

What Is Subchapter V and How Does It Differ From Chapter 13 and Other Chapter 11 Cases?


**15th Annual Frank W. Koger
Bankruptcy Symposium**

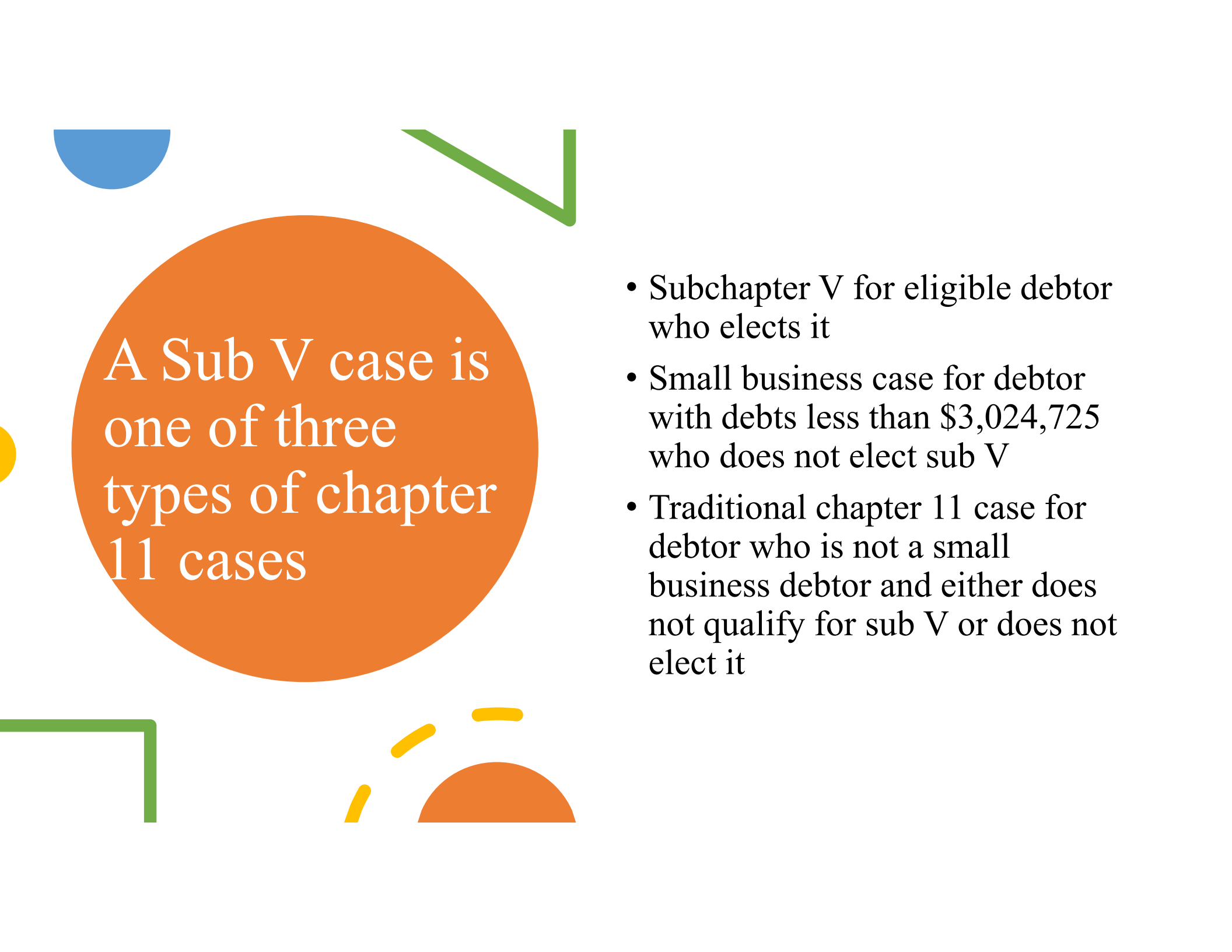


Overview of Subchapter V



It's still a Chapter 11 case.

- “First day” motions, including use of cash collateral, applications to employ professionals, use of bank accounts, payment of prepetition employee claims
 - Chapter 11 confirmation rules apply with some modifications
 - Creditors vote on the plan
 - No co-debtor stay
- 



A Sub V case is
one of three
types of chapter
11 cases

- Subchapter V for eligible debtor who elects it
- Small business case for debtor with debts less than \$3,024,725 who does not elect sub V
- Traditional chapter 11 case for debtor who is not a small business debtor and either does not qualify for sub V or does not elect it



**Top 15
Subchapter V
Features**

1. Eligibility Requirements

- Definition in § 1182(1) until June 20, 2024; thereafter, definition is §101(51D) (“small business debtor”)
- Debt Limit of \$ 7.5 million until June 20, 2024; \$ 3,024,725 thereafter
- Must be engaged in “commercial or business activities”
- At least 50% of debt must arise from such activities
- Can be engaged in real estate business, but not an SARE debtor

Eligibility – Debt Limit

- Debt is calculated based on “aggregate noncontingent liquidated secured and unsecured debts”
- Debts of affiliates in bankruptcy are included in the limit

Eligibility – Exclusions From Debt Limit

- Debts owed to affiliates
- PPP loans and lease rejection damages. *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020)

Eligibility – Debtor Must Be Engaged in “Commercial or Business Activities”

- Must the debtor be engaged in commercial or business activities on the petition date?
- Is active operation of a business required?

Eligibility – 50% or More of Debts Must Arise From Commercial or Business Activities

- Qualifying debts “must be directly and substantially connected to the ‘commercial or business activities’” of the debtor. *In re Ikalowych*, 2021 WL 1433241 (Bankr. D. Colo. 2021)



Not eligible for Sub V:

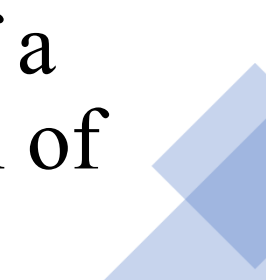
**-Public company or
affiliate of public company**

-SARE debtor

**-Spouse who is not eligible
for Sub V**



2. Appointment of Trustee

- Trustee in all cases
 - Debtor remains in possession of assets
 - Trustee duties do not include investigation
 - Trustee has the duty to “facilitate the development of a consensual plan of reorganization”
- 



3. No committee of unsecured creditors

- Court may order otherwise



4. No U.S. Trustee Fees

5. Subchapter V Debtor Has Same Reporting Requirements as Small Business Debtor

§ 1187 requires subchapter V debtor to comply with the duties and reporting requirements applicable to a small business debtor under §1116.

6. Required status conference and report -- §1188

- Court must hold status conference within 60 days of filing
- Debtor must file report not later than 14 days before status conference that details “the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.”

7. Property of the estate

- § 1115 does not apply, so property of the estate does not include postpetition assets or earnings
- If cramdown confirmation occurs, property of the estate includes all property of the estate under § 541 and postpetition assets and earnings



**8. Filing of Plan and
Contents; No Disclosure
Statement**

Only the
debtor may
file a plan

- Debtor must file plan within 90 days
- Court may extend the time based on “circumstances for which the debtor should not justly be held accountable”
- No confirmation deadline
- Only the debtor may request modification of the plan

Contents of Plan

Plan must contain:

- Brief history of the business operations of the debtor
- Liquidation analysis
- Projections with regard to ability of the debtor to make payments

No disclosure statement unless court orders otherwise

**Plan may
modify
certain
mortgages
on a
principal
residence**


Loan proceeds:

- Must not have been used primarily to acquire the property
- Must have been used primarily for the small business of the debtor

9. Payment of Administrative Expenses Under the Plan

- A chapter 11 plan must provide for payment of administrative expenses in full upon the effective date under § 1129(a)(9)(A) unless the holder agrees to different treatment
- § 1191(e) permits payment of administrative expenses under the plan if cramdown confirmation occurs

10.
Confirmation
of Consensual
Plan –
§1191(a)

- Court must confirm plan if it meets all requirements of §1129(a) except (a)(15)
 - (a)(15) requires individual to pay projected disposable income for the longer of 5 years or term of the plan
- 



11. Cramdown Rules Are Changed

- No absolute priority rule
- No requirement that any creditor accept
- Debtor must pay projected disposable income for 3 to 5 year period, as fixed by the court
- Cramdown rules for secured creditors are unchanged

12. Payments Under the Plan

- Debtor makes payments under consensual plan; trustee's services terminate upon substantial consummation
- Trustee makes payments under cramdown plan unless the plan or confirmation order provides otherwise

13. Timing and scope of discharge depend on type of confirmation

- If consensual confirmation occurs, debtor receives discharge upon confirmation under § 1141(d), except that § 1141(d)(5) does not apply so individual receives discharge immediately
- If cramdown confirmation occurs, §1192 applies
 - Discharge deferred until completion of payments for three to five years, as court determines
 - Debate over whether § 523(a) exceptions apply to discharge of corporation



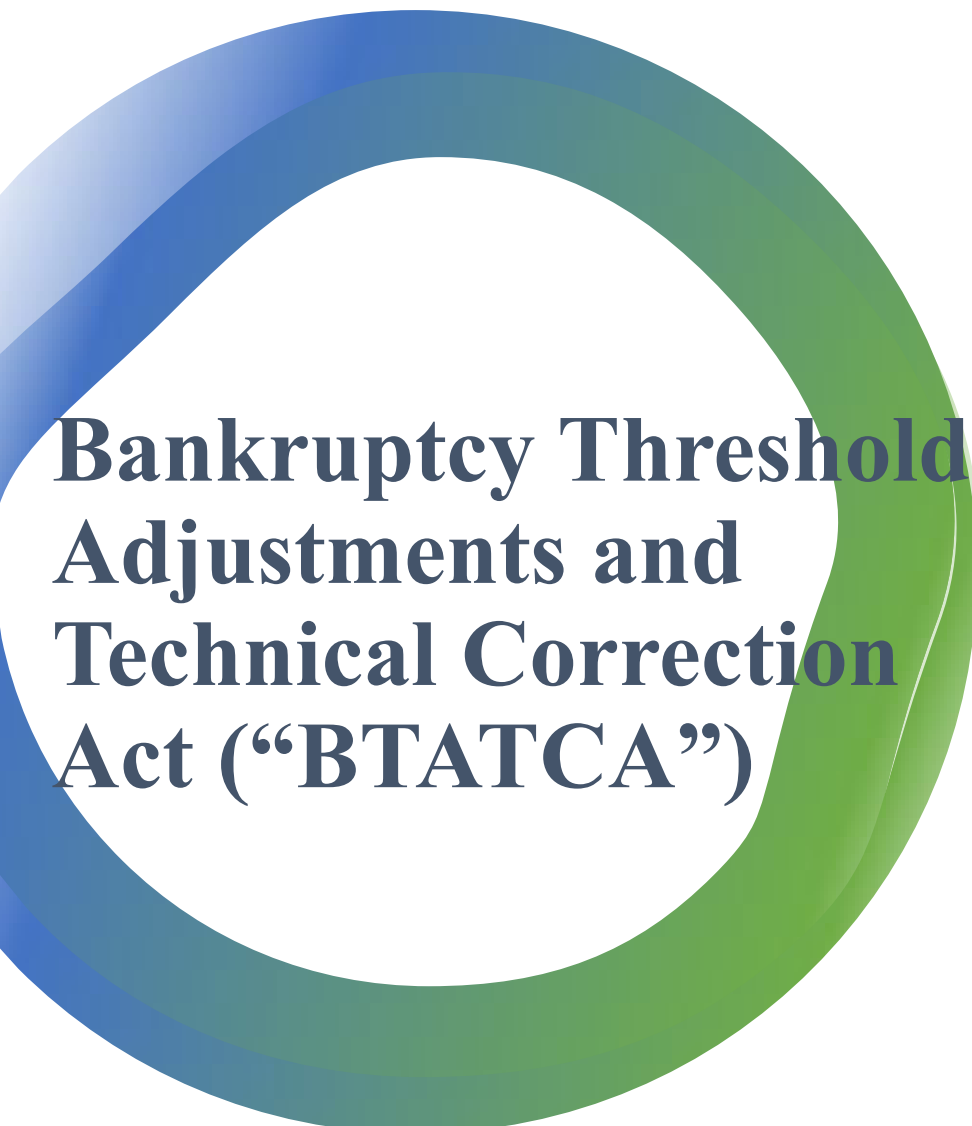
14. Postconfirmation Modification

- After consensual confirmation, postconfirmation not permitted after substantial consummation, which ordinarily occurs when first payment is made under the plan
- After cramdown confirmation, postconfirmation is permissible at any time within three to five years, as the court determines
- Postconfirmation requires that circumstances warrant the modification and that the modified plan meet applicable confirmation requirements

15. Prepetition claim of professional of less than \$10,000 does not disqualify professional from representing debtor



**How does Subchapter V
does differ from
Chapter 13?**



Bankruptcy Threshold Adjustments and Technical Correction Act (“BTATCA”)

For two years ending on June 20, 2024:

- Chapter 13 debt limit is \$2.75 million
- Subchapter V debt limit is \$7.5 million
- No distinction between secured and unsecured debts under either provision

Availability of Chapter 13 and Subchapter V for Individuals

Until June 20, 2024, an individual is eligible for both Chapter 13 and Subchapter V if the debtor –

- Has regular income;
- Has noncontingent and liquidated debts less than \$ 2.75 million; and
- Is engaged in “commercial or business activities.”

Spouses and codebtors

- Spouse of debtor is not eligible for subchapter V unless spouse also meets eligibility requirements
- No codebtor stay

Subchapter V
has a
different
plan process

- Subchapter V plan not due until 90 days after filing; no pre-plan payments
- Creditors entitled to vote on subchapter V plan
- Confirmation requirements are similar but different
- Two types of confirmation
 - Consensual – §1191(a)
 - Cramdown – §1191(b)



**Confirmation
consequences
differ based
on type**

- Discharge
- Property of the estate –
postpetition assets and
earnings
- Postconfirmation
modification
- Role of trustee

Reporting Requirements

- § 1187 imposes duties and requirements of §§ 308 and 1116 on subchapter V debtor
- Compliance with §§ 308 and 1116 may require more time and effort than reporting requirements in chapter 13 case

Projected Disposable Income

Chapter 13 – §1325(b)

- Applies if trustee or unsecured creditor objects
- “Means test” standards apply to above-median debtor
- “Applicable commitment period” is five years for above-median debtor

Subchapter V – § 1191(c)

- Applies only if *class* of creditors objects to confirmation
- “Means test” standards do not apply
- Commitment period is three to five years

Modification of Secured Claims

Chapter 13

- “Hanging paragraph” requires treatment of some claims secured by PMSI in personal property as fully secured
- Equal monthly payments required
- Cannot modify residential mortgage


Subchapter V

- No hanging paragraph; PMSI claims can be bifurcated
- No requirement for equal monthly payments
- Residential mortgage can be modified in some circumstances

**Plan may
modify
certain
mortgages
on a
principal
residence**

Loan proceeds:

- Must not have been used primarily to acquire the property
- Must have been used primarily for the small business of the debtor



§1111(b)(2) election and modification of residential mortgage

- §1111(b)(2) permits undersecured creditor to elect claim to be allowed as fully secured
- Payments must have present value equal to value of collateral *and* total of payments must equal allowed amount of claim
- No election if collateral is of “inconsequential value”

Payment of administrative expenses and priority claims under the plan

- In chapter 13, debtor may pay administrative and priority claims (including DSO) through plan payments; no interest on tax claims
- In sub V, administrative and priority claims must be paid in full on the effective date, except taxes that may be paid, with interest, over a five-year period beginning on date of filing petition, with interest at governmental rate under § 1129(a)(9)(C)
- § 1191(e) permits payment of administrative expenses under the plan if cramdown confirmation occurs

Plan Payments

- In consensual plan, trustee's service terminates on substantial consummation and debtor makes plan payments
- In cramdown plan, trustee continues to serve and makes plan payments unless court orders otherwise

Postpetition Assets and Earnings

Chapter 13 – §§ 1306(a), 1327(b)

- Property of the estate includes postpetition assets and earnings
- Confirmation vests property of estate in debtor unless plan or confirmation order provides otherwise – §1327(b)

Subchapter V – § 1186(a)

- Postpetition assets and earnings are property of estate only after cramdown confirmation – §1115(a) does not apply (§1181(a))
- Confirmation vests property of the estate in the debtor unless plan or confirmation order provides otherwise? -- §1141(b)

Postconfirmation Modification of Plan

Chapter 13 – § 1329(a)

- Debtor, trustee, or unsecured creditor may modify plan

Subchapter V – § 1193(b), (c)

- Only the debtor may modify plan
- No postconfirmation modification of consensual plan after “substantial consummation”

Discharge

- Sub V discharge is subject to all exceptions in § 523(a); not all exceptions apply to “completion” discharge under § 1328(a)
- Discharge occurs upon confirmation of consensual plan
- After confirmation of cramdown plan, discharge is deferred until completion of payments for three to five years – § 1192
- No hardship discharge



**Comparison of
Subchapter V to
Chapter 11**


Key Administrative Differences in Sub V and Chapter 11 Cases

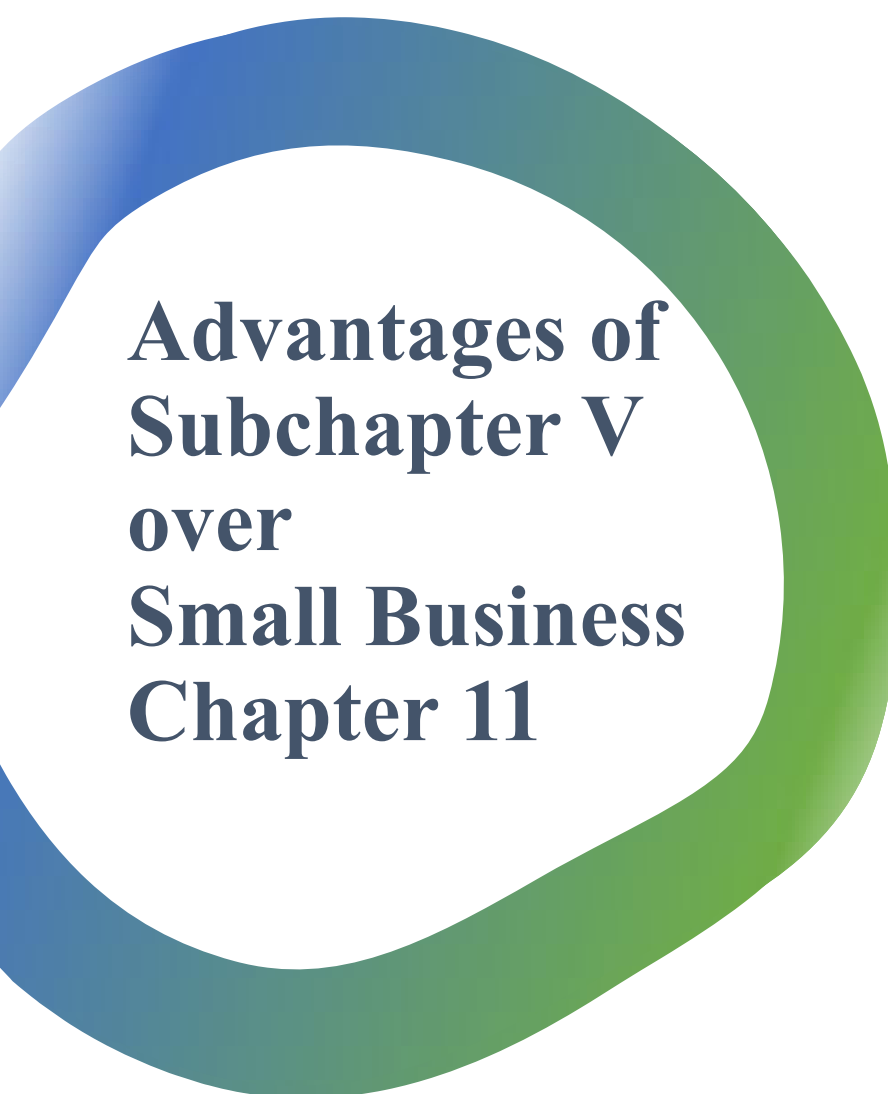
- No trustee in traditional or small business case
- No deadline for filing plan in traditional case
- No U.S. Trustee fees in subchapter V case
- No creditors' committee in subchapter V case
- No disclosure statement in subchapter V case
- Reporting requirements

Advantages of Subchapter V over Chapter 11– Plan Provisions

- No absolute priority rule
- No accepting class required for cramdown confirmation
- Different projected disposable income rules:
 - No PDI requirement for consensual plan
 - Minimum time for PDI commitment is three years instead of five
 - Means test standards do not apply
- Plan can modify residential mortgage

Other Advantages of Subchapter V over Chapter 11

- Postpetition assets and earnings are not initially property of the estate
 - Immediate discharge upon confirmation of consensual plan
 - No modification of plan by trustee or creditors
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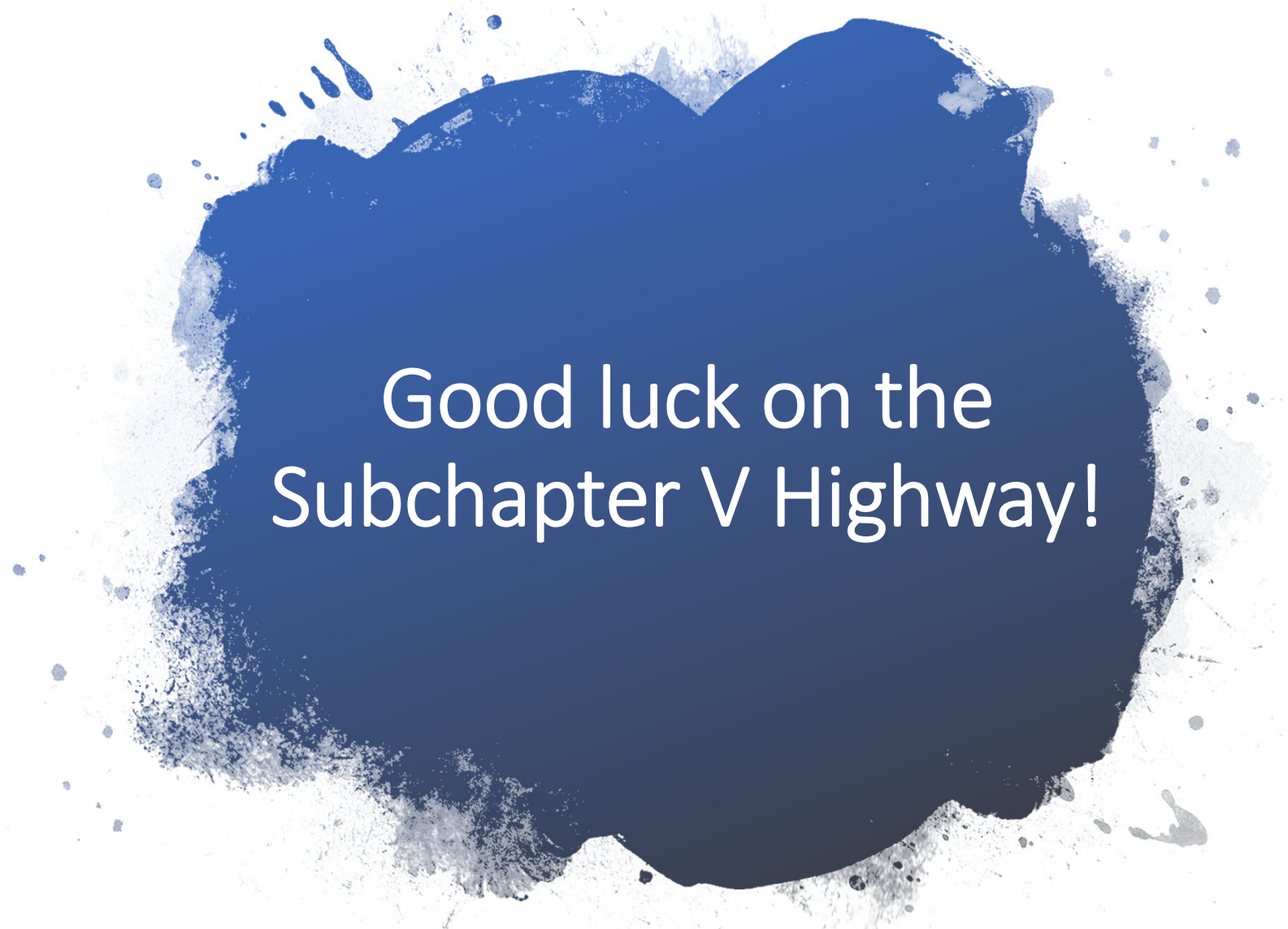


**Advantages of
Subchapter V
over
Small Business
Chapter 11**

- Same advantages as in chapter 11 comparison
- No deadline for confirmation (but earlier plan deadline)
- Same reporting requirements



Questions?



Good luck on the
Subchapter V Highway!

