inapplicable in a sub V case.

Section 1104 also permits appointment of a trustee if it is "in the interests of creditors, any equity security holders, and other interests of the estate." New § 1185(a) does not include this reason as "cause" for removing a debtor in possession.

Section 1104 also permits the appointment of an examiner. Subchapter V has no provision for appointment of an examiner. As Section IV(B)(1) notes, the court may authorize a trustee to investigate for cause shown under new § 1183(b)(2).

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

[120] New § 1185(a).

If the court removes the debtor in possession, the trustee has the duty to operate the business of the debtor,[121] and other duties that Section IV(B)(3) discusses. The trustee cannot, however, file a plan.[122]

New § 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing.[123] Section 1202(b) contains identical language in chapter 12 cases, and § 1105 similarly permits the court to terminate the appointment of a chapter 11 trustee and restore the debtor to possession and management of the estate and operation of the debtor's business.[124]

Like §§ 1104(a) and 1204(a), new § 1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists.[125] A potential issue is whether removal of the debtor for failure to perform under a confirmed plan is mandatory if the failure is not material or if the debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at

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[121] *Id*.§ 1183(b)(5).
[122] *Id*.§ 1189(a) (stating that only the debtor may file a plan).
[123] *Id*.§ 1185(b).
[124] §§ 1105, 1202(b). If the debtor is removed from possession, a question arises whether the attorney (and other professionals employed by the debtor) is entitled to compensation for services rendered to the debtor after the removal.

The Supreme Court in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023 (2004), ruled that an attorney for a former chapter 11 debtor in possession who provides services after conversion to chapter 7 is not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney. The same principle applies when a trustee is appointed in a chapter 11 case, thus removing the debtor as debtor in possession.

Subchapter V does not address this issue. If the *Lamie* ruling precludes compensation of a sub V debtor's attorney after removal and the debtor cannot find an attorney to provide counsel without compensation, the debtor will not have a realistic chance of obtaining reinstatement or filing a plan.
[125] New § 1185(a).

the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

VI. Administrative and Procedural Features of Subchapter V

Subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. These features include elimination of the committee of unsecured creditors and the requirement of a separate disclosure statement unless the court orders otherwise; the requirement of a status conference; an expedited timetable for the filing of a plan; elimination of U.S. Trustee fees; and a modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a).

A. Elimination of Committee of Unsecured Creditors

SBRA amends § 1102(a)(3) to provide that a committee of unsecured creditors will not be appointed in the case of a small business debtor unless the court for cause orders otherwise.[126] Prior to the amendment, § 1102(a)(3) permitted the U.S. Trustee to appoint a committee unless the court, for cause, ordered that a committee not be appointed. The other provisions of § 1102[127] (dealing with appointment of committees) and § 1103 (dealing with powers and duties of committees) do not apply in a sub V case unless the court orders otherwise.[128]

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

[126] SBRA § 4(a)(11).
[127] The other provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).
[128] New § 1181(b).

change the requirement of Bankruptcy Rule 1007(d) that a debtor in a voluntary chapter 11 case file a list of its 20 largest unsecured creditors, excluding insiders.

The requirement of the list serves two purposes. First, an objection to the debtor's designation of itself as a small business debtor or to its election of subchapter V[129] must be served on the creditors on the Rule 1007(d) list under Interim Rule 1020(c). Second, if the court directs the appointment of a committee, the list provides the information that the U.S. Trustee needs to identify the largest unsecured creditors for purposes of selecting committee members from the holders of the largest claims willing to serve under § 1102(b)(1).

B. Elimination of Requirement of Disclosure Statement

Section 1125 regulates postpetition solicitation of acceptances or rejections of a plan. It requires that creditors receive "adequate information"[130] about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.[131] The court must hold a hearing on approval of the disclosure statement after at least 28 days' notice before solicitation of votes on the plan may occur.[132]

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing,[133] so that solicitation may occur without prior notice and hearing on the disclosure statement.[134] The hearing on approval of the disclosure statement may be combined with the hearing on confirmation.[135] In addition, the court in a small business case may determine that the plan itself provides adequate

[129] See Section III(A).
[130] Section 1125(a)(1) defines "adequate information" as information that would enable "a hypothetical investor of the relevant class to make an informed judgment about the plan." § 1125(a)(1).
[131] § 1125(b).
[132] FED. R. BANKR. P. 3017(a).
[133] § 1125(f)(3)(A).
[134] § 1125(f)(3)(B).
[135] § 1125(f)(3)(C).

information and that a separate disclosure statement is not necessary,[136] and may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B.[137]

In a sub V case, § 1125 is inapplicable unless the court orders otherwise.[138] Thus, the debtor need not file a disclosure statement in connection with its plan unless the court requires it. If the court orders that § 1125 apply, the provisions of § 1125(f) apply.

A sub V debtor's plan must contain certain information that a disclosure statement typically contains, including: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.[139] Subchapter V does not require that the plan contain "adequate information," and it does not provide for judicial review of the required information. Material or intentional errors or omissions might provide a basis for denial of confirmation for the debtor's lack of good faith in proposing the plan.[140]

C. Required Status Conference and Debtor Report

Section 105(d) permits, but does not require, the court to convene a status conference in a case under any chapter, on its own motion or on request of a party in interest.[141] Section 105(d) does not apply in a sub V case.[142] Instead, new § 1188(a) makes a status conference mandatory and requires the court to hold it not later than 60 days after the entry of the order for relief in the case. The court may extend the time for holding the status conference if the need for an

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[136] § 1125(f)(1).
[137] § 1125(f)(2).
[138] New § 1181(b).
[139] New § 1181(a)(1).
[140] § 1129(a)(3). *See also* Brubaker, *supra* note 5, at 10.
[141] § 105(d).
[142] New § 1181(a).

extension is "attributable to circumstances for which the debtor should not justly be held accountable."[143] The statutory purpose of the status conference is "to further the expeditious and economical resolution" of the case.

Not later than 14 days prior to the status conference, the debtor must file, and serve on the trustee and all parties in interest, a report that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."[144] The trustee has the duty to appear and be heard at the status conference.[145]

Neither subchapter V nor the Interim Rules specify how the court schedules the status conference, the agenda for the status conference, or the contents of the debtor's report. The practitioner must consult local rules, orders, and procedures to determine how the bankruptcy judge will address these matters and the judge's expectations about the report and the status conference.[146]

Some courts include the time for the status conference in the Notice of Chapter 11 Bankruptcy Case that the clerk sends at the outset of the case. Others schedule it in a separate notice, or include it in a scheduling order, that the clerk or debtor's counsel mails to parties in interest.

New § 1188(a) states only that the purpose of the status conference is "to further the expeditious and economical resolution" of the subchapter V case, and new § 1188(c) requires only that the report detail "the efforts the debtor has undertaken and will undertake to attain a

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[143] New § 1188(b).
[144] New § 1188(c).
[145] New§ 1183(b)(3).
[146] For example, the New Jersey bankruptcy court has promulgated a mandatory form for the debtor's report, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms. Bankruptcy courts in the District of Maryland, https://www.mdb.uscourts.gov/content/local-bankruptcy-forms, and in the Central District of California, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms, have published suggested forms.

consensual plan of reorganization." While some courts are scheduling the status conference without further direction, others have provided more specific instructions.

For example, a scheduling order for the status conference may remind counsel that senior management must attend the conference, that the report will be covered, and that the debtor should be prepared to discuss any anticipated complications in the case (such as adversary proceedings, discovery, or valuation disputes), the timing of the confirmation hearing and related procedures and deadlines, and monthly operating reports.

A scheduling order may also outline specific items to be included in the report, which may include one or more of the following: (1) the efforts the debtor has undertaken or will undertake to obtain a consensual plan of reorganization, as new § 1188(c) requires; (2) the goals of the reorganization plan; (3) any complications the debtor anticipates in promptly proposing and confirming a plan, including any need for discovery, valuation, motion practice, claim adjudication, or adversary proceeding litigation; (4) a description of the nature of the debtor's business or occupation, the primary place of business, the number of locations from which it operates, and the number of employees or independent contractors it utilizes in its normal business operations; and the goals of the reorganization plan; (5) any motions the debtor contemplates filing or expects to file before confirmation; (6) any objections to any claims or interests the debtor expects to file before confirmation and any potential need to estimate claims for voting purposes; (7) the estimated time by which the debtor expects to file its plan; (8) whether the debtor is current on all required tax returns; (9) other matters or issues that the debtor expects the court will need to address before confirmation or that could have an effect on the efficient administration of the case.

Regardless of whether the court specifies its requirements with regard to the debtor's report or sets an agenda for the scheduling conference, counsel for the parties should anticipate that the court will be interested in any of these matters that the case involves and that debtor's counsel must ultimately address in connection with plan confirmation. Creditors may use the status conference as an opportunity to obtain information about the financial affairs of the debtor and to articulate their views and concerns about the debtor's operations, prospects for a feasible plan, and other matters.[147]

D. Time for Filing of Plan

Only the debtor may file a plan.[148] The debtor has a duty to do so.[149]

The deadline for the sub V debtor to file the plan is 90 days after the order for relief.[150] The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable,[151] the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221.[152] New § 1193(a) permits preconfirmation modification of a plan.[153]

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[147] *See* Bradley, *supra* note 9, manuscript at 18, 26.
[148] New§ 1189(a).
[149] New§ 1184. Note 116 discusses the debtor's duty to file a plan.
[150] New§ 1189(b).
[151] *Id*.
[152] The court in *In re Trepetin*, 2020 WL 3833015 (Bankr. D. Md. 2020), found guidance for determining whether to extend the deadline in a chapter 12 case that addressed the issue under § 1221, *In re Gullicksrud*, 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016). The *Trepetin* court reasoned, 2020 WL 3833015, at *6:

> The Court finds it appropriate to apply a standard similar to that articulated in *Gullicksrud* to sections 1188(b) and 1189(b) and the facts before it. Not only does that standard align with the Court's understanding of the Subchapter V deadlines but it also reflects the plain meaning of the words of the statute. Indeed, "justly" in this context is commonly defined as "in accordance with justice, law, or fairness" and "accountable" as "responsible" or "liable to be called to account or to answer for responsibilities and conduct." *Justly*, Oxford English Dictionary Online, oed.com/view/Entry/102238?redirectedFrom=justly#eid (last visited July 7, 2020); *Accountable*, Oxford English Dictionary Online, oed.com/view/Entry/1198?redirectedFrom=accountable#eid (last visited July 7, 2020). The question thus becomes whether the Debtor is fairly responsible for his inability to timely submit his status report, attend the status conference, or file a plan in this Subchapter V case.

[153] New § 1193(a).

Section 1121(e) requires that a debtor in a small business case file a plan within 300 days of the filing date,[154] and § 1129(e) requires that confirmation occur within 45 days of the filing of the plan.[155] These requirements do not apply in a subchapter V case.[156] They continue to apply in the case of a small business debtor who does not elect subchapter V. The schedule for the filing of the plan in a sub V case thus differs from the schedule in a non-sub V case in two ways. First, a sub V debtor must file a plan much more promptly than a non-sub V debtor – 90 days instead of 300.[157] Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

As in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal.[158] Section 1112(b)(1) states that the court *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interest of creditors and the estate, unless the court determines that the appointment of a trustee or an examiner *under § 1104* is in the best interests of the estate.[159] Because § 1104 does not apply in a sub V case,[160] the court apparently has no alternative to conversion or dismissal.

E. No U.S. Trustee Fees

28 U.S.C. § 1930(a)(6)(A) requires the quarterly payment of U.S. Trustee fees in chapter 11 cases based on disbursements in the case. SBRA amends this subparagraph to except cases under subchapter V from this requirement.[161]

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[154] § 1121(e).
[155] § 1129(e).
[156] New § 1181(a).
[157] Because of the short time to file a plan, counsel for a sub V debtor should promptly request the court to issue a bar order establishing a deadline for the filing of proofs of claim if the court by local rule or general order has not fixed a deadline for filing proofs of claim in sub V cases.
[158] § 1112(c)(4)(J).
[159] 1112(b)(1).
[160] New § 1181(a).
[161] SBRA § 4(b)(3).

F. Modification of Disinterestedness Requirement for Debtor's Professionals

Section 327(a) permits employment of professionals by a debtor in possession in a chapter 11 case only if, among other things, the professional is a "disinterested person." A person who holds a claim against the debtor is not a disinterested person under the term's definition in § 101(14)(A).[162] A disinterested person cannot not have an interest "materially adverse to the interest of the estate."[163]

These provisions disqualify an attorney or other professional to whom the debtor owes money at the time of filing because the professional is a creditor. Moreover, because payment of amounts owed to the professional prior to filing would in most instances be a voidable preference under § 547 and result in the professional having a material adverse interest to the estate in a preference action, the debtor's professionals must either waive any unpaid fees or forego representation of the debtor.

New Section 1195 addresses this issue in part. It provides that a person is not disqualified from employment under § 327(a) solely because the professional holds a prepetition claim of less than $ 10,000.[164]

Depending on what the debtor's plan will propose to pay to unsecured creditors, the economic impact of the new provision may be limited. An important practical implication is that debtor's counsel will no longer have to explain to accountants and other professionals who are not familiar with bankruptcy practice that they must waive their fees to provide services to the debtor in the case – something that may be contrary to their standard practice of declining to provide services if the client fails to pay fees in a timely manner.

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[162] § 327(a).
[163] § 101(14)(C).
[164] New § 1195.

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

Section 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse.[165] If the election is made, the claim is allowed as secured to the extent it is allowed. The election may be made at any time prior to the conclusion of the hearing on the disclosure statement.[166] Alternatively, if the disclosure statement is conditionally approved under Bankruptcy Rule 3017.1 and a final hearing on the disclosure statement is not held, the election must be made within the date fixed for objections to the disclosure statement under Bankruptcy Rule 3017.1(a)(2) or another date fixed by the court.[167]

Interim Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the § 1111(b) election may be made not later than a date the court may fix.[168]

Courts are taking varied approaches to scheduling the date for the § 1111(b) election. Many have decided not to address it unless a party requests it. Others are fixing the date by reference to the date the plan is filed (such as 14 or 30 days after the plan's filing) in a scheduling or other order or notice. When the court on its own does not set a date and a party anticipates that a creditor will make the election, the party should request that the court establish a deadline.

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[165] § 1111(b). For a discussion of strategic considerations for creditors regarding the § 1111(b) election, see Bradley, *supra* note 9, manuscript at 21.
[166] FED. R. BANKR. P. 3014.
[167] FED. R. BANKR. P. 3017.1.
[168] INTERIM RULE 3017.

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

Bankruptcy Rule 3017: (1) requires the court to fix the time for holders of claims or interests to vote to accept or reject a plan on or before approval of the disclosure statement; (2) provides that the record date for creditors and holders of equity securities is the date that the order approving the disclosure statement is entered or another date fixed by the court; (3) permits the court to set the date for the hearing on confirmation in connection with approval of the disclosure statement; and (4) requires that, upon approval of the disclosure statement, the court must fix the date for transmission of the plan, notice of the time for filing acceptances or rejections, and notice of the hearing on confirmation.[169]

New Interim Rule 3017.2 provides for the court to establish all these times in a subchapter V case in which the disclosure statement requirements of § 1125 do not apply.[170]

I. Bar Date for Filing of Proof of Claim

Bankruptcy Rule 3003 governs the filing of proofs of claim or interest in a chapter 11 case. The Interim Rules made no change in its provisions.

Rule 3003 does not establish a deadline for filing a proof of claim. Instead, Rule 3003(c) provides that the court "shall fix and may extend the time within which proofs of claim or interest may be filed."

Many courts have adopted procedures for fixing the bar date for the filing of proofs of claim at the outset of the case. Some are including the bar date in the Notice of Chapter 11 Bankruptcy Case that the clerk sends. Others establish the deadline in a separate document, such as a scheduling order or other notice. A lawyer representing a creditor in a subchapter V case

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[169] FED. R. BANKR. P. 3017.1.
[170] INTERIM RULE 3017.2.

who is accustomed to the usual practice in chapter 11 cases – the issuance of a separate bar date order – must check local practice to make sure that she knows the deadline.

Some courts have set the bar date as 70 days after the filing of the petition. This is the same time that Bankruptcy Rule 3002(c) establishes in chapter 12 and 13 cases. Others have set the date as 90 days after the § 341(a) meeting of creditors.

An advantage of fixing the bar date as 70 days after the filing date is that it expires before the deadline under new § 1189(b) for the debtor to file a plan, which is 90 days after the order for relief. If a debtor must know with certainty what the claims in the case are before it can file its plan, the debtor will need to ask the court to extend the time until some time after expiration of the bar date. The debtor will have to establish that the need for the extension is "attributable to circumstances for which the debtor should not justly be held accountable" under new § 1189(b).

The court cannot shorten the time for a governmental unit to file a proof of claim, which is 180 days after the order for relief under § 502(b)(9). Although it would be helpful for tax claims to be filed before the debtor files a plan, this should rarely be an obstacle. Most taxes are self-assessed by the debtor upon filing a return. If the debtor does not know its tax liability, it is unlikely that the taxing authority does either. A debtor might not be able to accurately calculate the exact amount of interest and penalties, but it should know the principal amount.

VII. Contents of Subchapter V Plan

The requirements for the contents of a sub V plan are contained in §§ 1122 and 1123 (with two exceptions) and in new § 1190. An important provision is that new § 1190(3) permits

modification of a claim secured only by a security interest in real property that is the principal residence of the debtor if the loan arises from new value provided to the debtor's business.[171]

Section 1122 states rules for classification of claims in a chapter 11 plan, and § 1123 states what provisions a plan must and may have. Two provisions in § 1123 – (a)(8) and (c) – are not applicable in sub V cases.[172]

Official Form 425A, which is a permissible, but not required, form for a chapter 11 plan, has been modified and may be used in a subchapter V case. Courts may adopt local forms for subchapter V plans[173] or make the use of Official Form 425A mandatory and provide guidance on its preparation.[174]

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

Section 1123(a)(8) requires the plan for an individual debtor to provide for payment to creditors of all or such portion of earnings from postpetition services or other future income as is necessary for the execution of the plan.[175] Section 1123(c) prohibits a plan filed by an entity other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.[176]

SBRA replaces § 1123(a)(8) with a similar provision applicable to all debtors in new § 1190, which contains additional provisions for the content of a plan. Section 1123(c) is superfluous in a subchapter V case because only the debtor can propose a plan.[177]

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[171] New § 1190(3).
[172] New § 1181(a).
[173] E.g., *Debtor's Chapter 11, Subchapter V Plan* (D.Md.) (suggested), available at https://www.mdb.uscourts.gov/content/local-bankruptcy-forms; *Chapter 11 Subchapter V Small Business Debtor's Plan of Reorganization [or Liquidation]* (D. New Jersey) (mandatory), available at http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms; *Plan of Reorganization* (W.D. Wisconsin) (suggested), available at https://www.wiwb.uscourts.gov/forms.
[174] E.g., *SBRA Plan Instructions*, available at http://www.canb.uscourts.gov/forms/district.
[175] § 1123(a)(8).
[176] § 1123(c).
[177] New § 1189(a).

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

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

First, new § 1190(1)[178] requires information that would otherwise be included in a disclosure statement. The plan must include: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan.

Second, new § 1190(2) requires the plan to provide for the submission of "all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." In an individual case, this provision replaces the similar rule in the inapplicable § 1123(a)(8). In non-individual cases, it imposes a new requirement.

Because a plan ordinarily must provide for payment of creditors from the debtor's income, the requirement for the submission to the trustee of income as necessary for the execution of the plan states nothing more than a feasibility requirement.

New § 1190(2) raises interpretive issues regarding the requirement that future income be submitted to the "supervision and control" of the trustee.

If a consensual plan is confirmed under new § 1191(a), new § 1194 does not contemplate that the trustee make the payments. Moreover, new § 1183(c)(1) provides for termination of the trustee's service upon substantial consummation of a consensual plan under new § 1191(a). Under § 1101(2), "substantial consummation" occurs upon (among other things[179])

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

[179] Substantial consummation also requires transfer of all or substantially all of the property proposed by the plan to be transferred, § 1101(2)(A) (2018), and assumption by the debtor or by the successor to the debtor of the business or of the management of all or substantially all of the property dealt with by the plan, § 1101(2)(B).

"commencement of distribution under the plan."[180] An issue is whether a consensual plan must provide for submission of future income to the trustee's supervision and control when the trustee's service will terminate once the first plan payment is made.[181]

The third content provision in new § 1190(3) changes the rule of § 1123(b)(5) that a plan may not modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence. The same antimodification rule applies in chapter 13 cases under § 1322(b)(2).

New § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value was "used primarily in connection with the small business of the debtor."[182]

Courts have considered whether the prohibition on modification of a residential mortgage applies when the property in which the debtor resides has nonresidential characteristics or uses, usually in chapter 13 cases.[183] For example, the property may be a multi-family dwelling that does or can generate rental income or a farm. The debtor may use it for business purposes, or it may include additional tracts or acreage beyond a residential lot.

The issue in such cases is whether the claim is secured by property other than the debtor's residence. Some courts have ruled that antimodification protection extends to a mortgage

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[180] § 1101(2)(C).
[181] *See infra* Section IX(A).
[182] New § 1190(3). For a discussion of strategies for lenders to consider to preclude application of the subchapter V exception to the anti-modification rule, see Bradley, *supra* note 9, manuscript at 26-27. Professor Bradley suggests lenders might require more than half of the loan proceeds to be used for personal expenses or that, in the case of a proposed loan secured by a second mortgage, the lender instead pay off the first mortgage and refinance that amount so that most of the loan is not for the business. *Id.*
[183] *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 5:42.

secured by any real property that the debtor uses, at least in part, as a residence. Other courts, however, have concluded that the debtor's use of real property as a residence does not alone mean that the debt is secured only by the debtor's principal residence, and that a mortgage on property the debtor uses as a residence is subject to modification if the property has sufficient nonresidential characteristics or uses.[184]

The court in *In re Ventura*[185] concluded that application of new § 1190(3) requires a different analysis. There, an individual operated a bread and breakfast business in her residence through a limited liability company she owned. In her chapter 11 case filed prior to SBRA's enactment, the court had ruled that she could not modify the mortgage on the property, applying the cases holding that a debtor may not modify a mortgage on property in which she resides even if she uses it for other purposes.

After SBRA's effective date, the debtor amended her petition to elect application of subchapter V. In addition to permitting her to proceed under subchapter V,[186] the court addressed the lender's contention that she could not invoke § 1190(3) because the proceeds from the mortgage had been used to acquire the property.[187]

The court concluded that § 1190(3) specifically permits the modification of a residential mortgage if the conditions of subparagraphs (A) and (B) exist. The questions, therefore, were whether the mortgage proceeds were "not used primarily to acquire the real property" (new § 1190(3)(A)) and were "used primarily in connection with the small business of the debtor" (new § 11903(3)(B)).[188]

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[184] *Id.*
[185] *In re Ventura,* 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
[186] *Id.* at 7-14. Part XIII discusses the court's ruling on the availability of subchapter V in the case.
[187] The lender also argued that § 1190(3) could not be applied to a transaction arising prior to its effective date. Part XIII discusses the court's ruling rejecting this contention.
[188] *In re Ventura,* 615 B.R. 1, 23 (Bankr. E.D.N.Y. 2020).

The court focused on two terms in subparagraph (A). "Primarily," the court said, means "for the most part," "of first importance," or "principally," rather than "substantial." The phrase "real property," the court continued, refers back to the real property that is the debtor's residence.[189]

Based on these definitions, the court phrased the question of subparagraph (A)'s application in the case before it as "whether the Mortgage proceeds were used primarily to purchase the Debtor's Residence."[190] The inquiry thus differs from the issue under § 1123(b)(5) (and § 1322(b)(2) in chapter 13 cases) that, under the court's prior ruling, prohibited modification of the mortgage because the debtor resided in the property, regardless of its other uses. New § 1190(3), the court explained, "asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor's residence."[191]

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

The court concluded that subparagraphs (A) and (B) directed it "to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor's business activities."[192]

The court proposed five factors to consider in this analysis: "(1) Were the mortgage proceeds used primarily to further the debtor's business interests; (2) Is the property an integral part of the debtor's business; (3) The degree to which the specific property is necessary to run

[189] *Id.* at 24.
[190] *Id.*
[191] *Id.*
[192] *Id.*

the business; (4) Do customers need to enter the property to utilize the business; and (5) Does the business utilize employees and other businesses in the area to run its operations."[193]

The court found that the debtor bought the property to operate it as a bed and breakfast, that its primary purpose was the offering of rooms for nightly fees, that the debtor's LLC provided additional services to guests for additional fees, and that the mortgage proceeds were used to purchase the building that houses the business. The court ruled that the evidence was sufficient to hold a full evidentiary hearing to determine whether the debtor could use § 1190(3) to modify the mortgage.[194]

A business debtor may grant a security interest in a principal residence as additional collateral without receiving new value, perhaps in connection with a workout involving forbearance or restructuring of the debt. A potential issue is whether the new § 1190(3) exception to the antimodification rule applies in this situation when the debtor receives no additional loan proceeds.

C. Payment of Administrative Expenses Under the Plan

If the court confirms a plan under the cramdown provisions of new § 1191(b), new § 1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date.[195] Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 502(f).

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[193] *Id.* at 25.
[194] *Id.*
[195] New § 1191(e).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of the trustee and of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.[196]

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

Under pre-SBRA law, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits so-called "cramdown" confirmation "if the plan does not discriminate unfairly, and is fair and equitable" with regard to each impaired class that has not accepted it.[197] Section 1129(b)(2) states the rules for the "fair and equitable" requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)).[198] The effects of confirmation are the same regardless of whether cramdown confirmation occurs under § 1129(b).

New § 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual if an unsecured creditor invokes it.[199] Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual

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[196] The permission to pay these priority claims "through the plan" without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. *See* Brubaker, *supra* note 5, at 15-16.
[197] § 1129(b)(1).
[198] § 1129(b)(2).
[199] New § 1181(a).

debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.[200]

If all the applicable requirements in § 1129(a) are met except for the projected disposable income rule of paragraph (a)(15), new § 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.[201] This paper refers to it as a "consensual plan."

New § 1191(b) states the rules for cramdown confirmation. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case.[202] In general, new § 1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)). The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims remain applicable in a sub V case.[203]

Cramdown confirmation under new § 1191(b) does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as the next Section discusses. For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* do not accept the plan. Unless a class consists of only one creditor, a single creditor cannot invoke the projected

[200] INTERIM RULE 1007(b).
[201] New § 1191.
[202] § 1181(a).
[203] New § 1191(c)(1).

disposable income requirement, which a single creditor can do in a standard or non-sub V case even if all impaired classes accept the plan.[204]

Importantly, the effects of confirmation differ depending on whether confirmation occurs under new § 1191(a) (where all classes have accepted it) or under new § 1191(b) (where one or more – or even all – classes have not accepted it).[205]

B. Cramdown Confirmation Under New § 1191(b)

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

Discussion of the revised cramdown rules in a sub V case begins with a summary of the key provisions that govern cramdown confirmation under pre-SBRA law.

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan.[206] Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.[207]

Section 1129(b) permits cramdown confirmation if all the requirements for confirmation in § 1129(a) are met except the requirement of paragraph (a)(8) that all impaired classes accept it. Section 1129(b), however, does not affect the confirmation requirement of § 1129(a)(10) that

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[204] § 1129(a)(15). One may view the projected disposable income requirement for cramdown confirmation as protection for a dissenting class of unsecured creditors that substitutes for the inapplicable absolute priority rule. *See In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020). In absolute priority rule theoretical terms, it recognizes "sweat equity" (i.e., future income) as "new value" that permits equity owners to retain their interests. The inability of a single creditor to invoke the projected disposable income rule is consistent with the inability of a single creditor to invoke the absolute priority rule under § 1129(b); both apply only if a class does not accept.

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

[206] § 1129(a)(8).

[207] § 1129(a)(10).

at least one impaired class of creditors accept the plan. Cramdown confirmation under § 1129(b) is not available if no impaired class of creditors has accepted the plan.

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).[208] In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.[209]

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.[210] Instead, new § 1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.[211] New § 1191(c) states a new "rule of construction" for the requirement that a plan be "fair and equitable."[212] It replaces the "fair and equitable" requirements of §1129(b), which do not apply in a subchapter V case.

The debtor may invoke new § 1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, new § 1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income test applicable to all debtors.[213]

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[208] § 1129(b)(2)(B).
[209] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d] (Richard Levin & Henry J. Sommer eds., 16th ed. 2019)
[210] New § 1181(a).
[211] New § 1191(b).
[212] New § 1191(c).
[213] New § 1191(d).

Under the cramdown rules in new § 1191(b), if all other confirmation standards are met, the court must confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. These two general standards are the same as the ones that govern in a cramdown under § 1129(b).

It does not appear that the new statute effects any change in the unfair discrimination requirement. New § 1191(c) does, however, provide a new "rule of construction" in subchapter V cases for the condition that a plan be "fair and equitable," to replace the detailed definition of that term that § 1129(b) contains.

The following text explains the requirements of the "fair and equitable" test in sub V cases.

2. Cramdown requirements for secured claims

Subchapter V does not change existing law about permissible cramdown treatment of secured claims. With regard to a class of secured claims, a subchapter V plan is "fair and equitable" if it meets the existing rules for secured claims stated in § 1129(b)(2)(A).

Subchapter V does limit the ability of a partially secured creditor with an unsecured deficiency claim to block cramdown confirmation. An undersecured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a standard or non-sub V case because of the absence of an accepting impaired class of claims, which § 1129(a)(10) requires.[214] This requirement is inapplicable for cramdown confirmation in a sub V case under new § 1191(b).

[214] § 1129(a)(10).

In addition, the creditor cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

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

New § 1191(c) does not state a "fair and equitable" rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the "best efforts" test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.[215]

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

The projected disposable income (or "best efforts") requirement is in new § 1191(c)(2).[216]

The plan must provide that all of the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.[217] Alternatively, the plan may provide that the value of property to be distributed under the

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[215] The court in *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020), reasoned that the projected disposable income is a substitute for the absolute priority rule. See also *supra* note 204.

[216] New § 1191(c)(2). Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under new § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

[217] New § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

This was the chapter 13 rule until the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. BAPCPA in 2005, which amended 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.

Presumably, the amended chapter 13 provision takes account of the fact that the "means test" standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.[218]

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.[219] Like the chapter 12 requirement (and unlike chapter 11 cases), it applies to entities as well as individuals.

Key confirmation issues are: (1) How is projected disposable income determined? (2) How does the court determine whether the required period should be longer than three years; and (3) If so, how does the court determine how much longer the period must be?

i. Determination of projected disposable income

The Bankruptcy Code does not define "projected disposable income," but it defines "disposable income" in chapters 12[220] and 13.[221] In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.[222]

New § 1191(d) defines disposable income as income that is received by the debtor and that is not "reasonably necessary to be expended" for these specified purposes:

— the maintenance or support of the debtor or a dependent of the debtor;[223] or

— a domestic support obligation that first becomes payable after the date of the filing of the petition;[224] or

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The difference in how the debtor must use projected disposable income may affect the timing of payments to unsecured creditors but appears to have no material effect on the amount of money that must be paid under the plan or how much of it goes to unsecured creditors. *See id.* § 8:68.

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

[219] See § 1225(b). Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. New § 1191(c)(2) does not contain this provision, raising the possibility that a creditor could insist on commitment of disposable income to pay more than the allowed amount of the claim. *See* Brubaker, *supra* note 5, at 13. It seems unlikely that Congress could have intended such a result that is inconsistent with the common-sense principle, even if unstated, that payment of the full amount of the claim (perhaps with interest) resolves it.

[220] § 1225(b)(2).

[221] § 1325(b)(2).

[222] § 1129(a)(15).

[223] New § 1191(d)(1)(A).

[224] New § 1191(d)(1)(B).

— payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.[225]

The definition of disposable income in new § 1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2). It is also substantially the same definition as in § 1325(b)(2), except that § 1325(b)(2) permits a deduction for charitable contributions. The chapter 11 provision incorporates the chapter 13 definition.[226]

The definition of disposable income in all cases is substantially the same. But the manner of determining permissible deductions in calculating disposable income differs materially with regard to expenditures for the "maintenance or support" of the debtor and the debtor's dependents.

In chapter 13 cases, the so-called "means test" standards govern the deductions that an "above-median"[227] debtor may take in calculating disposable income.[228] The means test rules do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.[229]

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[225] § 1191(d)(2).
[226] § 1129(a)(15).
[227] Generally, an "above-median" debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a "below-median" debtor is one whose income is below the median. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 8:12. The rules for determining the debtor's status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the "means test" rules for determination of disposable income; and § 1325(b)(4), which defines "applicable commitment period" for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an "above-median" debtor must use the means test rules and pay projected disposable income for five years. A "below-median" debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor's plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, §§ 4:9, 8:12.
[228] § 1325(b)(3).
[229] In chapter 11 cases, § 1129(a)(15) states that projected disposable income is "as defined in [§ 1325(b)(2)]." §1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of "amounts reasonably necessary to be expended" under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in

New § 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are "reasonably necessary to be expended" for "maintenance or support" in new § 1191(d)(1) in sub V cases is the same as it is in chapter 12 and below-median chapter 13 cases, and as it was in chapter 13 cases prior to the introduction of the means test standards in BAPCPA.[230] The case law on disposable income in such cases should provide guidance in making such determinations.

With regard to expenditures for the business, income is not "disposable income" under new § 1191(d)(2) if it is "reasonably necessary to be expended" for expenditures "necessary for the continuation, preservation, or operation" of the business.[231] The rule contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that are anticipated (*e.g.*, the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.*, increasing inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

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§ 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

[230] Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor's dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that new § 1191(d)(1) states. For a discussion of application of the "reasonably necessary" standard for expenditures for maintenance and support in chapter 13 cases, see W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 8:28.

[231] New § 1191(d)(2).

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.[232] As later text discusses, an extension of the period that the debtor must make payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or to grow the business.

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

If the debtor's disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income[233] but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

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[232] *See, e.g.*, Hammrich v. Lovald (*In re* Hammrich), 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve); *In re* Schmidt, 145 B.R. 983 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re* Kuhlman, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re* Janssen Charolais Ranch, Inc., 73 B.R. 125 (Bankr. D. Mont. 1987) (dicta) (reserve is allowable). *But* see Broken Bow Ranch, Inc. v. Farmers Home Admin. (*In re* Broken Bow Ranch, Inc.), 33 F.3d 1005 (8th Cir. 1994).

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

Courts will have to decide whether distributions to owners to pay taxes the owners incur are an appropriate expenditure that is "reasonably necessary for the continuation, preservation, or operation of the business" when the debtor is not obligated to pay the tax.

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

A projected disposable income test applies in cases under chapter 12[234] and 13[235] and in standard chapter 11 and non-sub V cases of individuals.[236] Each section prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the "commitment period," but only chapter 13 specifically uses the term by defining the "applicable commitment period" – the period for which the debtor must use projected disposable income to pay unsecured creditors – as three years for "below-median" debtors and five years for "above-median" debtors.[237]

For sub V cases, new § 1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.[238] The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the chapter 11 and above-median chapter 13 tests.[239]

New § 1191(c)(2) contains no standards for fixing the commitment period. And because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent under the tests in other chapters may not provide guidance.

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[234] § 1225(b).
[235] § 1325(b).
[236] § 1129(a)(15).
[237] § 1125(b)(4).
[238] New § 1191(c)(2).
[239] The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A), and five years for above-median debtors, § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

In chapters 12 and 13 and in non-sub V chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor wants.[240] Case law dealing with the length of a plan under the other tests does not deal with the issue that new § 1191(c)(2) presents.[241]

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[240] In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

In chapter 13 cases, the court has no choice to make. The statute fixes the "applicable commitment period" as three years for a below-median debtor and five years for an above-median debtor. The only dispute for the court is whether the debtor is below-median or above-median.

In chapter 11 cases, § 1129(a)(5) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

[241] The court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years. §§ 1222(c), 1322(d).

In chapter 13 cases, the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

In a non-sub V chapter 11 case, § 1129(a)(15) sets the commitment period as the longer of five years or the period for which the plan provides payments. Thus, the terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments.

Until enactment of BAPCPA in 2005, which increased the minimum commitment period in chapter 13 cases for above-median debtors to five years, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. § 1322(c) (2000) (current version at § 1322(d) (2018)) (BAPCPA renumbered subsection (c) as subsection (d)); *see* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:9. And the pre-BAPCPA projected disposable income test required use of projected disposable income for only three years, regardless of the length of the plan. 11 U.S.C. § 1325(b)(1)(B) (2000) (current version at 11 U.S.C. § 1325(b)(4) (2018)).

The pre-BAPCPA rules for chapter 12 cases were different, and BAPCPA did not change them. As in pre-BAPCPA chapter 13 cases (and as in cases of below-median chapter 13 debtors under current law), the maximum duration of a plan under § 1222(c) is three years unless the court approves a longer period for cause. But unlike pre-BAPCPA chapter 13, the chapter 12 projected disposable income test in § 1225(b)(1) requires use of projected disposable income during any longer period that the court approves.

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under §1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA

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

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.[242]

Courts will also have to decide how to proceed when a creditor or trustee asks to fix the commitment period for a longer time than proposed in the debtor's plan.[243] The authority of the court to fix the commitment period implies authority to order more payments than the debtor's plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court's determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

The court's authority to fix the commitment period implies that the court may raise the issue *sua sponte*.

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amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

Although the case law deals with the question of how long a plan should be, it does so in the context of a debtor's proposal of a longer period. The case law does not consider the different question of whether the court should require the debtor to make payments for a longer period than the plan proposes.

[242] *See* 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (Richard Levin & Henry J. Sommer eds., 16th ed. 2019) (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

[243] Subchapter V does not expressly give the trustee standing to object to confirmation. The trustee's duty to appear and be heard at the confirmation hearing, new § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee's views on any confirmation issue to the court.

If the trustee is not a lawyer, a trustee's "objection" may initiate a dispute that requires legal representation, whereas a trustee's report bringing potential issues to the attention of the court may not. *See supra* Section IV(F). Unless the court concludes as a legal matter that it has no independent duty to determine compliance with confirmation requirements, it makes no practical difference, unless the trustee plans to appeal an adverse determination. Failure to object might be a waiver of it for appellate purposes.

5. Requirements for feasibility and remedies for default

New § 1191(c)(3) adds two additional factors to the "fair and equitable" analysis.

First, new § 1191(c)(3)(A) requires that the debtor will be able to make all payments under the plan,[244] or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan.[245] The requirement strengthens the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposes it.[246]

Second, new § 1191(c)(3)(B) requires that the plan provide appropriate remedies to protect the holders of claims or interests if the debtor does not make the required plan payments.[247] Section XII(B) discusses remedies for default in the plan.

6. Payment of administrative expenses under the plan

New § 1191(e) permits confirmation of a plan under new § 1191(b) that provides for payment through the plan of administrative expense claims and involuntary gap claims. Section VI(C) discusses this provision.

C. Postconfirmation Modification of Plan

The rules for postconfirmation modification in new § 1193 differ depending on whether the court has confirmed a consensual plan under new § 1191(a) or a cramdown plan under new § 1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case.[248]

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[244] New § 1191(c)(3)(A)(i).
[245] § 1191(c)(3)(A)(ii).
[246] § 1129(a)(11).
[247] New § 1191(c)(3)(B).
[248] New § 1181(a).

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

If the court has confirmed a consensual plan under new § 1191(a), new § 1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under new § 1191(a).[249] The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote.[250] These are the same rules that govern postconfirmation modification in standard and non-sub V cases under § 1127(b).

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

If the plan has been confirmed under new § 1191(b), new § 1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the court fixes.[251] The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of new § 1191(b).[252]

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. In these chapters, postconfirmation modification is permitted at any time prior to the completion of payments under the plan, on condition that the modified plan meet confirmation requirements.[253] Unlike

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[249] § 1193(b).
[250] § 1193(d).
[251] § 1193(c).
[252] The provisions of new § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.
[253] §§ 1229, 1329.

the provisions in the other chapters, new § 1193(c) does not permit modification at the request of creditors or the trustee.[254]

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

Subchapter V has different provisions for the disbursement of payments to creditors and the role of the trustee depending on whether the court confirms a consensual plan or a cramdown plan.

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

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other than § 1129(a)(15),[255] the court must confirm the plan.[256] Confirmation of a consensual plan under new § 1191(a) leads to the termination of the trustee's service under new § 1183(c)(1) when the plan has been "substantially consummated."[257] The debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest.[258]

Under § 1101(2), "substantial consummation" generally occurs upon "commencement of distribution under the plan."[259] Unless the plan implicates other requirements for substantial consummation, the sub V trustee's service terminates under new § 1183(c)(1) when the first payment under the plan occurs.

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[254] New § 1193(c).
[255] Section 1129(a)(15) states chapter 11's projected disposable income requirement, which applies only in the case of an individual. *See supra* Section VIII(B)(4).
[256] New § 1191(a).
[257] § 1183(c)(1).
[258] § 1183(c)(2).
[259] § 1101(2)(C). "Substantial consummation" under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A) and (2) assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(B).

Arguably, a sub V trustee could make the first payment under the plan, although the statute does not appear to require this. But it is clear that, at least after the first payment, the sub V trustee no longer exists and cannot make payments thereafter.

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

When the court confirms a cramdown plan, new § 1194(b) provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise.[260] Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.[261]

Because the sub V trustee must make payments under a cramdown plan, the trustee's service does not terminate upon its substantial consummation. The trustee's service continues, at a minimum, until the trustee has made the required disbursements. Subchapter V does not specify when the trustee's service is terminated under a cramdown plan. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge, as Section X(B) discusses. That seems to be the appropriate time for the trustee or the debtor to

[260] New § 1194(b). Curiously, paragraph (b) of new § 1194 is titled "Other Plans," even though it applies exclusively to plans confirmed under the cramdown provisions of new § 1191(b) and no other provisions of new § 1194 deal specifically with payments under a consensual plan confirmed under new § 1191(a).
[261] § 1226(c), 1326(c).

request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.[262]

New § 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.[263] The statute contains no standards for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because new § 1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee. In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.[264] Courts vary as to whether the debtor may make direct payments to other types of creditors.

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated and postpetition payments due on leases or executory contracts that are being assumed. In such

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[262] *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 45, at 3-16 ("Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee.").
[263] New § 1194.
[264] W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 4:10.

instances, the trustee usually disburses the amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the plan does not modify.[265]

Some courts require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.[266] In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as Section VIII(B)(4) discusses.

X. Discharge

The discharge that a debtor receives in a sub V case and its timing depend on whether consensual or cramdown confirmation occurs.

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

Section 1141(d) governs discharge in a chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan. It does not apply when the court confirms a cramdown plan.[267]

Section 1141(d)(5) does not apply in a sub V case.[268] The omission is material only in an individual case because (d)(5) applies only when the chapter 11 debtor is an individual. Section 1141(d)(5) has two primary effects in an individual case.[269]

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[265] *Id.*
[266] *Id.*
[267] New § 1181(c).
[268] New § 1181(a).
[269] Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been

First, § 1141(d)(5) prohibits entry of a discharge order until the individual has completed payments under the plan unless the court orders otherwise for cause.[270]

Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable.[271]

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under new § 1191(a).[272] Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in § 502(g) (claims from the rejection of an executory contract or unexpired lease lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising

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liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.

Subparagraph C of § 1141(d)(5) provides the court may not grant a discharge under either subparagraph (A) or (B) if the court finds that § 522(q)(1) is applicable, certain criminal proceedings are pending, or the debtor is liable for a debt described in § 522(q)(1). The same grounds for discharge are in § 727(a)(12). Section 522(q)(1) denies a debtor an exemption of assets in excess of an aggregate amount of $ 170,350 (as of April 1, 2019; it is subject to adjustment every three years) under circumstances described in subparagraphs (A) or (B) of § 522(q)(1) unless the court finds under § 522(q)(2) that certain exempt property is reasonably necessary for the support of the debtor or any dependent.

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B) denies the exemption if the debtor owes a debt arising from (1) violation of state or federal securities laws; (2) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under the federal securities laws; (3) any civil remedy under 18 U.S.C. § 1964; or (4) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

[270] § 1141(d)(5)(A).

[271] § 1141(d)(5)(B).

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

after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan.[273]

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.[274] Only an individual is entitled to a discharge in a chapter 7 case.[275] An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.[276]

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order. Section 1141(d) has two exceptions applicable in a sub V case.

First, in the case of an individual debtor, a § 1141(d)(1)(A) discharge does not discharge the individual from any debt that is excepted under § 523(a).[277] No such exceptions to the § 1141(d)(1)(A) discharge exist for a debtor that is not an individual.

Second, the § 1141(d)(1)(A) discharge does not discharge any debtor from any debt (1) specified in § 523(a)(2)(A) or (B) that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 of the United States Code; or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid.[278]

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[273] § 1141(d)(1)(A).
[274] § 1141(d)(3).
[275] § 727(a)(1).
[276] § 727(a).
[277] § 1141(d)(1)(A).
[278] § 1141(d)(6).

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

When the court confirms a cramdown plan, § 1141(d) does not apply, except as provided in new § 1192.[279] Instead, the debtor receives a discharge under new § 1192.

New § 1192 provides for discharge to occur "as soon as practicable" after the debtor completes all payments due within the first three years of the plan, "or such longer period not to exceed five years as the court may fix."[280] Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with cramdown confirmation under new § 1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The cramdown discharge under new § 1192 discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions discussed below, unless § 1141(d), the plan, or the confirmation order provides otherwise.

The new § 1192 discharge also applies to "all other debts allowed under [§ 503] and provided for in the plan."[281] Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;[282] compensation of the trustee and professionals employed by the trustee and the debtor;[283] and claims for goods the debtor received within 20

[279] New § 1181(c).
[280] New § 1192. Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. New § 1192 contains no provision for an earlier discharge.
[281] New § 1192.
[282] § 503(b)(1).
[283] § 503(b)(2).

days of the filing.[284] The discharge provision recognizes that a plan confirmed under new § 1191(b) may provide for the payment of administrative expenses through the plan.[285]

New § 1192 excepts certain debts from discharge. First, new § 1192 does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court.[286] Again, any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation. Second, new § 1192(2) excepts any debt "of the kind specified in [§ 523(a)]."[287] The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual under § 1141(d)(2).

It is unclear whether the § 523(a) exceptions apply when a debtor that is not an individual receives a discharge under § 1192. In the case of a non-individual, the § 1141(d) discharge is not subject to the exceptions in § 523(a). Section 1141(d)(2) makes the § 523(a) exceptions applicable, but expressly limits application of § 523(a) to a debtor who is an individual.

New § 1192(2), in contrast, states, without qualification, that debts "of the kind specified" in § 523(a) are excepted from discharge. Because § 523(a) specifies various debts, the conclusion is that a debt listed in § 523(a) is excepted from the § 1192 discharge.[288]

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[284] § 503(b)(9).

[285] New § 1191(c). Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). New § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under new § 1191(b). *See supra* Section VI(C).

New § 1191(e) also permits payment of claims specified in § 507(a)(3) through the plan. Section 507(a)(3) provides a priority for "involuntary gap claims" allowed under § 502(f).

[286] New § 1192(1).

[287] New § 1192(2).

[288] Without discussing this issue, some commentators have stated this conclusion. 5 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 107:17 (3d ed. 2019); James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, *Norton Bankr. L. Adviser*, Oct. 2019, Part IX.

The language of § 523(a) permits a different conclusion. As amended, § 523(a) begins as follows:

> A discharge under section 727, 1141, *1192*, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – [defined in paragraphs (1) through (19) of § 523(a)].[289]

(The other listed sections are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.)

As amended, therefore, § 523(a) states that a discharge under new § 1192 does not discharge an *individual* debtor from the listed types of debts. This amendment would be superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), new § 1192 alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

In other words, although new § 1192 states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of a non-individual has no operative effect. Section 523(a), as amended, applies only to individuals.

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a new § 1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the new § 1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and "any debt that is otherwise nondischargeable."[290] The use of the words "otherwise nondischargeable" logically refers to § 523(a), which applies only to individuals.

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[289] § 523(a) (language inserted by amendment in italics).
[290] H.R. REP. NO. 116-171, at 8.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law – one would expect the House Judiciary Committee Report to point that out. It does not.[291] To the contrary, the Report's explanation that the exceptions are for "any debt that is otherwise nondischargeable" demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Limited case law under chapter 12 supports the conclusion that the § 523(a) exceptions may apply to a new § 1192 discharge of a non-individual debtor. The chapter 12 discharge provision, § 1228(a)(2),[292] has the same language as new § 1192, and the prefatory language of § 523(a) as amended refers to § 1228 and new § 1192 in the same way.

In two corporate chapter 12 cases, the corporate debtors contended that the § 523(a) exceptions to the chapter 12 discharge did not apply to them because § 523(a) states that it only excepts debts of an individual.[293] Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

In *In re JRB Consolidated, Inc.*,[294] the court reasoned that the operative language in § 1228(a)(2) ("debts of the kind" specified in § 523(a)) "does not naturally lend itself to also incorporate the meaning 'for debtors of the kind' referenced in § 523(a)."[295] Instead, the court concluded, "debts of the kind" is limited to the types of debts that the subparagraphs of § 523(a)

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[291] Retired Bankruptcy Judge A. Thomas Small, Jr., submitted testimony in support of the legislation. Judge Small's explanation of the new § 1192 discharge similarly made no reference to the § 523(a) exceptions to the discharges of non-individuals. Testimony of A. Thomas Small, *supra* note 44.
[292] The chapter 12 discharge provision, § 1228(a)(2), excepts from discharge any debt "of a kind specified" in § 523(a). The language also appears in § 1228(c)(2), which governs the so-called "hardship" discharge that a debtor who cannot complete plan payments may receive under § 1228(b).
[293] *In re* Breezy Ridge Farms, Inc., 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009); *In re* JRB Consol., Inc., 188 B.R. 373 (Bankr. W.D. Tex. 1995).
[294] *In re JRB Consol.*, 188 B.R. at 373.
[295] *Id.* at 374.

identify.[296] Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.[297]

The court in *In re Breezy Ridge Farms, Inc.*,[298] adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)[299] apply to debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)" that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms.[300] The *Breezy Ridge Farms* court explained that its interpretation harmonized the provisions of § 1228 and § 523(a):

> Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.[301]

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge under subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is nondischargeable.[302] Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting.[303] If the debtor does not list the creditor, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of a proof of claim and a timely request for the determination, unless the creditor had

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[296] *Id*.
[297] *Id*.
[298] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.
[299] Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. *See supra* Section X(A).
[300] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.
[301] *Id*.
[302] § 523(c)(1).
[303] FED. R. BANKR. P. 4007(c).

actual notice of the deadlines in time to do so.[304] The clerk's office must give at least 30 days' notice of the deadline.[305]

XI. Changes to Property of the Estate in Subchapter V Cases

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.[306] Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, new § 1186 provides that, if the court confirms a plan under the cramdown provisions of new § 1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.[307] New § 1186 applies to debtors that are entities as well as individuals.

Discussion of the effects of these changes begins with a summary of postpetition property and earnings under pre-SBRA law.

A. Property Acquired Postpetition and Earnings from Services Performed Postpetition as Property of the Estate in Chapter 11 Cases Under Current Law

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).[308]

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[304] § 523(a)(3).
[305] The new Official Forms for the notice of the filing of a sub V case (Form B309E2 for cases of individuals and Form B309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.
[306] New § 1181(a).
[307] § 1186.
[308] § 541.

Section 541(a)(7) provides that any interest in property that the *estate* acquires after the commencement of the case is property of the estate.

In the case of an entity, the debtor in possession (or trustee) controls the entity and all its property and acts on behalf of the estate. Bankruptcy does not recognize any distinction between the property interests of an entity debtor and those of the estate. Any interest in property that an entity acquires after the commencement of the case (including any postpetition earnings) must be property that the estate acquires and is property of the estate under § 541(a)(7).

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,[309] unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).[310] Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.[311] In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.[312]

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

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[309] Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.
[310] § 541(a)(6).
[311] *Id.*
[312] §§ 1207(a), 1306(a).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,[313] and earnings from postpetition services,[314] both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.[315] New § 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).[316] New § 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

1. Property of the estate in subchapter V cases of an entity

Section 1115(a) does not apply to an entity, so its inapplicability in a sub V case has no effect on the property of the estate in a sub V case of an entity.

New § 1186 deals with property of the estate when cramdown confirmation occurs under new § 1191(b). It provides that property of the estate consists of property of the estate under

[313] § 1115(a)(1).
[314] § 1115(a)(2).
[315] New § 1181(a).
[316] New § 1186(a)

§ 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of new § 1186 when it applies begins with an explanation of what happens when it does not, *i.e.*, when the court confirms a consensual plan under §1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.[317]

The vesting of property of the estate in the debtor means that the automatic stay with regard to acts against property terminates. Section 362(c)(1) provides, "[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate."[318] Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.[319]

In the cramdown situation, new § 1186 provides that property of the estate consists of property of the estate under § 541 (which covers all the debtor's property at the time of confirmation, as earlier text explains) and any postpetition assets and earnings. This means that the automatic stay does not terminate at confirmation under § 362(c)(1) because all property of the debtor and all its earnings remain property of the estate.

New § 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1114(b) provides for vesting of property of the estate in the debtor upon

[317] §§ 1227(b), 1327(b).
[318] § 362(c)(1).
[319] § 1141(b).

confirmation. New § 1186, however, keeps the property in the estate when cramdown confirmation occurs.

The purpose seems to be to maintain judicial supervision of a debtor's assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation[320] and makes payments under the plan,[321] and discharge does not occur until the debtor has completed payments for the specified period.[322]

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.[323] New § 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these concepts, the provisions of new § 1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

2. Property of the estate in subchapter V cases of an individual

SBRA's new rules governing property of the estate just discussed apply in the case of an individual sub V debtor.

Because § 1115(a) does not apply, postpetition assets and earnings of an individual are not property of the estate. The pre-BAPCPA rule recognizing the distinction between property of the estate and property of the debtor comes back into play.

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[320] *See supra* Sections IV(D)(1).
[321] *See supra* Section IX(B).
[322] *See supra* Section X(B).
[323] "[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statues should prevail over older or more general ones." United States v. Lara, 181 F.3d 183, 198 (1st Cir. 1999) (*citing* HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) and Morton v. Mancari, 417 U.S. 535, 550-51 (1974)); *accord, e.g., In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); Tug Allie-B, Inc., v. United States, 273 F.3d 936, 941, 948 (11th Cir. 2001); Southern Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373 (11th Cir. 1999); *In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); *see* 2B Sutherland Statutory Construction § 51:2 (7th ed. 2019-20 Supp.).

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.[324] The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

The exclusion of postpetition assets and income from property of the estate of an individual in a sub V case raises questions. In a chapter 7 case, an individual is free to use postpetition assets and earnings without restriction or judicial approval. That is the same rule that governed pre-BAPCPA chapter 11 cases of individuals, and it now applies in a sub V case. Does this mean, for example, that an individual who acquires assets postpetition, or has earnings from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?[325]

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[324] *E.g.*, *In re* Copeland, 609 B.R. 834 (D. Ariz. 2019); *In re* Meier, 550 B.R. 384 (N.D. Ill. 2016); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re* Hoyle, No. 10-01484, 2013 WL 3294273 (Bankr. D. Idaho June 28, 2013); *In re* Tolkin, No. 808-72583-REG, 2011 WL 1302191 (Bankr. E.D.N.Y. Apr. 5, 2011), *aff'd sub nom.* Pagano v. Pergament, No. 11-CV-2630 SJF, 2012 WL 1828854 (E.D.N.Y. May 16, 2012); *accord, e.g.*, *In re* Lincoln, No. 16-12650, 2017 WL 535259 (Bankr. E.D. La. Feb. 8, 2017); *In re* Gorniak, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re* Vilaro Colón, No. 13-05545 EAG, 2016 WL 5819783 (Bankr. D.P.R. Oct. 5, 2016). *Contra, e.g.*, *In re* Markosian, 506 B.R. 273, 275-77 (9th Cir. BAP 2014); *In re* Evans, 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

[325] Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, & ADAM M. GOODMAN, *supra* note 66, § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate. May the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, new § 1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.[326]

One consequence of the addition of postpetition assets and earnings to the estate is that, if conversion to chapter 7 occurs after cramdown confirmation, postconfirmation property and earnings will be property of the chapter 7 estate. If the court confirms a consensual plan, such property may not be property of the estate because neither § 1115(a) nor new § 1186 applies. Sections XII(C) and (D) further discuss this issue.

Issues may arise because of the retroactive nature of the operation of new § 1186: property that was not property of the estate becomes property of the estate upon cramdown confirmation. For example, what happens if, at the time of the confirmation hearing, an individual debtor has disposed of postpetition assets or earnings, which the debtor had the right to do when the property was not property of the estate? A creditor opposing confirmation could argue that the court cannot confirm the plan because the estate will not have all the property that new § 1186 requires it to have.

[326] New § 1186.

XII. Default and Remedies After Confirmation

If a debtor defaults after confirmation of a plan, creditors must decide what remedies are available and how to invoke them. If the court confirmed the plan under the cramdown provisions of new § 1191(b), the sub V trustee must also decide what to do if a default occurs.

A. Remedies for Default in the Confirmed Plan

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan's provisions for default and remedies control. In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. Secured creditors and lessors are unlikely to accept a plan unless it includes acceptable remedies in the plan that allow them to exercise their remedies if the debtor defaults. Unsecured creditors and tax claimants often do not participate actively in the case of a small business debtor, but if they do, they likewise have the opportunity to negotiate acceptable terms to deal with defaults.

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in new § 1191(c) provide the source of remedies for default. Cramdown confirmation requires that the plan provide "appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made."[327] The only specific remedy in new § 1191(c)(3)(B) is "the liquidation of nonexempt assets." [328]

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include

[327] New § 1191(c)(3)(B).
[328] *Id*.

secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of new § 1191(c)(3)(B), creditors will want remedies that will protect their rights to recover.

For secured creditors and lessors who have property rights in specific assets, the primary objective is to recover possession of the encumbered or leased property and to exercise their rights promptly upon the debtor's default. Secured creditors and lessors will want provisions in the plan that recognize their rights to proceed against the debtor's property and that confirm that neither the automatic stay nor the discharge injunction will apply to their efforts to do so.

An unsecured creditor can subject the debtor's assets to its debt only through judicial process, a somewhat cumbersome and potentially lengthy process with uncertain results and expense that may not justify the effort. An effective remedy for unsecured creditors might include conversion to chapter 7 to permit a trustee to liquidate the assets. Later text in Section XII(C) discusses issues that arise upon postconfirmation conversion to chapter 7 that the plan might appropriately address to protect unsecured creditors.

B. Removal of Debtor in Possession for Default Under Confirmed Plan

New Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or "for failure to perform the obligations of the debtor under a plan confirmed under this subchapter."[329] If removal of the debtor in possession occurs after the trustee's service has been terminated upon

[329] New § 1185(a). Section V(C) discusses removal for cause.

substantial consummation of a consensual plan confirmed under new § 1191(a), new § 1183(c)(1) provides for reappointment of the trustee.

New § 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. A specific duty is operation of the business of the debtor. The duties do not include liquidation of the debtor's assets. Nothing in subchapter V appears to authorize the trustee to do so.

The trustee's operation of the business will be difficult, if not impossible, if secured creditors or lessors take possession of assets on account of the debtor's defaults. Even if the trustee can operate the business, its future is unclear. Perhaps the plan will have provisions for the cure of defaults and the trustee can manage the business to cure defaults so that the plan can go forward. If not, the plan will remain in default, and the trustee will do nothing more than observe as creditors exercise their remedies under the plan unless the plan is modified or the case is converted to chapter 7.

Property of the estate issues arise when reappointment of the trustee based on the debtor's default occurs after confirmation of a consensual plan under new § 1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan or confirmation order provides otherwise.[330] If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no "debtor in possession" to be removed.

Under this view, new § 1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the

[330] *See supra* Section XI(B).

estate remains property of the estate under new § 1186[331]) or because the plan or confirmation order so provides.

It is arguable that Congress did not intend to limit the operation of new § 1185(a) based on how property vests at confirmation. One possible interpretation of new § 1185(a), therefore, is that it impliedly authorizes the trustee to take possession of property of the debtor. Another potential interpretation is that it impliedly revests the debtor's assets into the estate.

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.[332] Moreover, if the plan was a consensual one confirmed under new § 1191(a), postconfirmation modification under new § 1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan). Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.[333]

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes

[331] *See supra* Section XI(B).
[332] New § 1193(b).
[333] § 721.

"material default by the debtor with respect to a confirmed plan."[334] Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.[335]

1. Postconfirmation dismissal

The effects of postconfirmation dismissal differ depending on whether the debtor has received a discharge. The timing of the discharge under subchapter V depends on the type of confirmation that occurs.

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under new § 1191(a).[336] Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.[337]

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.[338] Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the

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[334] § 1112(b)(4)(N).
[335] § 702(d).
[336] *See supra* Section X(A).
[337] *E.g.*, National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt."); *In re* T&A Holdings, LLC, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) ("[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan."); *In re* Potts, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).
[338] New § 1192.

case is dismissed prior to the entry of discharge.[339] Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause, (1) § 349(b)(1) provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and (2) § 349(c) revests property of the estate in the entity in which such property was before the filing of the case.[340]

2. Postconfirmation conversion

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of

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[339] Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a "hardship" discharge, §§ 1228, 1328. Chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by BAPCPA. In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. *See* First National Bank of Oneida, N.A. v. Brandt, 597 B.R. 663, 668-69 (M.D. Fla. 2018) (Collecting cases holding that chapter 12 or 13 confirmed plan is no longer binding upon dismissal). *But see* Weise v. Community Bank of Central Wisconsin (*In re* Weise), 552 F.3d 584 (7th Cir. 2009).

The district court in *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663 (M.D. Fla. 2018) addressed the binding effect of a confirmed plan upon dismissal of an individual's chapter 11 case on remand from the Eleventh Circuit. First National Bank of Oneida, N.A. v. Brandt, 887 F.3d 1255 (11th Cir. 2018). The Eleventh Circuit noted that case law in chapter 13 cases dealing with dismissal without a discharge "could perhaps become relevant to a determination of whether and how the dismissal of Brandt's Chapter 11 case without a discharge affects the enforceability of his confirmed Chapter 11 plan." *Id.* at 1261. The district court determined that it was, 597 B.R. at 669, and ruled that the confirmed plan was not binding upon dismissal prior to confirmation based on that case law, the provisions of § 349(b), and public policy. *Id.* at 671.

In *Community Bank of Central Wisconsin (In re Weise*), 552 F.3d 584 (7th Cir. 2009), the bankruptcy court, on the debtors' motion, dismissed their chapter 12 case after confirmation of their plan that incorporated a settlement between debtors and bank that, among other things, released lender liability claims against the bank. In connection with dismissal, the bankruptcy court determined that, under U.S.C. § 349(b), cause existed for the plan's terms with regard to the settlement to remain binding on the parties. The Seventh Circuit ruled that the bankruptcy court did not abuse its discretion and that cause existed under § 349(b) to keep some terms of the plan binding on the parties. The Seventh Circuit stated that § 349(b) "explicitly contemplates that the court can choose to keep some terms binding on the parties where there is cause." *Weise, supra*, 552 F3d at 591. The court observed, "[N]egotiation alone would not be an acceptable standard for 'cause,' since every confirmed plan that required the consent of the creditor would involve some degree of negotiation." *Id.* at 589.

The district court in *Brandt, supra*, 597 B.R. 663, distinguished *Weise* because the bankruptcy court in dismissing Brandt's chapter 11 case made no mention of binding the parties to plan provisions and "chose not to keep specified plan terms binding." *Id*. at 670.

[340] § 349.

the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor, unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under new § 1191(a), but not when cramdown confirmation occurs under new § 1191(b) because new § 1186 keeps property in the estate.[341]

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not revest property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.[342] Other courts have ruled that property of the estate

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[341] *See supra* Section XI(B).

[342] *E.g.*, Bell v. Bell (*In re* Bell), 225 F.3d 203, 216 (2d Cir. 2000); National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("Property which revested in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case."); Lacy v. Stinky Love, Inc. (*In re* Lacy), 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re* L & T Machining, Inc., 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re* Sundale, Ltd., 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re* Canal Street Limited Partnership, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re* K & M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz 1997); Carter v. Peoples Bank and Trust Co. (*In re* BNW, Inc.), 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.*, 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. "[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor's pre-confirmation estate. . . .); *In re* TSP Indus., Inc., 117 B.R. 375 (Bankr. N.D. Ill. 1990). *See also* Pioneer Liquidating Corp. v. United States Trustee (*In re* Consol. Pioneer Mortgage Entities), 264 F.3d 803 (9th Cir. 2001) (holding that "language and purpose" of liquidating plan demonstrated that assets vested in debtor upon confirmation revested in estate upon conversion); 6 HON. WILLIAM L. NORTON JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 14:13 (3d ed. 2019) (discussing different approaches to revesting of assets upon conversion after confirmation).

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

upon conversion consists of property owned by the debtor at the time of commencement of the case,[343] on the confirmation date,[344] or on the date of conversion.[345]

Under these principles, property of the estate in a sub V case converted to chapter 7 after *cramdown* confirmation includes all the debtor's property. The result is the same if a consensual plan or the order confirming it provides that property of the estate not vest in the debtor until the occurrence of some later event that has not occurred at the time of conversion.

If property of the estate vested in the debtor at the time of confirmation of a *consensual* plan, however, what constitutes property of the estate at conversion is uncertain. In the first instance, it depends on whether the court applies the vesting principles in existing case law noted above and, if so, which view it adopts.

An alternative argument is that the provision in new § 1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that new § 1185(a) requires the revesting of property of the estate upon removal of the debtor in possession after default under a consensual plan; otherwise, § 1185(a) has no effective operation in that circumstance. If so, the same result follows if conversion occurs.

To avoid these potential issues and to insure that the estate has property at the time of conversion, creditors negotiating a consensual plan may want to insist on a provision in the plan that will keep assets as property of the estate until the debtor completes payments or meets some other milestone.

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[343] Smith v. Lee (*In re* Smith), 201 B.R. 267 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9th Cir. 1998).
[344] Carey v. Flintridge Lumber Sales, Incl (*In re* RJW Lumber Co.), 262 B.R. 91 (Bankr. N.D. Ca. 2001).
[345] *In re* Midway, Inc., 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

XIII. Effective Date and Retroactive Application of Subchapter V

Section 5 of SBRA provides:

> This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

This language does not restrict application of subchapter V to cases filed on or after the effective date of February 19, 2020. It thus differs from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which provided that most of its provisions did not apply "with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act."[346]

Debtors in pending chapter 11 cases have sought to amend their petitions after SBRA's effective date to elect application of subchapter V. They argue that Bankruptcy Rule 1009(a) permits amendment of a petition "as a matter of course at any time before the case is closed" and that SBRA does not restrict application of subchapter V to cases filed after its enactment.

One court rejected the debtor's argument, concluding, "Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect."[347] The court observed that to rule otherwise would create a "procedural quagmire" in that the debtor would be unable to comply with the statute's requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA's effective date. The debtor's failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[348]

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[346] Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).
[347] *In re* Double H Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. 2020).
[348] *Id.* at 554.

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.[349] Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor's amendment to the petition to elect subchapter V in an existing case means that the case proceeds under subchapter V unless and until the court orders otherwise;[350] the court need not approve the election.[351]

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.[352]

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[349] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020); *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re* Moore Properties of Person County, LLC, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re* Progressive Solutions, Inc., 2020 WL 975464 (Bankr. C.D. Cal. 2020). *Accord, In re* Blanchard, Case No. 12440 (Bankr. E.D. La. July 16, 2020); *In re* Trepetin, 2020 WL 3833015 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re* Bonert, 2020 WL 3635869 (Bankr. C.D. Cal. 2020); *In re* Bello, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

[350] *See supra* Section III(A).

[351] *In re* Body Transit, 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020) (treating objection to debtor's motion for authority to proceed under subchapter V as an objection to amendment of the petition to make the election); *In re* Progressive Solutions, Inc., 2020 975464, at *5 (Bankr. C.D. Cal. 2020).

[352] *In re* Ventura, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020) ("Given that the Debtor's case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor."); *In re* Progressive Solutions, Inc., 2020 WL 975464, at *4 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord, In re* Trepetin, 2020 WL 3833015 (Bankr. D. Md. 2020).

In *In re Trepetin*, 2020 WL 3833015 (Bankr. D. Md. 2020), the court considered whether to extend the statutory deadlines for the debtor's report, status conference, and filing of a plan after it had granted the debtor's motion to convert his pre-SBRA chapter 7 case to chapter 11. In permitting the debtor to proceed under subchapter V and extending the deadlines, the court reasoned, *id.* at *6-7:

> The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.
>
> The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC.*[353] The *Moore Properties* court and others[354] have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*[355] in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

One canon, said the *Landgraf* Court, is that "a court is to apply the law in effect at the time it renders its decision."[356] The conflicting one is that "[r]etroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[357]

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

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> the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor's conduct and potential prejudice to creditors.
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> Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case.

[353] *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).
[354] *In re* Ventura, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020); *In re* Body Transit, 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020)
[355] Landgraf v. USI Film Products, 511 U.S. 244, 264-71 (1994).
[356] *Id.* at 264, *quoting* Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974).
[357] *Id.* at 264, *quoting* Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988).

"settled expectations should not be lightly disrupted."[358] The presumption against retroactivity particularly applies, the Court reasoned, to "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance."[359] The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee's appeal after a bench trial was pending, did not apply to the employee's action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank.*[360] At issue in *Security Industrial* Bank was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest on exempt personal property.[361] The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

The Court in *Security Industrial Bank* recognized that the Constitution's bankruptcy clause[362] "has been regularly construed to authorize the retrospective impairment of contractual obligations"[363] but that the bankruptcy power could not be exercised "to defeat traditional property interests" because the bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.[364] The Court thus recognized

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[358] *Id.* at 265.
[359] *Id.* at 271. Among other cases, the Court cited United States v. Security Industrial Bank, 459 U.S. 70, 79-82 (1982), which the text discusses next.
[360] United States v. Security Industrial Bank, 459 U.S. 70 (1982).
[361] 11 U.S.C. § 522(f)(1)(B).
[362] U.S. Const. Art. I, § 8, cl. 4.
[363] United States v. Security Industrial Bank, 459 U.S. 70, 74 (1982), *citing* Hanover National Bank v. Moyses, 186 U.S. 181 (1902).
[364] *Id.* at 75, *citing* Louisville Joint Stock Bank v. Radford, 295 U.S. 555 (1935).

a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.[365]

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."[366]

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created "none of the taking or retroactivity concerns" that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank.* [367] With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not "alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights."[368]

The *Moore Properties* court explained that the modification of prepetition contractual relationships in a chapter 11 case occurs through a plan. The court then set out the changes that subchapter V made to existing requirements for the contents of the plan and for its confirmation and concluded that none of them amounted to an impermissible retroactive taking.

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. New § 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from

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[365] *Id.*
[366] *Id.* at 81, *citing* Holt v. Henley, 232 U.S. 637 (1913) and Auffm'ordt v. Rasin, 102 U.S. 620 (1881).
[367] *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).
[368] *Id.*

personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.[369] The third change is that new § 1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.[370]

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.[371]

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under new § 1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.[372]

New § 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does

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[369] See *supra* Section VII(A).

[370] See *supra* Section VII(B).

[371] *In re* Moore Properties of Person County, LLC, 2020 WL 995444, at *4 (Bankr. M.D.N.C. 2020).

In a footnote, the court observed that new § 1190(2), which requires any debtor to contribute earnings as necessary for execution of the plan, rendered § 1123(a)(8) superfluous and that § 1123(c) is inapplicable because only the debtor can propose a plan. *Id.* at *4 n. 13.

In another footnote, the court explained that the exception to the antimodification provision did not prohibit the availability of subchapter V in the case before it for two reasons. First, the exception could not apply because the debtor was an artificial entity with no principal residence. Second, even if it did apply, the question would be whether its application would constitute an impermissible taking. If it did, the court said, it would not apply the exception rather than declare the entirety of subchapter V inapplicable, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). *Id.* at *4, n. 14.

[372] *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of new § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.

not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of "fair and equitable" for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.[373]

The court concluded, "The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking."[374]

The court acknowledged that, if a case were pending for an extended period of time on SBRA's effective date, the case "could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights."[375] In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider "the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make its application offend '[e]lementary considerations of fairness' such that the parties 'have an opportunity to know what the law is and to conform their conduct accordingly.'"[376]

Because the application of new subchapter V in the existing case did not violate the Supreme Court's rulings in *Landgraf* or *Security Industrial Bank,* the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.[377]

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[373] *Id.* See *supra* Section VIII(B)(3), (4).
[374] *Id.*
[375] *Id.*
[376] *Id., quoting* Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994), and *citing In re* Progressive Solutions, Inc., 2020 WL 975464 (Bankr. E.D. Cal. 2020).
[377] *Id.*

The bankruptcy court in *In re Body Transit*[378] applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA's effective date to reject the secured creditor's contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor's argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor's assets and business, would also have the right to file a plan.[379]

The court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.[380] In addition, the court noted that a debtor's ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would unduly prejudice a party.[381] The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.[382]

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its

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[378] *In re* Body Transit, 613 B.R. 400 (Bankr. E.D. Pa. 2020).
[379] The court had scheduled a hearing on the creditor's motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.
[380] *Id.* at 408.
[381] *Id.* at 408-09, *citing In re* Cudeyo, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re* Brooks, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re* Romano, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re* Bendi, Inc., 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).
[382] 213 B,R. at 409.

burden of showing prejudice in the case before it.[383] The court summarized, "[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor's right to amend its petition under [Bankruptcy Rule] 1009."[384]

In *In re Ventura*,[385] an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA's effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a "residence" based on her use of it as a bed and breakfast. After the court had ruled that the exception applied as long as the debtor used any party of the property for her residence,[386] the court scheduled a hearing on confirmation of the lender's plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA's effective date.[387]

The court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had

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[383] *Id.* at 409.
[384] *Id.* at 410.
[385] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
[386] Other courts have accepted the debtor's position. *See generally* W. HOMER DRAKE, JR., PAUL W. BONAPFEL, AND ADAM M. GOODMAN, *supra* note 66, § 5:42 (2d ed. 2019).
[387] *In re* Ventura, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020).

vested rights at the time of the amendment in that its plan was ripe for confirmation.[388] The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

The *Ventura* court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit.* In addition, the court concluded that the revision of the definition of "small business debtor" does not appear to affect contractual or vested property rights.[389]

The court then addressed whether the exception in new § 1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender's property rights that vested prior to SBRA's effective date. The court held that, because the debtor had discharged her personal liability in

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[388] *Id.* at 11. The debtor in the current case and in two previous bankruptcy cases had asserted that her debts were "primarily consumer debts." *Id.* at 8. The debtor owed $ 1,678.664.80 on the mortgage, and the property was worth no more than $ 1,200,000. *Id.* at 9. Although the opinion does not reflect what other debts the debtor has, the context indicates that she had other unsecured debt that were relatively small.

The lender asserted that, in these circumstances, the debtor did not qualify as a small business debtor, and that, even if she did, she should be judicially estopped from amending her petition to designate herself as a small business debtor based on her representations in the previous and current cases.

The court acknowledged that a purchase money mortgage on a residence is generally a consumer debt, but ruled that "the fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is a consumer debt." *Id.* at 19. The test, the court explained, is whether a debt is incurred with an eye toward profit. "Courts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction," the court stated. *Id., quoting In re* Martin, 2013 WL 54233954, at *6 (S.D. Tex. 2013) and *citing In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988) (debt incurred with an eye toward profit is a business debt, rather than a consumer debt).

The court found that the property was the debtor's residence but that the primary purpose of purchasing it was to own and operate a bed and breakfast. The court concluded that the mortgage was a business debt and that she qualified as a small business debtor. *Id.* at 20.

The court declined to apply judicial estoppel to bar her amendment to designate herself as a small business debtor. The court ruled that her amendment to describe the mortgage as a business debt was not necessarily with her prior descriptions of the debt. She had referred to it as a bed and breakfast and described it on her Schedule A/B as a "B & B Inn" rather than as a "single-family" home. Moreover, the court had taken no action in any of the cases based on the description of the mortgage debt as a consumer debt, so it was not misled. Nor had the debtor taken unfair advantage of the lender by changing the description of her debt to fit within a statute that did not exist when she filed her cases. *Id.* at 20-22.

[389] *Id.* at 16-17, *citing* Moore Properties of Person County, LLC, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).

her previous chapter 7 case, application of new § 1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the court observed, even if the debt had not been discharged, new § 1190(3) might not "raise significant Constitutional doubts to warrant only prospective application."[390] Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of new § 1190(3) to modify the mortgage would not violate the lender's Fifth Amendment rights.[391] The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.[392]

The *Ventura* court found no prejudice to the lender based on the history of the case, including the fact that the lender's plan was before the court for confirmation. The court saw no Constitutional issues and declined to treat its prior rulings as creating "vested" rights. The court reasoned, "Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender]."[393]

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

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[390] *Id.* at 17.
[391] *Id.* at 17.
[392] *Id.* at 24-25. Section VII(B) discusses this aspect of the court's ruling in connection with consideration of new § 1190(3).
[393] *Id.* at 18.

by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.[394]

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to $ 7.5 million.[395] Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than $ 7.5 million cannot amend its petition to elect application of subchapter V.

[394] *In re* Body Transit, 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).
[395] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See supra* Section III(B).

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

Enacted August 23, 2019, Effective February 19, 2020

(As Amended By The CARES Act, Enacted and Effective March 27, 2020)

May 2020

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

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

11 U.S.C.	**Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases**	New Subchapter V Section
§ 105(d)	§ 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it.	New § 1181(a)
§ 327(a)	New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than $ 10,000.	New § 1195(a)
§ 1101(1)	§ 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2).	New § 1181(a)
§ 1102(a) § 1102(b) § 1103	Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees. These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise.	New § 1181(b)
§ 1104 § 1105	Provisions for appointment of trustee (§ 1104) and termination of trustee's appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession)	New § 1181(a)
§ 1106	§ 1106 specification of duties of trustee and examiner is inapplicable. New § 1183(b) states the trustee's duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new § 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).	New § 1181(a)

§ 1107	§ 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties. § 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional's representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than § 10,000 impliedly has the same effect.	New § 1181(a)
§ 1108	§ 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business)	New § 1181(a)
§ 1115	§ 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor.	New § 1181(a)
§ 1116	§ 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties.	New § 1181(a)
§ 1121	Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1123(a)(8)	Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1123(c)	Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1125	Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c).	New § 1181(b)
§ 1127	Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193.	New § 1181(a)

§ 1129(a)(9)(A)	Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b).	New § 1191(e)
§ 1129(a)(15)	Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1129(b)	"Cramdown" provisions are not applicable. New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met. New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is "fair and equitable with respect to" each impaired, nonaccepting class. The "fair and equitable" requirement in subchapter V does not include the absolute priority rule. For a secured creditor, the "fair and equitable" requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1). To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3).	New § 1181(a)
§ 1129(c)	Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1129(e)	Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time) but does not contain a deadline for confirmation.	New § 1181(a)
§ 1141(d)	Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs.	New § 1181(c)

	In the cramdown context, discharge does not occur under new § 1192 until the debtor has completed payments under the plan for three years, or such longer period not to exceed five years as the court determines. The new § 1192 discharge applies to (1) debts listed in § 1141(d)(1)(A) and (2) all other debts allowed under § 503 and provided for in the plan, except for debts (x) on which the last payment is due after the applicable three to five year period and (y) of the kind specified in § 523(a).	
	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V	
11 U.S.C.		SBRA
§ 322(a)	Amended to make its provisions for qualification of trustee in a case applicable to a subchapter V trustee appointed under new § 1183.	§ 4(a)(3)
§ 326(a)	Excepts subchapter V trustee appointed under new § 1183 from percentage limitations on compensation applicable to trustees in chapter 11 (and chapter 7) cases.	§ 4(a)(4)(A)
§ 326(b)	Provides that standing subchapter V trustee (like standing chapter 12 and 13 trustees) cannot receive compensation under § 330. (Standing trustees receive compensation under 28 U.S.C. § 586(e), as amended to include standing subchapter V trustees.)	§ 4(a)(4)(B)
§ 347	Current § 347(a) provides for a chapter 7, 12, or 13 trustee to pay into the court, for disposition under chapter 129 of title 28, funds that remain unclaimed 90 days after final distribution under § 726, § 1226, or § 1326. It thus does not apply in chapter 11 cases. SBRA § 4(a)(5)(a) adds subchapter V to the list of trustees and adds new § 1194 to the list of sections providing for distributions. New § 1194 provides for the subchapter V trustee to make distributions under a plan confirmed under the cramdown provisions of new § 1191(b). Current § 347(b) provides that unclaimed property in a case under chapter 9, 11, or 12 at the expiration of the time for presentation of a security or performance of any other act as a condition to participate under any plan confirmed under § 1129, § 1173, or § 1225 becomes property of the debtor or any entity acquiring the debtor's assets under the plan. SBRA § 4(a)(5)(B) added new § 1194 to the list of plans confirmed, but the CARES Act made a technical correction to change this to § 1191. Accordingly, § 347(b) as amended and corrected provides for property that is distributed under a confirmed plan and that is unclaimed to become property of the debtor. It is unclear under these amendments what happens to funds that a trustee disburses under a confirmed plan that a creditor does not	§ 4(a)(5); CARES Act § 1113(a)(4)(B)

	claim. Amended § 347(a) directs the trustee to pay them into court, but amended § 347(b) makes them property of the debtor. Perhaps the intended result is that unclaimed disbursements that a trustee makes become unclaimed funds subject to § 347(a) whereas unclaimed disbursements that a debtor makes become the debtor's property under § 347(b).	
§ 363(c)(1)	Extends provisions authorizing trustee who is authorized to conduct business to enter into transactions in the ordinary course of business without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 363 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(6)
§ 364(a)	Extends provisions authorizing trustee who is authorized to conduct business to obtain unsecured credit and incur unsecured debt without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 364 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(7)
§ 523(a)	Applies exceptions to discharge to discharge of individual subchapter V debtor under new § 1192 (which is the discharge that a debtor receives when a plan is confirmed under the cramdown provisions of new § 1191(b)). It is unclear whether under new § 1192 the exceptions apply to the discharge of a debtor that is not an individual. If the court confirms a consensual plan under new § 1191(a), the debtor receives a discharge under § 1141(d)(1)-(4), under which the § 523(a) discharge exceptions apply only in cases of individuals.	§ 4(a)(8)
§ 524(a)(1)	Makes discharge injunction applicable to discharge granted under new § 1192.	§ 4(a)(9)(A)(i)
§ 524(a)(3)	Makes discharge provisions relating to community claims applicable to discharge under new § 1192.	§ 4(a)(9)(A)(ii)
§ 524(c)(1) § 524(d)	Extends provisions governing reaffirmation of debt and for hearing on proposed reaffirmation (which apply to a discharge under § 1141(d)) to discharge granted under new § 1192.	§ 4(a)(9)
§ 557(d)(3)	Makes provisions for expedited consideration of appointment of trustee and for retention and compensation of professionals subject to § 1183 in cases of debtors that own or operate grain storage facilities	§ 4(a)(10)
§ 1146(a)	Prohibition on taxation of issuance, transfer, or exchange, or of the making or delivery of an instrument of transfer, under a plan confirmed under § 1129 is extended to a plan confirmed under § 1191.	§4(a)(12)

	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter	SBRA
28 U.S.C. § 586(a)(3), (b), (d)(1), (e)	Provisions applicable to U.S. Trustees duties to supervise the administration of cases and trustees, (a)(3), appoint standing trustees (b), prescribe qualifications of trustees, (d)(1), and fix compensation of standing trustees, (e), extended to include cases and trustees under subchapter V. Adds new 28 U.S.C. § 586(e)(5), which provides for compensation of standing trustee in subchapter V case when trustee's services are terminated due to dismissal or conversion of the case or substantial consummation of a plan under new § 1183(c)(1). In these circumstances, the standing trustee does not make disbursements on which a percentage fee would be due. The court is to award compensation "consistent with services performed by the trustee and the limits on compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."	§ 4(b)(1)
28 U.S.C. § 589b	Provisions relating to reports of trustees and debtors in possession made applicable in subchapter V cases.	§ 4(b)(2)
28 U.S.C. § 1930(a)(6)(A)	Subchapter V cases excluded from requirement of payment of quarterly U.S. Trustee fees	§ 4(b)(3)
	Amendments Applicable in All Cases	
11 U.S.C. § 547(b)	As amended, 11 U.S.C. § 547(b) provides that a trustee may avoid a preferential transfer "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c).	SBRA § 3(a)
28 U.S.C. § 1409(b)	As amended, 28 U.S.C. § 1409(b) provides for venue only in the district of the defendant of a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than $ 25,000.	SBRA § 3(b)

Summary of SBRA Interim Amendments to The Federal Rules of Bankruptcy Procedure To Implement SBRA

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

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

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

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

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

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

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

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

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

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

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

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

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

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

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

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

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

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

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

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13
Prepared by Mary Jo Heston's Chambers
(Updated August 5, 2020)

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1] No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person who primary activity is the business of owning single asset real estate or operating real property or conducting services incidental to the real property) person whose primary activity is business of owning or operating real	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than $7,500,000 (will return to $2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended § 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors	For individuals: 1) family farmer with regular income and aggregate debts up to $10,000,000, and 50% of the aggregate noncontingent, liquidated debt arises from a farming operation, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the farming operation, more than 80% of asset value relates to farming operations, and	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); § 1113, CARES Act.

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

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

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

	profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.			
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13 trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP.	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11 cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions.	A disinterested trustee is appointed in every ch. 13 case. § 1302. A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee

Trustee Fees	convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	§ 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for	shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."

	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	"cause." Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).
Estate Property	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306.	Section 1186 augments § 541 and parallels § 1115 in ch. 11.	Section 1207 augments § 541 and parallels § 1115 in ch. 11.	Section 1306 augments § 541, and parallels § 1115 in ch. 11.
Estate Property Post-confirmation	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	No separate rule.	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).
Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims

	property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	payments to the holder of a secured claim. § 1194(c).	provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b).	secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order. § 1123(b)(3)(B).	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.

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

	Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f).			
Commencement of Plan Payments	None required.	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).	None required.	None required.
Plan Content	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.		Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019).	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1).
	Plans *must*: 1) designate classes of claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2) provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the	Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the

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

	the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		(including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017. Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include	

			§ 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants.	
Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of §	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1)	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8).	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b).

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

Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets

				3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch. 12 based on the motion date, not the petition date). There is no specific provision	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the conversion. § 1307(f).

			permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523. Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under

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

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

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

- Election to Have Subchapter V Apply

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

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

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

[2] United States Bankruptcy Judge, Middle District of North Carolina. No copyright is claimed in these materials by the authors, who give permission to reproduce in whole or in part.

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

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

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

- Status Conference

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

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

- Filing Plan of Reorganization

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

- Confirmation Hearing[6]

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

- Appointment and Termination of Service of Trustee

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

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

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

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

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

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

- Discharge

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

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

- Modification of a Plan

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

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

- Plan Term

  - Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express

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

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

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

prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

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

Subchapter V Deadlines[11]

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

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

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

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

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

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

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

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

TIME PERIODS RELATED TO PLANS

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

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

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

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

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

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

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

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

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

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

DEADLINES THROUGHOUT THE CASE

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

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

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

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

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

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

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

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

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

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

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

ISSUES TO CONSIDER FOR ACHIEVING A CONSENSUAL SMALL BUSINESS PLAN

(FROM FJC PRESENTATION BY JUDGE THOMAS SMALL AND BENJAMIN KAHN)

- 3 – 5 years of projected disposable income applies in cramdown, but can be basis of negotiation for consensual plans – ("I can get a cramdown plan at 3 years PDI, but if you consent, I will give you 4")
- Actual disposable income - cramdown requires a fixed amount of projected disposable income, but if actual disposable income turns out to be more, creditors only get projected amount - consensual can provide for actual disposable income with a minimum of projected.
- Delaying discharge - in consensual plan discharge comes at confirmation – but that can be changed to come later, for example after payment of a certain amount. 1141(d)(1)
- Delaying vesting of property - 1141(b) – property vests on confirmation (consensual or cramdown) but that can be delayed
- Possession of the property – 1186(b) – ordinarily the debtor has possession, but there can be limitations in consensual plan
- Continuing oversight of debtor – trustee goes away at substantial consummation in consensual plan, but supervision can also be continued in a consensual plan – 1183(c)1)
- Post confirmation reports can be required
- Remedies upon default are provided in cramdown plans but can also be included in consensual plans; these might include the sale of assets together with the specific procedures for the sale – 1191(c)(3)(B). Also, remember that a consensual plan only may be modified by consent under 1193(b), and may not be modified after substantial consummation. Therefore, any remedies for default under a consensual plan are likely to stick unless the creditor consents to a modification of those remedies. In contrast, a plan confirmed under 1191(b) may be modified for at least 3 years and up to 5 years as set by the court, without the requirement of consent and regardless of substantial consummation. 1193(c).
- Usual secured creditor negotiations (value, interest rate, term) – discharge is not given on the secured claim in a cramdown where term extends beyond term of plan 1192(1). Discharge is given at confirmation in a consensual plan, but the discharge can be delayed – 1141(d)(1)
- Exit financing if debtor has access to "exit financing" there are all kinds of negotiating possibilities as creditors will want cash up front, rather than the prospect of payment from disposable income; creditors may be willing to take a lesser amount if cash is offered – it may also be possible to negotiate the terms of a "early payout at a discount" of the debtor's obligation if exit financing becomes available in the future

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

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1] No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person who primary activity is the business of owning single asset real estate or operating real property or conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is "an	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than $7,500,000 (will return to $2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended § 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below $10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below $10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B).	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); § 1113, CARES Act.

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

	affiliate of an issuer" under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over $2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a "small business debtor" hinges, at least in part, upon whether a creditor's committee is appointed, and on how much that creditor's committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor's committee thereby extinguishing debtor's small business status. The UST appoints any such committee. *Id.* Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.		Family farmer must be engaged in a farming operation, including "farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." § 101(21).	

Filing Fees	$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is $325 for disbursements up to $15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first $450,000 paid under the plan, and 3% of any payments in excess of $450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13 trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194.	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11 cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate	A disinterested trustee is appointed in every ch. 13 case. § 1302. A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in

	many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for "cause."	business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."
Trustee Fees	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).

Estate Property	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306.	Section 1186 augments § 541 and parallels § 1115 in ch. 11.	Section 1207 augments § 541 and parallels § 1115 in ch. 11.	Section 1306 augments § 541, and parallels § 1115 in ch. 11.
Estate Property Post-confirmation	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	No separate rule.	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).
Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by

			property securing the claim (like the indubitable equivalent test). § 1205(b).	personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order. § 1123(b)(3)(B).	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.
Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d).	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).

	Small Business Debtors: Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).			
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes. Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f).	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.
Status Conference	None required.	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended	None required.	None required.

		for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).		
Commencement of Plan Payments	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.		Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019).	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1).
Plan Content	Plans *must*: 1) designate classes of claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123.	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2) provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2).	Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222.	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322.
	Plans *may*: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any	Plans *may*: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is	Under § 1222(b)(1)-(12), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay	Under § 1322(b)(1)-(11), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay

	claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 *debtors in possession* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		Ch. 12 debtors in possession *and* trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which applies only in ch. 12, allows *trustees* under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th	Ch. 13 *debtors* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).

			2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017. Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the	

			scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants.	
Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor

	priority rule applies in individual ch. 11s. *In re Rogers*, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements as their larger ch. 11 counterparts.	for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income. Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b). After confirmation and	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only

		substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a).	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a

	The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).		hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch. 12 based on the motion date, not the petition date). There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the conversion. § 1307(f).
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor's failure	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as

	that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523. Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1). An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.	Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328.

Entered on Docket June 1, 2020

Below is the Order of the Court.

Timothy W. Dore
U.S. Bankruptcy Court
(Dated as of Entered on Docket date above)

TIMOTHY W. DORE
United States Bankruptcy Judge
700 Stewart Street, Room 8106
Seattle, WA 98101
(206) 370-5300

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: POP Gourmet, LLC, Debtor.	Case No. 20-11497-TWD **ORDER SETTING STATUS CONFERENCE AND DEADLINE TO FILE CLAIMS**

The Debtor has elected that Subchapter V of Chapter 11 apply in this case. Accordingly, it is ORDERED that:

1. The status conference required by 11 U.S.C. § 1188(a) ("Conference") shall be held on July 17, 2020 at 11:00 a.m. telephonically. Dial-in information for the Conference is as follows:

Dial: 1-888-363-4749
Enter Access Code: 2762430#
Press the # sign
Enter Security Code when prompted: 5334#

2. The Debtor, the Debtor's attorney and the Trustee shall attend the Conference. Attendance by creditors or other interested parties is strictly voluntary.

3. The Debtor shall prepare, file and serve the report required by 11 U.S.C. § 1188(c) by July 2, 2020.

4. Pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3), the last day to file proofs of claim or equity security interest is July 15, 2020 ("Claim Deadline").

5. By June 5, 2020, the Debtor shall prepare, file and serve on all creditors, equity security holders and other parties in interest a notice of the Claim Deadline ("Claim Notice"). The Claim Notice shall include the following language about the option to file proofs of claim or equity security interest electronically:

> Creditors may file their proofs of claim online at http://www.wawb.uscourts.gov/eclaims.htm. Alternatively, proofs of claim may be filed with the Clerk of the United States Bankruptcy Court, 700 Stewart Street, Room 6301, Seattle, Washington 98101.

6. By June 5, 2020, the Debtor shall prepare and file a proof of service demonstrating compliance with paragraph 5 of this Order.

/ / / End of Order / / /

Entered on Docket August 26, 2020

Below is the Order of the Court.

Timothy W. Dore
U.S. Bankruptcy Court
(Dated as of Entered on Docket date above)

TIMOTHY W. DORE
United States Bankruptcy Judge
700 Stewart Street, Room 8106
Seattle, WA 98101
(206) 370-5300

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: POP Gourmet, LLC, Debtor.	Case No. 20-11497-TWD **ORDER SETTING CONFIRMATION HEARING AND RELATED DEADLINES**

The Debtor has filed a plan under 11 U.S.C. § 1189 [Docket No. 92] ("Plan") and the Court has not entered an order under 11 U.S.C. § 1181(b) making 11 U.S.C. § 1125 applicable. Accordingly, pursuant to Interim Rules of Bankruptcy Procedure 3014 and 3017.2, it is ORDERED that:

1. The hearing to consider confirmation of the Plan shall be held on October 2, 2020 at 9:30 a.m. telephonically. Dial-in information for the hearing is as follows:

Dial: 1-888-363-4749
Enter Access Code: 2762430#
Press the # sign
Enter Security Code when prompted: 5334#

2. September 25, 2020 is the last day by which the holders of claims and interests may accept or reject the Plan. Acceptance or rejection shall be expressed by completing the ballot and providing it to the Debtor's attorney.

3. An equity security holder or creditor whose claim is based on a security must be the holder of record of the security on September 18, 2020 to be eligible to accept or reject the Plan.

4. September 25, 2020 is the last day to file an objection to confirmation of the Plan.

5. September 18, 2020 is the last day for a secured creditor to make an election under 11 U.S.C. § 1111(b)(2).

6. By September 1, 2020, the Debtor shall mail to all creditors, equity security holders and other parties in interest the Plan, a ballot for accepting or rejecting the Plan and a copy of this Order.

7. By September 1, 2020, the Debtor shall prepare and file a proof of service demonstrating compliance with paragraph 6 of this Order.

8. A copy of this Order shall constitute notice of all matters set forth above and no separate notice is required.

/ / / End of Order / / /

Virginia Andrews Burdette, *Andrews Burdette, Seattle, Washington.* Long ago and far away Ms. Burdette represented debtors, primarily in Chapter 13 cases. She was appointed as a Chapter 7 Panel Trustee in 1997, has served as the Standing Chapter 12 Trustee for the District of Oregon and Western District of Washington since 2010 and joined the SBRA Trustee panel in 2020. Ms. Burdette is believed to be the oldest WOMBAT remaining in bankruptcy captivity.

Jim Day is a partner in the Seattle law firm of Bush Kornfeld LLP and specializes in the resolution of complex commercial creditor-debtor issues, emphasizing the representation of companies and individuals in chapter 11 reorganizations, chapter 9 debt adjustments and out-of-court workout negotiations and agreements. Jim has significant experience in the residential, commercial and retail real estate sectors, health care, manufacturing, tech, fishing and maritime, and franchised restaurants. Jim has been named a Super Lawyer by Washington Law & Politics each year since 2003, and was named 2020 Lawyer of the Year in Litigation-Bankruptcy by Best Lawyers.

Thomas D. Neeleman

Thomas D. Neeleman is the founding member of Neeleman Law Group, P.C., a multi-office bankruptcy and insolvency firm with offices located in Washington State.

Mr. Neeleman has been practicing law since 1982 concentrating his practice in all facets of debt relief, including business and consumer bankruptcy, complex settlement negotiation and tax controversy.

Mr. Neeleman received undergraduate degrees in Finance and Management from the University of Utah and his Masters of Business Administration and Juris Doctorate from Brigham Young University. Mr. Neeleman is a trained mediator and received post graduate certification in Mediation and Alternative Dispute Resolution from the University of Utah department of Communications. Mr. Neeleman currently serves on the Executive Committee of the Bankruptcy Court's Thomas T. Glover Mediation Program.

Mr. Neeleman has been a presenter on topics including bankruptcy, debt negotiation, implementing the paperless law office and remote computer access to the law firm environment.

The Honorable Timothy W. Dore
United States Bankruptcy Judge for the Western District of Washington

Judge Dore was sworn in as a bankruptcy judge for the Western District of Washington on April 4, 2011. Prior to his judicial appointment, Judge Dore spent his entire 23-year legal career at the Seattle law firm of Ryan, Swanson & Cleveland, PLLC. He became a member of the firm in 1995 and served as chair of its bankruptcy and creditors' rights group for more than a decade. He also served a term on the firm's executive committee.

The vast majority of Judge Dore's legal work in private practice was in bankruptcy law and situations involving financial distress. Judge Dore represented many Chapter 11 debtors in business cases and Chapter 7 trustees in all types of cases. His practice included adversary proceedings, appeals, out-of-court workouts and receiverships. He also served as a receiver and a Chapter 11 trustee.

Judge Dore volunteered for nearly 20 years at neighborhood legal clinics including the Debt Clinic. He has volunteered as a moot court competition judge and been involved in various activities supporting Consumer Education and Training Services (CENTS).