SUBCHAPTER V UPDATE

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

SUBCHAPTER V UPDATE

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I. How Is Subchapter V Working?

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

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

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

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

The results are consistent with data compiled by the United States Trustee Program with regard to subchapter V cases, which shows confirmation in approximately 58 percent of the cases.[3] The report notes that, compared to non-subchapter V cases historically, subchapter V

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

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

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

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

[3] United States Trustee Program, *Chapter 11 Subchapter V Statistical Summary Through August 31, 2022,* available at https://www.justice.gov/ust/page/file/1499276/download. The data includes only cases filed in United States Trustee Program districts, which thus excludes Alabama and North Carolina.

For subchapter V cases through September 20, 2022, the report shows that confirmation occurred in 58 percent of them and that confirmation was consensual in approximately 70 percent. Conversion occurred in 25% of the cases, and 10% were dismissed. The remaining seven percent were pending without a confirmed plan. It reports the median months to confirmation as 6.5 and the median months to dismissal as 4.7.

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

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

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[4] *Id.*

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

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

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

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

The following summarizes the changes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), *rev'g* 630 B.R. 466 (Bankr. D. Md. 2021), a competitor of the company obtained a judgment against the company for almost $5 million for, among other things, "tortious interference with business relations" of the competitor. 36 F.4th at 512; *see also* 630 B.R. at 469. After the company filed a subchapter V case, the competitor commenced an adversary proceeding seeking to have its judgment against the debtor declared nondischargeable under § 523(a)(2) ("fraud") or § 523(a)(6) ("willful and malicious injury").

The company filed a motion to dismiss for failure to state a claim on which relief could be granted on the ground that the § 523(a) exceptions did not apply to the discharge of an entity.

The bankruptcy court concluded that the plain language of the statutes clearly "limit[ed] the application of section 523 in Subchapter V cases to individual debtors." The debts "of the kind specified" in § 523(a), the court held, are debts of an individual. Accordingly, § 1192(2) does not except them. 630 B.R. at 472. Four other bankruptcy courts have agreed with the bankruptcy court in *Cleary Packaging.*[6]

The Fourth Circuit reversed on direct appeal. It concluded that § 1192's specific reference to debts "of the kind" specified in § 523(a) "incorporates only the list of debts—debts 'of the kind specified in section 523(a)'—and not the class of debtors addressed by § 523(a)." 36 F.4th at 515.

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[6] Avion Funding LLC v. GFS Industries, LLC (*In re* GFS Industries, LLC), 2022 WL 16858009, 2022 Bankr. LEXIS 3199 (Bankr. W.D. Tex. 2022), certified for direct appeal to Fifth Circuit, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023); Jennings v. Lapeer Aviation, Inc. (*In re* LaPeer Aviation, Inc.), 2022 WL 1110072, 2022 Bankr. LEXIS 1032 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021); Gaske v. Satellite Restaurants, Inc., Crabcake Factory USA (*In re* Satellite Restaurants, Inc., Crabcake Factory USA), 626 B.R. 871, 876 (Bankr. D. Md. 2021). Two bankruptcy courts have reached the opposite conclusion in unreported decisions. *In re* Duntov Motor Co., LLC. Docket No. 21-40348-MXM-11, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021); Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), ECF No. 15, Docket No. 20-4064-BTR (Bankr. E.D. Tex. Sep. 16, 2020).

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

IV. Postconfirmation Modification

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

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

The key difference between the subsections is one of timing. A consensual plan may only be modified before the plan is "substantially consummated,"[7] whereas a nonconsensual plan may be modified at any time during the three to five year period for the payment of projected disposable income.

In *In re Samurai Martial Sports*, 644 B.R. 667 (Bankr. S.D. Tex. 2022), the debtor sought to modify its plan after cramdown confirmation when its business suffered due to air conditioning problems—a significant problem for an athletic facility operating in the Texas summer—and after defaulting on a few payments. The modification proposed to pause payments for three months and cure the arrearage near the end of the plan. The primary creditor and the subchapter V trustee objected.

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

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

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

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

Thus, the court concluded that modification is warranted when the debtor shows that the circumstances that gave rise to modification were unforeseen and rendered the confirmed plan unworkable. *Id.* at 681. The court noted that the inquiries regarding both foreseeability and

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

workability are factual ones where, particularly for the foreseeability inquiry, the "debtor's good faith and business judgment are relevant." *Id.* at 681.

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

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

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

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

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

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

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

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

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

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

After considering conversion to chapter 7 and dismissal under § 1112, the court concluded that the interests of creditors and of the estate would best be served by permitting the debtor to remain in chapter 11 but revoking the debtor's subchapter V designation so that the trustee or other parties could file a plan.[8]

Although nothing in the Code specifically permits the revocation of a Subchapter V election, the court noted, courts permitted pre-SBRA chapter 11 debtors to amend their petitions pursuant to Bankruptcy Rule 1009 to take advantage of the newly effective subchapter V provisions. "[I]f a petition may be amended to elect to proceed under Subchapter V post-petition, logically it follows that the opposite must also be an option for debtors and courts." *Id.* at 348.

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

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

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

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

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

In considering the "close" question of whether a court could permissibly revoke the subchapter V designation over a debtor's objection, the court noted that the *National Small Business Alliance* result was the right one on policy grounds, *id.* at *4, and that the cases permitting debtors in pending cases to elect subchapter V after its enactment support that result.[9]

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

Because non-debtor parties in interest may not force a debtor into subchapter V over the debtor's objection, the *ComedyMX* court reasoned, "it cannot be argued that parties in interest have *carte blanche* to . . . move debtors in or out subchapter V as they see fit." *Id.* at *5. Further, the court noted, Rule 1020[10] implies that the debtor's subchapter V designation controls unless the court finds the debtor statutorily ineligible to proceed. *Id.* at *5.

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

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

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

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

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

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

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

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

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

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

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

When chapter 12 was enacted as a temporary measure in 1986, it used the same language as the chapter 13 PDI test (and subparagraph (A) in subchapter V cases), which had come into the Bankruptcy Code in 1984. But in chapter 12 cases, courts began requiring that the debtor show, at the end of the case and in connection with an application for a discharge, that the debtor had paid all disposable income during the plan period to creditors. The court would then determine whether the debtor had paid all disposable income retroactively, and a debtor would have to either pay that amount or the case would be dismissed. *E.g., Rowley v. Yarnall (In re Rowley),* 22 F.3d 190 (8th Cir. 1994).

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

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

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

First, it made chapter 12 permanent.

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

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

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

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (B.A.P. 9th Cir. 2022), the debtor's plan proposed to pay creditors from two sources. One was $433,000 the debtor had realized from the liquidation of an estate asset. The other was its actual disposable income over five years. The debtor's projections were that it would have disposable income of $287,000 over three years and $493,000 over five, but the plan provided that creditors might receive less, based on actual earnings.[11]

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

The court concluded, however, that the plan's provision for the payment of the liquidation proceeds of $433,000 met the requirement of § 1191(c)(2)(B) that the debtor pay the *value* of its projected disposable income for the commitment period. The $433,000 payment

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

exceeded the projected disposable income of $287,000 for three years, which the court held was the proper period in the absence of the bankruptcy court's fixing of a longer time.

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

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

The court then concluded, "Requiring all the disposable income to be reported and distributed does not violate" these rules. *Id*. at *3. The court added that the bankruptcy court's requirements were within its authority under the All Writs Act[12] and § 105(a) because they "were clearly necessary and appropriate under the facts of this case." *Id.* at 4.

[12] 28 U.S.C. § 1651(a) provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

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

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

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

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

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

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

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

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

The court concluded that the plan did not contain a third-party release or permanent bar to the assertion of claims on the guaranty. Although the injunction was not a permanent bar order, the court evaluated the requested injunction by evaluating the factors identified in *In re Dow Corning Corp.,* 280 F.3d 648, 658 (6th Cir. 2002), with regard to a plan's bar order, in

accordance with the Eleventh Circuit's decision in *In re Seaside Eng's & Surveying, Inc.,* 780 F.3d 1070, 1079 (11th Cir. 2015), *Global Travel,* 2022 WL 17581986 at *3:

> 1. Whether an identity of interests exists between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> 2. Whether the non-debtor has contributed substantial assets to the reorganization;
>
> 3. Whether the injunction is essential to the reorganization, namely whether the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
>
> 4. whether the impacted class has overwhelmingly accepted the plan;
>
> 5. Whether the plan provides a mechanism to pay for all, or substantially all, of the class members affected by the injunction;
>
> 6. Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full.

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

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

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

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

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

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

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

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

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

VIII. Role of the Trustee in Subchapter V Cases

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

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

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

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

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

The court continued, *id.* at 6:

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

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

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

The good faith objection, in part, was that the debtors had not provided accurate financial disclosures in their monthly operating reports. The court agreed that initial reports were not

entirely accurate and were incomplete. The court found no absence of good faith, however, stating, *id.* at *4 :

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

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

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

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

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

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

Concerned that "the result of removing the debtor as debtor-in-possession could very well lead to the failure or collapse of the business," the court instead expanded the powers of the subchapter V trustee to include investigation of the debtor under § 1183(b)(2). *Id.* at 234. The court noted that further relief, such as removal of the debtor from possession, dismissal, or conversion might be required, based on the outcome of the investigation. *Id.* at 234.

Corinthian Communications illustrates two points. First, it is an example of how a debtor should *not* deal with the subchapter V trustee. Second, it is an example of how the presence of

the subchapter V trustee provides an opportunity to salvage a viable business *if* the debtor follows the approach of the debtors in *Channel Clarity* and *Lapeer Aviation.*

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

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

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

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

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

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

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

An order removing the debtor from possession is not a final order for purposes of appeal. *In re Corinthian Communications, Inc.,* 642 B.R. 224 (Bankr. S.D.N.Y. 2022).

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

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

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

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

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

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

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

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

XI. The “Appropriate Remedies” Requirement for Cramdown Confirmation, § 1191(c)(3)(B)(ii)

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

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

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

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

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

The *Channel Clarity* court noted that two cases had concluded that an adequate remedy was the availability of relief in the bankruptcy court to enforce the plan or seek relief available under federal or applicable state law. *In re Ellingsworth Residential Cmty. Ass’n, Inc.,* 2021 WL 6122645 at *2 (Bankr. M.D. Fla. 2020); *In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985 at * 11 (Bankr. E.D. Wis. 2021).

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

XII. Plan Provisions Inconsistent With Statutory Provisions

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

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

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

XIII. Confirmation Requirement of § 1129(a)(5) Regarding Management of the Debtor

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

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

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

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

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

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

XIV. Technical Amendments to Eligibility Requirements

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

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

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

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

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

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

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

The Bankruptcy Threshold Adjustments and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) made a further technical amendment to subparagraph (B)(iii). As amended, the statute excludes an affiliate of a public company rather than an affiliate

of an issuer. Because the amendment applies retroactively, the *Phenomenon Marketing* court later entered an order, *In re Phenomenon Marketing & Entertainment, LLC,* 2022 WL 3042141 (Bankr. C.D. Cal. 2022), permitting the debtor to proceed under subchapter V, thus replacing its earlier ruling.

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

XV. Miscellaneous Matters of Interest

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

2. Death of debtor. Death of debtor prior to confirmation may result in conversion to chapter 7. *In re Landau,* 2022 WL 4647473 (Bankr. D. Kan. 2022).

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

4. No conversion from chapter 12 to subchapter V. A chapter 12 debtor cannot convert the case to subchapter V. *In re Powell,* 2022 WL 10189109 (Bankr. M.D. Pa. 2022).

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

6. Ineligibility because most debts do not arise from commercial or business activities. Medical debts arising from injuries sustained by a debtor engaged in a "tree-felling" business while doing such work for his mother without charge do not arise out of commercial or business activities, and the debtor is not eligible for subchapter V when such debts exceed business debts. *In re Bennion,* 2022 WL 3021675 (Bankr. D. Idaho 2022).

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

8. Adequacy of debtor's financial projections. "Nothing in the Code requires an audit or independent verification of a debtor's financial projections. 'The creation of a liquidation analysis and financial projections is not an exact science, so the Courts typically defer to the debtors' projections, subject to cross-examination and/or a competing set of projections.'" *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602 at * 6 (Bankr. N.D. Ill. 2022), *quoting In re Lost Cajun Enters., LLC,* 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021). .

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

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

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

11. Reported confirmation orders entered after resolution of objections. A number of confirmation orders have been reported that do not resolve objections but address confirmation requirements. Some include other provisions (such as releases and exculpations). *In re ActiTech,* 2022 WL 6271936 (Bankr. N.D. Tex. 2022) (plan attached to order; order provides for approval of settlement, releases, and exculpation); *In re North Richland Hills Alamo, LLC,* 2022 WL 2975121 (Bankr. N.D. Tex. 2022); *In re Logistics Giving Resources, LLC,* 2022 WL 2760126 (Bankr. D. Utah 2022); *In re iVidex,* 2022 WL 5264710 (Bankr. W.D.N.Y. 2022).