MAY-JUNE 2022 SUPPLEMENT

TO

A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019 (JULY 2021 REVISION)

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U.S. Bankruptcy Judge, N.D. Ga.

This May-June 2022 Supplement supplements the July 2021 and May 2022 compilations of *A Guide to the Small Business Reorganization Act of 2019,* which updated the work originally published at 93 Amer. Bankr. L. J. 571 (2019).

This Supplement is in two parts. The first part supplements the July 2021 compilation with revisions and new material that were in the May 2022 Supplement and the May 2022 compilation. The May 2022 supplement and compilation incorporate material in an interim February 2022 Supplement prepared for use at continuing legal education programs. The second part is the June 2022 Supplement, which supplements the May 2022 compilation with additional revisions and material. The June Supplement begins at page 34.

All revisions are in the June 2022 compilation.

The reader who is not familiar with the July 2021 compilation may consult only the June 2022 compilation, because it includes all the material in both parts of this Supplement.

The reader who is familiar with the July 2021 compilation may consult only this Supplement to review new material added to the July 2021 version. The reader who is familiar with the May 2022 Supplement may consult only the June part of this Supplement to review new material added to the May 2022 version.

MAY 2022 SUPPLEMENT

I. Introduction

Page 3, footnote 10, add to end of Ventura citation:

rev'd on other grounds sub nom. Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

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

III B. Eligibility for Subchapter V; Revised Definitions of "Small Business Debtor" and "Small Business Case"

Page 15, add at end of page:

Most courts have determined that the burden is on the debtor to establish eligibility for subchapter V if challenged.[1] A contrary view is that the objecting party as the moving party has the burden of proving that the debtor is not eligible.[2] It is not clear whether a bankruptcy court's order determining that a debtor is eligible is a final order for purposes of appeal under 28 U.S.C. § 158(a)(1).[3] A district court or bankruptcy appellate panel has jurisdiction to hear an appeal

[1] NetJets Aviation, Inc. v. RS Air, LLC (*In re* RS Air, LLC), 2022 WL 1288608 at *8-9 (B.A.P. 9th Cir. 2022); National Loan Invs., L.P. v. Rickerson (*In re* Rickerson*),* 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021); Lyons v. Family Friendly Contracting LLC (*In re* Family Friendly Contracting LLC)*,* 2021 WL 5540887 at * 2 (Bankr. D. Md. 2021); *In re* Vertical Mac Construction, LLC, 2021 WL 3668037 at *2 (Bankr. M.D. Fla. 2021); *In re* Port Arthur Steam Energy, L.P., 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021); *In re* Offer Space, 629 B.R. 299, 304 (Bankr. D. Utah 2021); *In re* Ikalowych, 629 B.R. 261, 275 (Bankr. D. Colo. 2021); *In re* Johnson, 2021 WL 825156 at *4 (Bankr. N.D. Tex. 2021); *In re* Thurman, 625 B.R. 417, 419 n.4 (Bankr. W.D. Mo. 2020).

[2] *E.g.,* Hall L.A. WTS, LLC v. Serendipity Labs, Inc. (*In re* Serendipity Labs, Inc.), 620 B.R. 679, 680 n.3 (Bankr. N.D. Ga. 2020); *In re* Body Transit, Inc., 613 B.R. 400, 409 n. 15 (Bankr. E.D. Pa. 2020).

[3] In *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC),* 2022 WL 1288608 (B.A.P. 9th Cir. 2022), the court reviewed the bankruptcy court's eligibility order in connection with an appeal of the order confirming the subchapter V plan. The court stated, "The interlocutory Subchapter V Order merged into the final Confirmation Order." *Id.* at *3 n. 3. The court cited *United States v. Real Prop. Located at 475 Martin Lane,* 545 F.3d 1134 , 1141 (9th Cir. 2008) (under merger rule, interlocutory orders entered prior to the judgment merge into the judgment and may be challenged on appeal).

In *Gregory Funding v. Ventura (In re Ventura),* 2022 WL 1188367 (E.D. N.Y. 2022), however, the court in reversing an order of the bankruptcy court determining that the debtor was eligible for subchapter V, without discussing the finality issue, stated that district courts have appellate jurisdiction over final judgments, orders, and decrees. *Id.* at *3.

from an interlocutory order, with leave of the court, under 28 U.S.C. § 158(a)(3) and § 158(b)(1), respectively. Courts of appeals have discretionary jurisdiction to hear an appeal of an interlocutory order (as well as a final one) of the bankruptcy court under 28 U.S.C. § 158(d)(2) that a bankruptcy court, district court, or bankruptcy appellate panel certifies on various grounds.[4]

Page 18, add at end of footnote 42

See also In re Caribbean Motel Corp., 2022 WL 50401 (Bankr. D. P.R. 2022) (motel renting rooms by the hour generating five to seven percent of income from providing food service on request and selling goods such as prophylactics and aspirin is not a single asset real estate debtor).

The district court's ruling in *Guan v. Ellingsworth Residential Community Association, Inc. (In re Ellingsworth Residential Community Association, Inc.)*, 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022), indicates that an eligibility determination is a final order. The creditor filed a notice of appeal after the bankruptcy court issued an order scheduling a hearing on confirmation of the debtor's subchapter V plan after a hearing at which it took the eligibility objection under advisement. The creditor appealed the scheduling order, and the bankruptcy court denied the creditor's motion for a stay pending appeal. In a later order, the bankruptcy court determined that the debtor was eligible. See *In re* Ellingsworth Residential Community Association, Inc.*,* 619 B.R. 519 (Bankr. M.D. Fla. 2019). The creditor did not seek leave to amend her notice of appeal to include the order denying a stay pending appeal or the eligibility order.

The district court held that the scheduling order was interlocutory and that the order denying the eligibility objections was not properly before the court. Guan v. Ellingsworth Residential Community Association, Inc. (*In re* Ellingsworth Residential Community Association, Inc.), 2021 WL 3908525 at * 2 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022). The implication is that the eligibility order was a final order because it finally resolved the objection to eligibility. The district court nevertheless determined that, even if the creditor had properly raised the issue, the appeal would be denied on the merits. *Id.*

The Eleventh Circuit dismissed the appeal *sua sponte* for lack of jurisdiction because the district court's order affirming the bankruptcy court's interlocutory scheduling order was not a final order of the district court within its appellate jurisdiction under 28 U.S.C. § 158(d)(1). Guan v. Ellingsworth Residential Community Association, Inc. (*In re* Ellingsworth Residential Community Association, Inc.), 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022).

[4] The lower court must certify either: (1) that the order involves a question of law as to which no controlling circuit or Supreme Court authority exists or a matter of public importance; (2) that the order involves a question of law requiring resolution of conflicting decisions; or (3) that an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A)(i)-(iii).

III C. Debtor Must Be "Engaged in Commercial or Business Activities"

Page 20, add at beginning of section

If a debtor is conducting active operations at the time of filing, it plainly meets the eligibility requirement that the debtor be "engaged in commercial or business activities." A profit motive is not necessary for a debtor to qualify as being "engaged in commercial or business activities." Thus, a nonprofit entity, such as a homeowner's association, meets the requirement.[5] Similarly, an entity formed for the sole purpose of acquiring and selling interests in aircraft and providing depreciation tax benefits to its sole member is eligible for subchapter V even though it has no profit motive.[6]

Page 23, add at end of section

National Loan Invs., L.P. v. Rickerson (*In re Rickerson),* 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021) also ruled that eligibility requires that the debtor be engaged in commercial or business activities on the petition date.

The Bankruptcy Appellate Panel of the Ninth Circuit extensively reviewed the subchapter V case law on the issue in *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 2022 WL 1288608 (B.A.P. 9th Cir. 2022). The Ninth Circuit BAP adopted the majority view that "engaged in" is "inherently contemporary in focus and not retrospective." *Id.* at *5. The court ruled, *id.*:

[5] *In re* Ellingsworth Residential Community Association, Inc.*,* 619 B.R. 519 (Bankr. M.D. Fla. 2019). The district court agreed with the bankruptcy court in an order affirming the issuance of a scheduling order. Guan v. Ellingsworth Residential Community Association, Inc. (*In re* Ellingsworth Residential Community Association, Inc.), 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022).

[6] NetJets Aviation, Inc. v. RS Air, LLC (*In re* RS Air, LLC), 2022 WL 1288608 at *6-8 (B.A.P. 9th Cir. 2022). The court's holding on this point is broad: "[N]o profit motive is required for a debtor to qualify for subchapter V relief. To hold otherwise would wrongfully exclude nonprofits and other persons that lack such a motive." *Id.* at *8.

Thus, a debtor need not be maintaining its core or historical operations on the petition date, but it must be "presently" engaged in some type of commercial or business activities to satisfy [the eligibility requirement].

III C 2. What activities are sufficient to establish that the debtor is "engaged in commercial or business activities" when the business is no longer operating

Page 26, insert after end of second full paragraph

National Loan Invs., L.P. v. Rickerson (In re Rickerson), 636 B.R. 416 (Bankr. W.D. Pa. 2021), rejected *Ikalowych's* conclusion that an employee is "engaged in commercial or business activities" for purposes of sub V eligibility. The court reasoned that the ordinary meaning of the phrase does not encompass "an employee who is in an employment relationship with an employer – at least where the employee has no ownership or other special interest with an employer." *Id.* at 426.

Ikalowych's broad reading, the court explained, "threatens to virtually drain it of any meaning." 636 B.R. at 426. The court continued, *id.* at 426:

> If any person who is an employee is thus engaging in commercial or business activities, and thus potentially eligible to proceed under Subchapter V, why limit it there? What about a debtor whose only source of income is Social Security – cannot such a person nonetheless be said to be engaging in commercial or business activity by purchasing food and gasoline on a regular basis, and therefore potentially be eligible to proceed under Subchapter V?

Page 30, add after first full paragraph:

In *In re Vertical Mac Construction, LLC,* 2021 WL 3668037 (Bankr. M.D. Fla. 2021), the debtor filed a subchapter V case to liquidate its assets and disburse the sale proceeds to

creditors. Shortly after filing the petition, the debtor moved to sell its assets under § 363, and the court approved the sale.

The court denied the U.S. Trustee's objection to eligibility based on the fact that the debtor was no longer operating a business on the filing date. The court concluded that the debtor was engaged in commercial or business activities on the filing date "by maintaining bank accounts, working with insurance adjusters and insurance defense counsel to resolve [various claims] and preparing for the sale of its assets." *Id.* at * 4.

The Bankruptcy Appellate Panel of the Ninth Circuit in *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 2022 WL 1288608 at *5-6 (B.A.P. 9th Cir. 2022), adopted a broad approach to what activities qualify as "commercial or business activities" on the petition date, citing cases that earlier text discusses.

The bankruptcy court in *RS Air* had found that the debtor was engaged in commercial or business activities on the petition date by litigating with the objecting creditor, paying registry fees for its aircraft, remaining in good standing as a limited liability company under state law, filing tax returns, and paying taxes. The bankruptcy court also found that the debtor intended to resume business operations once it was able to do so. The BAP concluded that these activities were "commercial or business activities" within the meaning of the eligibility statute. *Id.* at *6.

In a chapter 12 case, the court in *In re Mongeau,* 633 B.R. 387 (Bankr. D. Kansas 2021), ruled that debtors who had discontinued their own farming operations were nevertheless "engaged in farming" based on their involvement in the operation of farms of their extended family, their intent to continue farming operations in the future, and their ownership of some farm assets. The court relied in part on subchapter V cases concluding that winding down a

business that had ceased operations on the filing date is sufficient to be "engaged" in business activities. *Id.* at 397.

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III D. What Debts Arise From Debtor's Commercial or Business Activities

Page 31, insert before last full paragraph

In *Lyons v. Family Friendly Contracting LLC (In re Family Friendly Contracting LLC),* 2021 WL 5540887 (Bankr. D. Md. 2021), the former owner of the business and an affiliate that owned the business premises had sold their interests to the current owners of the debtor and an affiliate. The sale had been financed with bank loans on which the debtor and its affiliate were jointly and severally liable. The bank loans comprised over 90 percent of the debt.

The former owner objected to the debtor's eligibility on the ground that most of the debtor's obligations to the bank were incurred primarily for the benefit of the debtor's owners and affiliate and, therefore, did not arise out of the debtor's commercial or business activities. The court concluded that the loans were part of a "fully integrated transaction" that provided benefits to the debtor. *Id.* at * 4.

In determining how much of the debtor's debt arose from its commercial or business activities, the court concluded that the eligibility statute "does not require the court to dissect the various benefits obtained by all the parties and, for purposes of § 1182(1)(A), include only debt that is linked to a direct benefit obtained by a debtor, while excluding debt that directly benefitted others." *Id.* at * 5. Accordingly, the court ruled that the debtor was eligible.

National Loan Invs., L.P. v. Rickerson (*In re Rickerson),* 636 B.R. 416 (Bankr. W.D. Pa. 2021), considered whether an individual's personal tax obligation qualified as a business debt. The court noted that courts had concluded that, for purposes of determining whether a debtor's

debts are "primarily consumer debts" for purposes of dismissal for abuse under § 707(b), a personal tax obligation is neither a consumer nor a business debt. *Id.* at 428.[7]

The *Rickerson* court declined to rule on that basis, however. Instead, the court concluded that taxes owed with regard to income the debtor earned from previous businesses did not arise from commercial or business activities. The obligation arose from the debtor's failure to address taxes she owned on her income, not her commercial and business activities. *Id.* at 429.

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

III G. Ineligibility of Corporation Subject to SEC Reporting Requirements and of Affiliate of Issuer

Page 41, delete the third full paragraph and replace it with:

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

[7] The court cited *In re Brashers,* 216 B.R. 59 (Bankr. D. Okla. 1998) and *In re Stovall,* 209 B.R. 849 (Bankr. E.D. Va. 1997).

Congress could not have intended such results. The appropriate interpretation of (B)(iii) is to limit its application to an affiliate of an issuer that is subject to the reporting requirements specified in (B)(ii).[8]

IV. The Subchapter V Trustee

IV A. Appointment of Subchapter V Trustee

Page 43, add at end of section

The trustee must be a "disinterested person. § 1183(a). Section 101(14) defines a disinterested person as a person that, among other things, "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." § 101(14)(C).

In *In re 218 Jackson LLC,* 631 B.R. 937 (Bankr. M.D. Fla. 2021), the court ruled that the sub V trustee was not a disinterested person because he was not impartial. The trustee represented a creditor in a chapter 11 bankruptcy case in which the principals of the debtor were the same as those in the case before it. The trustee's representation of the creditor included representation in a state court lawsuit against the principals.

Noting that a unique duty of a sub V trustee is the facilitation of a consensual plan (see Section IV(B)(1)), the court concluded that a sub V trustee must be independent and impartial. *Id.* at 948. The court observed that the trustee had been "openly and actively adverse" to the debtor and that time records showed "no time trying to bring the parties together or encouraging a consensual plan of reorganization." *Id.*

[8] *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.").

On the facts before it, the court determined that cause existed to remove the trustee under § 324 because the trustee was not independent and impartial and had an interest materially adverse to the debtor's principals. *Id.* at 949. Because, due to the conflict, the trustee's fees were not reasonable or necessary, the court denied the request for compensation.

IV B. Role and Duties of the Subchapter V Trustee

Page 44, add after first full paragraph:

For a general discussion of a subchapter V trustee's role and duties, see *In re 218 Jackson LLC,* 631 B.R. 937, 946-48 (Bankr. M.D. Fla. 2021).

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

Page 46, add at end of first full paragraph

The trustee's duty to appear and be heard regarding confirmation gives the trustee standing to object to confirmation.[9]

Page 46, line 3 of second full paragraph, add footnote after "condition":

In re Ozcelebi*,* 639 B.R. 365 (Bankr. S.D. Tex. 2022) ("The responsibility of the subchapter V trustee to participate in the plan process and to be heard on the plan and other matters cloaks the subchapter V trustee with the statutory right to obtain information about the debtor's property, business, and financial condition.").

Page 47, add new paragraph at end of section

In *In re 218 Jackson LLC,* 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021), the court observed that, given (1) the trustee's duty to facilitate a consensual plan, (2) the fact that the debtor remains in possession of estate property, and (3) the absence of a requirement that the trustee investigate the financial affairs of the debtor unless the court orders otherwise, "It is not a stretch

[9] *In re* Topp's Mechanical, Inc.*,* 2021 WL 5496560 at *1 n.1 (Bankr. D. Neb. 2021)

then to conclude that the subchapter V trustee's role was intentionally designed to be less adversarial."

Nevertheless, when circumstances in the case raise significant questions such as the debtor's true financial condition, what property is property of the estate, the debtor's management of the estate as debtor-in-possession, and the accuracy and completeness of the debtor's disclosures and reports, a court may expect parties who have identified potential issues – including creditors, the U.S. Trustee, or the subchapter V trustee – to request an order under § 1183(b)(2) requiring the trustee to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, as well as other matters relevant to the case or formulation of a plan.[10]

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V. Debtor as Debtor in Possession and Duties of Debtor

V A. Debtor as Debtor in Possession

Page 66, after second line, add new text:

It is important to note that many of the requirements applicable in a traditional chapter 11 case govern a subchapter V case. The court must approve retention of the debtor's lawyers and

[10] *In re* Ozcelebi, 2022 WL 990283 at * 8 (Bankr. S.D. Tex. 2022).

other professionals[11] and their compensation.[12] The debtor cannot use cash collateral[13] or use, sell, or lease property outside the ordinary course of business[14] without court approval. The debtor must comply with guidelines of the U.S. Trustee, including the closing of prepetition bank accounts and the establishment of new debtor-in-possession accounts. The debtor must file appropriate "first day motions" to deal with issues such as payment of prepetition wages or other employee benefits, payment of prepetition taxes, or payment of other prepetition obligations (such as customer deposits or warranty obligations).

A subchapter V case is subject to dismissal or conversion for cause under § 1112(b)(1) under the same standards that apply in a traditional chapter 11 case.[15] Thus, failure to take such actions may constitute cause for dismissal or conversion under § 1112(b)(1).[16]

V B. Duties of Debtor in Possession

Page 67, add paragraph at end of footnote 145:

Bankruptcy Rule 2015 implements § 308. Interim Bankruptcy Rule 2015(a)(6) provides that the duty to file periodic reports in a chapter 11 small business case terminates on the effective date of the plan. Interim Bankruptcy Rule 2015(b) requires a subchapter V debtor to

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[11] § 327(a).

[12] § 330(a). *See generally In re* Rockland Industries, Inc., 2022 WL 451542 (Bankr. D. S.C. 2022) (disallowing portion of requested fees of attorney for subchapter V debtor). The court commented on the review of applications for compensation under § 330 in a subchapter V case, *id.* at *6:

> As a threshold matter, the Court emphasizes that the more cost-effective and streamlined approach to Chapter 11 bankruptcy offered by Subchapter V should not revive "economy of the estate" considerations that previously existed under the Bankruptcy Act and which have long since been abandoned. To be clear, the UST does not espouse, or even seemingly favor, an economy-of-the-estate standard. However, any deviation from the § 330 compensation standard because this is a Subchapter V case is a step on, or toward, a slippery slope that must be avoided. Professional services rendered in bankruptcy cases are scrutinized for necessity and reasonableness, and following the testimony of counsel at the Hearing, the Court is satisfied that this case presents more complexity than originally acknowledged by the UST and that this complexity should not prevent the Debtor from availing itself of the advantages of the Subchapter V designation. While the streamlined nature of Subchapter V means that reduced fees is a likely natural consequence, it should not be a forced result.

[13] § 363(c)(2).

[14] § 363(b).

[15] *See generally In re* Ozcelebi, 2022 WL 990283 (Bankr. S.D. Tex. 2022).

[16] *E.g., In re* MCM Natural Stone, Inc., 2022 WL 1074065 (Bankr. W.D. N.Y. 2022).

perform the duties prescribed in (a)(6). *See In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 6 (Bankr. D. P.R. 2022).

V C. Removal of Debtor in Possession

Page 70, sixth line, insert new sentence after footnote 158:

A court may, after notice and a hearing, remove a debtor from possession *sua sponte.*[17]

Page 71, insert new paragraph after second full paragraph:

Removal of a debtor from possession may be an alternative to dismissal or conversion of a subchapter V case for cause under § 1112(b)(1).[18] In *In re Pittner,* 2022 WL 348188 (Bankr. E.D. Mass. 2022), the debtor, who was in his fifth bankruptcy case and had been in bankruptcy for ten years, failed to comply with an order of the court that the debtor either file a motion to retain a real estate broker or a motion under § 363(b) to sell two parcels of real estate. After concluding that the violation of the order constituted cause to convert or dismiss under § 1112(a)(4)(E) and that the debtor had not invoked the exception in § 1112(b)(2) to the

[17] *In re* Pittner*,* 2022 WL 348188 (Bankr. E.D. Mass. 2022).

[18] Section 1112(b)(1) requires dismissal or conversion to chapter 7 of a chapter 11 case for "cause," unless the court determines that the appointment of a trustee or an examiner under § 1104 is in the best interests of the estate.

Section 1112(b)(2) states an exception if the court "finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate" and the debtor or another party in interests establishes a reasonable likelihood of confirmation of a plan and that (1) the grounds for converting or dismissing the case do not include substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (2) a reasonable justification exists for the act or omission; and (3) the act or omission will be cured within a reasonable period of time fixed by the court.

Because § 1104 does not apply in a subchapter V case, new § 1181(a), some courts have stated that § 1112(b)(1) permits no alternative other than conversion or dismissal if cause exists, unless the exception in § 1112(b)(2) applies. *E.g., In re* Ozcelebi, 2022 WL 990283 at * 9 (Bankr. S.D. Tex. 2022); *In re* MCM Natural Stone, Inc., 2022 WL 1074065 at * 4 (Bankr. W.D. N.Y. 2022). These courts did not consider removal of the debtor from possession as an alternative.

requirement of conversion or dismissal for cause, the court considered whether dismissal or conversion was in the best interest of creditors and the estate. *Id.* at *3.[19]

The court reasoned that dismissal would likely provide no recovery for unsecured creditors and that dismissal would bring no resolution to the disputes between the debtor and secured creditors based on the "long, contentious history" between them. It would result, the court predicted, in the filing of a sixth case. *Id.* at *3. The court agreed with the subchapter V trustee that conversion would result in abandonment of the debtor's principal assets and "would likely end no differently than a dismissal." *Id.*

The court noted that § 1112(b)(1) requires conversion or dismissal for cause "unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." Although § 1104(a) does not apply in a subchapter V case,[20] the court continued, subchapter V contains "its own parallel provision in § 1185(a)'s authorization for the court to remove a debtor in possession for cause, with a resulting increase under § 1183(b)(5) in the powers of the subchapter V trustee." *Id.* at *3.

The court reasoned, *id.* at *4:

> Removal of a debtor from possession is simply a lesser form of the conversion option. It is precisely that in every motion to convert or dismiss under § 1112(b)(1), where the Court is obligated to ask in every instance where cause is shown whether the appointment of a chapter 11 trustee might better serve the interests of creditors and the estate.

The court ruled that the debtor's deliberate refusal to obey the court's order was cause for removal of the debtor from possession under § 1185(a) and that removal, with the resulting

[19] Not surprisingly, the court rejected the debtor's contention that "moving forward on a purchase and sale agreement outside of the Court-established deadlines would be a better option" as an appropriate response to the failure to comply with the order. 2022 WL 348188 at *2.
[20] New § 1181(a).

increase in the subchapter V trustee's powers and duties under § 1183(b)(5), was in the best interests of creditors and the estate and better served those interests than either conversion or dismissal. *Id.*

From a debtor's standpoint, the removal remedy may be more advantageous than conversion or dismissal. The debtor retains the exclusive right to file a plan and has the right to seek reinstatement of possession under § 1185(b). A debtor thus has at least the opportunity of "repenting" from the conduct that led to the debtor's ouster and cooperating with the subchapter V trustee and creditors to achieve a result that benefits everyone more than conversion, dismissal, or liquidation of assets in the subchapter V case.

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VI. Administrative and Procedural Features of Subchapter V

VI D Time for Filing of Plan

Page 82, add footnote at end of second paragraph:

E.g., In re Online King LLC, 628 B.R. 340, 348 (Bankr. E.D.N.Y. 2021); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 343 (Bankr. S.D. Fla. 2020); *see In re* Majestic Gardens Condominium C Association, Inc., 2022 WL 789447 at * 2 (Bankr. S.D. Fla. 2022) (Failure to file plan within deadline generally requires dismissal, but court allows debtor's request to amend petition to remove subchapter V election instead of dismissing case).

Page 83, add new footnote at end of first paragraph:

Dismissal is not necessarily fatal for the debtor. Upon dismissal, the debtor can file another subchapter V case. The provisions of 11 U.S.C. § 362(n) that make the automatic stay inapplicable in a case pending within the previous two years apply only in a "small business case."

VI J. Extension of deadlines for status conference and debtor report and for filing of plan

Page 94, add to footnote 227, after E.g.:

In re Excellence 2000, Inc*.,* 2022 WL 163400 (Bankr. S.D. Tex. 2022).

Page 94, add text at end of line 3 after footnote 226:

Similarly, an error in calendaring the deadline for filing a plan may not provide a basis for an extension.[21]

The need to resolve disputes concerning the debtor's interests in property before filing a plan may justify extending the deadline,[22] but not if the debtor has failed to show that the dispute could not have been resolved prior to the deadline, what progress the debtor has made proposing a plan, and that its resolution is essential to the plan, even in the absence of any objection to the extension.[23]

VII. Contents of Subchapter V Plan

Page 97, line 1, add footnote after "1123":

A plan may include a provision for settlement of a dispute with a creditor over the avoidance of its lien. *E.g.,* Kopleman & Kopleman, LLP v O'Grady (*In re* O'Grady), 2022 WL 1058379 at *6 (D. N.J. 2022).

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[21] *In re* Majestic Gardens Condominium Association, Inc., 2022 WL 789447 (Bankr. S.D. Fla. 2022). The court declined to extend the deadline even though the debtor's lawyer filed the plan three days after expiration of the deadline. The court noted that the standard for extension of the plan filing deadline is more stringent than the "excusable neglect" standard of Bankruptcy Rule 9006(b)(1) for extending a deadline after its expiration.

The court allowed the debtor to amend the petition to remove the subchapter V election instead of dismissing the case. It is unclear what dismissal would accomplish in this situation: the debtor could simply re-file another case and promptly file the plan in the new one.

[22] *In re* HBL SNF, LLC, 635 B.R. 725 (Bankr. S.D.N.Y. 2022). The court granted an extension of 60 days rather than 90 as the debtor requested. The court reasoned that the 60-day extension would extend the deadline beyond the date of a scheduled hearing on a motion for summary judgment in an adversary proceeding regarding the debtor's lease of its facility and that the court at that time could assess the status of the case and rule on a further extension request, if necessary. The court observed that its "wait and see" approach is "sometimes used by bankruptcy courts when confronted with contested requests for an extension of a debtor's exclusivity period under Section 1121(d) in a traditional Chapter 11 case." *Id.* at 731.

[23] *In re* Excellence 2000, Inc., 2022 WL 163400 (Bankr. S.D. Tex. 2022).

Page 97, add at end of footnote 240:

The full text of a somewhat elaborate subchapter V plan is attached to the confirmation order in *In re Abri Health Services, LLC,* 2021 WL 5095489 at * 11 (Bankr. N.D. Tex. 2021).

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

Page 99, third line of third paragraph, add footnote after "residence":

E.g., Mechanics Bank v. Gewalt (*In re* Gewalt), 2022 WL 305271 (B.A.P. 9th Cir. 2022). The court held that a subchapter V liquidation plan providing for payment of the mortgage from the sale of the debtor's principal residence within two years, without a provision for current mortgage payments, violated § 1123(b)(5) because it impermissibly modified the mortgage lender's rights under the Supreme Court's interpretation of 11 U.S.C. § 1322(b)(2) in *Nobleman v. American Savings Bank.* 508 U.S. 324, 329, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). The court noted that it had reached the same result in a chapter 13 case. *Philadelphia Life Ins. Co. v. Proudfoot (In re Proudfoot),* 144 B.R. 876, 877-78 (B.A.P. 9th Cir. 1992). The exception in in § 1190(3) was not relevant in the case. *Gewalt at* *4 n. 7.

Page 99, end of third paragraph, add new footnote:

For a discussion of the antimodification provision in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 5:39-5:42.

Pages 100-101, footnotes 251 and 254, change Ventura citation to:

In re Ventura*,* 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

VIII. Confirmation of the Plan

VIII A. Consensual and Cramdown Confirmation in General

Page 105, add after first paragraph of section

Official Form B315 contemplates a short confirmation order that identifies the plan and recites that all requirements for confirmation have been met. As in many traditional chapter 11 cases, however, courts in subchapter V cases have entered lengthy and detailed confirmation orders with extensive findings of fact and conclusions of law, even in the absence of objections to confirmation.[24]

Page 106, add to footnote 270:

See also In re BCT Deals, Inc., 2022 WL 854473 (Bankr. C.D. Cal. 2022) (Court entered confirmation order on debtor's motion for confirmation in accordance with local rule without a hearing based on absence of opposition to motion after notice of opportunity to object).

Page 107, add text at end of page:

The type of confirmation also affects the timing of the entry of a final decree and the closing of the subchapter V case. Section 350(a) provides for the closing of a case "after an estate has been fully administered and the court has discharged the trustee." Bankruptcy Rule 3022 implements § 350 in a chapter 11 case by providing, "After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."

Full administration of a case necessarily includes entry of the discharge and discharge of the trustee.

[24] *E.g., In re* Roundy, 2021 WL 5428891 (Bankr. D. Utah 2021). *In re* Abri Health Services, LLC, 2021 WL 5095489 (Bankr. N.D. Tex. 2021); *In re* Triple J Parking, 2021 Bankr. Lexis 2304 (Bankr. D. Utah 2021).

If the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation,[25] and the subchapter V trustee's services are terminated upon substantial confirmation of the plan.[26] Full administration of a subchapter V case, therefore, may ordinarily occur shortly after confirmation of a consensual plan.

In the cramdown context, in contrast, discharge does not occur until completion of payments under the plan,[27] and the trustee continues to serve until that time.[28] Full administration cannot occur until three to five years after confirmation, depending on the period during which the debtor must make payments.[29]

Accordingly, whereas the court may enter a final decree and close a subchapter V case shortly after confirmation of a consensual plan, entry of a final decree and closing of the case after cramdown confirmation must await the completion of plan payments.[30]

The fact that the subchapter V case after cramdown confirmation must remain open pending completion of plan payments may prompt a debtor to request "administrative closing" of the case to reduce the costs of administration after confirmation and before closing of the case.

The court denied the debtor's request to administratively close a subchapter V case in *In re Gui-Mer-Fe, Inc.,* 2022 WL 1216270 (Bankr. D. P.R. 2022). The court concluded that a case can be closed only when it is fully administered and that the debtor's concerns about administrative costs were unfounded because the debtor was exempt from paying US. Trustee

[25] See § X(A).
[26] See § IV(D)(1).
[27] See § X(B).
[28] See § IV(D)(1).
[29] See § VIII(D)(4)(ii).
[30] *See In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at *3-5 (Bankr. D. P.R. 2022).

fees[31] and because its duty to file reports under § 308[32] and Bankruptcy Rule 2015 terminated upon confirmation. *Id.* at *8.[33] *See also id.* at * 6.

VIII B. Cramdown Confirmation Under New § 1191(b)

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

Page 111, add at end of section

Section 1191(c) states that the "fair and equitable" requirement *includes* the factors just mentioned. A plan may also not meet the requirement if it proposes to pay a secured creditor more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.[34]

[31] The court discussed cases dealing with administrative closing of traditional chapter 11 cases of individuals (in which discharge is deferred until completion of payments under the plan) in view of the burden on an individual debtor of paying U.S. Trustee fees for a lengthy time after confirmation if the case remained open. *In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at *5-8 (Bankr. D. P.R. 2022).

[32] Although § 308 applies only in a small business case, § 1187(b) requires a subchapter V debtor to comply with it.

[33] Interim Bankruptcy Rule 2015(a)(6) provides that the duty to file periodic reports in a chapter 11 small business case terminates on the effective date of the plan. Interim Bankruptcy Rule 2015(b) requires a subchapter V debtor to perform the duties prescribed in (a)(6).

[34] *In re* Topp's Mechanical, Inc. 2021 WL 5496560 (Bankr. D. Neb. 2021). The secured creditor in the case had a claim for about $ 3,765,000 secured by collateral worth about $ 2,125,000, resulting in an unsecured deficiency claim of about $ 1,640,000. The creditor elected treatment under § 1111(b)(2). As Section VIII(E)(1) discusses, the requirement for cramdown confirmation of an undersecured claim when the creditor elects § 1111(b)(2) requires payments that (1) have a value equal to the value of the collateral and (2) total the full amount of the claim.

The plan proposed to pay the creditor the full amount of the secured portion of the claim with interest, about $ 2,625,000. In addition, the plan provided for payment of the unsecured claim, for total payments of about $ 4,265,000.

The trustee contended that payments of interest on the secured portion of the claim should be taken into account in satisfying the requirement that the creditor receive payments that totaled the full amount of its claim. Under this method, the creditor was entitled to receive only approximately $ 1,140,000 on its unsecured claim, about $ 500,000 less than the $ 1,190,000 the plan proposed to pay. Because the proposed payments to the secured creditor resulted in $500,000 less being paid to unsecured creditors, the trustee contended, the plan discriminated unfairly against the unsecured class and was not fair and equitable.

The court concluded that the trustee's interpretation of the cramdown requirements was correct and that, therefore, the plan discriminated unfairly against the unsecured creditors and was not fair and equitable.

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

Page 111, add at end of last line on page:

Section 1191(c)(2) states two alternatives for satisfying the test. The same payments that satisfy the projected disposable income test may also satisfy the "liquidation" or "best interest of creditors" test of § 1129(a)(7).[35]

Page 112, delete line 1 and replace with:

The first is in subparagraph (A). Section 1191(c)(2)(A) requires that the plan provide that all of the

Page 112, fourth line, insert paragraph break after footnote 289, delete "Alternatively, the plan may provide that" and replace with this text:

The second alternative in subparagraph (B) is that the plan provide

Page 112, sixth line, after footnote 290, insert this text:

Courts have confirmed plans under the § 1191(c)(2)(B) alternative that provide for pro rata distributions to unsecured creditors from cash derived from a capital contribution from the debtor's equity owner[36] or the postpetition liquidation of an asset[37] in an amount not less than the value of the debtor's disposable income.

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[35] *See* Legal Service Bureau, Inc. v. Orange County Bail Bonds (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 (B.A.P. 9th Cir. 2022). The court did not discuss the issue, but the point is implicit in its holding. *See also* Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 7:2 (In a chapter 13 case, "[t]he plan must meet each of the best interest and projected disposable income tests, but the same payments may satisfy both of them. Thus, the debtor must pay the greater of the amount that the best interest test or the projected disposable income test requires.").

[36] *In re* The Lost Cajun Enterprises, LLC, 2021 WL 6340185 (Bankr. D. Col. 2021). The court confirmed a plan, over the objection of a creditor, that provided for pro rata cash payments to unsecured creditors on the plan's effective date, funded by a capital contribution from the debtor's sole member, equal to the debtor's projected disposable income for three years. The court did not consider whether the time should be longer.

[37] Legal Service Bureau, Inc. v. Orange County Bail Bonds (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 (B.A.P. 9th Cir. 2022). The plan provided for the pro rata distribution to creditors of proceeds realized from the postpetition sale of real property obtained through foreclosure of a deed of trust it held to secure a bail bond. The proceeds exceeded the value of the debtor's disposable income for three years. The court ruled that a three-year period applied because the bankruptcy court had not fixed a longer time. Section VIII(B)(4)(ii) further discusses the case.

Page 112, line 6, after footnote 290 and insertion of previous text, insert paragraph break before "The court".

VIII B 4 i. Determination of projected disposable income

Page 113, add at end of page

The definition of "current monthly income" in § 101(10A) specifically excludes Social Security benefits, § 101(10A)(B)(ii)(I), but the subchapter V definition of disposable income does not base the income component on "current monthly income." One commentator has concluded that Social Security benefits are not taken into account in determining projected disposable income in a subchapter V case.[38]

Page 116, add after first two lines

The court in *In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021), permitted an operating reserve based on testimony of the debtor's principal that the reserve was necessary to protect against shortfalls in cash due to the cyclical nature of the debtor's income.

Page 118, add at end of section

The determination of objections to confirmation based on the PDI requirement requires the court to receive evidence regarding their accuracy and reliability, which may include testimony from an accountant or financial advisor as well as the debtor's principal.[39]

[38] Alyssa Nelson, *Are Social Security Benefits "Disposable Income" for the Purposes of Subchapter V?,* 40-Sept Amer. Bankr. Inst. J. 30 (2021).
[39] *In re* The Lost Cajun Enterprises LLC, 2021 WL 6340185 (Bankr. D. Col. 2021).

VIII B 4 ii. Determination of period for commitment of projected disposable income for more than three years

Page 121, add after third full paragraph, at end of section

Several courts have addressed the issue of the period over which the debtor must pay disposable income to creditors.

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), which Section VIII(D)(8) discusses in detail, involved a plan that all impaired classes had accepted, so the PDI requirement did not apply. The court rejected the objecting creditor's contention that the debtor's failure to propose payments for more than three years established a lack of good faith.

In re Urgent Care Physicians, Ltd., 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), considered arguments by the U.S. Trustee and creditors that the court should require the debtor to make payments for five years instead of the three years that the plan proposed for the plan to be fair and equitable. The court concluded that a three-year term was appropriate.

The legislative history of subchapter V, the court said, indicated that Congress had recognized that small businesses typically have shorter life-spans than large businesses and that it had enacted subchapter V to permit small businesses to obtain bankruptcy relief in a timely, cost-effective manner and remain in business, thereby benefitting not only the owners, but also employees, suppliers, customers, and others who rely on the business.

Congress's recognition that small businesses typically have shorter life-spans, the court reasoned, "suggests that a plan term of three years is more reasonable, generally speaking (or as a default), than a five-year term, absent unusual circumstances." *Id.* at *10. The court added that Congress's concern for employees, customers, and others, as well as for the small business itself,

"reflects an intent to balance the shorter life-span planning of small businesses and timely cost-effective benefits to debtors, against the benefits to creditors." *Id.*

The *Urgent Care Physicians* court concluded that a three-year term achieved the proper balance. The court noted that the debtor provided outpatient health care for urgent needs, had deferred payments to insiders and some healthcare equipment payments, and had committed to paying at least its projected disposable income. Extending the term for two more years, the court continued, would further defer salary restoration to key staff, and further deferring full repayment of equipment charges could jeopardize availability of the equipment. *Id.* at *11.

The court concluded, *id.* at *11 (citation omitted):

> While at first blush the simple math of an extended plan term might seem to generate a higher payment to unsecured creditors, the inherent risks to the small business debtor of that extension could defeat the unsecured creditors' desire for greater recovery. The three-year term here is fair and equitable, as it properly balances the risks and rewards for both the debtor and its creditors. In these circumstances, the Court declines to fix a longer plan period. A longer plan term would disproportionately harm the debtor in forcing it to accrue additional unpaid expenses and potentially emerge from its reorganization saddled with more debt.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), the Bankruptcy Appellate Panel of the Ninth Circuit described the three-year period as a "baseline requirement." *Id.* at *5. The court explained, *id.*:

> As part of the streamlined, flexible process under subchapter V, the Bankruptcy Code sets a baseline requirement that a debtor commit three years of disposable income, while

it also affords the bankruptcy court discretion to require more as a condition of finding a plan fair and equitable.

The court observed that the court's role in setting a period longer than three years is "unique to subchapter V, noting that the period for payment of disposable income in chapter 13 cases is set by statute and in chapter 12 cases by the debtor, *id.* at *5, as earlier text discusses. Because the bankruptcy court had not set a commitment period longer than three years, the court ruled, the plan satisfied the minimum confirmation requirement if it provided for payment of disposable income based on a three-year period.

The *Orange County Bail Bonds* court affirmed confirmation of the plan because it met the alternative requirement of subparagraph (B) of § 1191(c)(2) that the plan provide for payments having a present value of not less than the debtor's disposable income for three years. Specifically, the plan provided for about $ 433,000 that the debtor realized from the postpetition liquidation of an estate asset to make payments under the plan, which exceeded its projected disposable income for three years of about $ 287,000. *Id*. at *6.[40]

[40] The opinion in *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), states that the liquidation proceeds were about $ 433,000, *id.* at *3, that the plan proposed to pay the objecting creditor, Legal Service Bureau, Inc., d/b/a Global Fugitive Recovery ("Global"), which the plan separately classified, $100,000 of those proceeds, *id.*, and that the bankruptcy court's confirmation order required payment to Global of $127,794.35. *Id.* at *4. The opinion further states that the plan proposed to pay Global from its actual disposable income for the five years after confirmation, but the debtor stated that because it would pay only actual disposable income, it was possible that Global could receive nothing from future earnings or that it might not be paid in full. *Id.* at *3. The debtor projected total disposable income of about $287,000 over the three-year period after confirmation and about $493,000 over five years. *Id.*

The BAP opinion further states that, in response to an objection to confirmation that § 1191(c)(2) requires a debtor to commit at least three years of projected disposable income to the plan, the debtor amended the plan to provide that it would not receive a discharge unless it paid all actual disposable income over a five-year period and it paid the largest creditor, separately classified, a minimum of $181,000 from actual disposable income. *Id.* at *3.

The BAP opinion does not recite what happened to the liquidation proceeds that Global did not receive or the treatment of unsecured claims in the other class.

A review of the plan and confirmation order in the bankruptcy court clarifies the provisions of the plan. *In re* Orange County Bail Bonds, Inc., Bankruptcy Case No. 8:19-bk-12411-ES (the "Bankruptcy Case").

Although the confirmed plan separately classified Global and general unsecured creditors, it provided for the classes to share pro rata in the liquidation proceeds remaining after payment of priority and administrative claims and in the debtor's actual disposable income. Plan of Reorganization for Small Business Debtor, Bankruptcy Case ECF No. 285 (Mar. 2, 2021), at 1 (¶ C), 3 (¶ 4.01, Class 2 and Class 3 treatment). The provisions for treatment of

VIII B 5. Requirements for feasibility and remedies for default

Page 122, add after first full paragraph (ending with "in the plan")

The court in *In re Moore & Moore Trucking, LLC,* 2022 WL 120189 (Bankr. E.D. La. 2022), held that a provision in a plan that permitted the objecting secured creditor to foreclose in the event of default was an appropriate remedy that met the requirement of § 1191(c)(3)(B).

Page 124, add after first two lines

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the two classes are identical except that the provision for Global states that the debtor is pursuing an appeal from the prepetition judgment it obtained. The debtor in the plan valued the distributions that creditors would receive at "approximately" 100 cents on the dollar, *id.* at 2 (Article 1), and the plan provided for payment of interest on the claims in both classes at the federal judgment rate. *Id*. at 3 (¶ 4.01, Class 2 and Class 3 treatment). The plan stated that, after payment of administrative expenses and apriority claims from the liquidation proceeds, Global would receive $100,000 on its claim and general unsecured creditors would receive pro rata distributions totaling $3,608.31. *Id.* at 1 (¶ C).

The confirmation order amended the discharge provision of the plan to provide that, unless all claims were paid in full, the debtor would not receive a discharge unless the debtor paid all actual disposable income to creditors for five years and the debtor paid a minimum of $181,000. Confirmation Order, Bankruptcy Case ECF No. 310 (Apr. 13, 2021), at 6-7 (¶ I). It did not provide for $181,000 to be paid to Global.

The confirmation order also) included specific directions for disbursement of the liquidation proceeds of $432,972.95. It provided for payment of allowed fees of the debtor's attorney's and professionals, the allowed fee of the subchapter V trustee, unpaid postpetition compensation due to the debtor's principal, and priority claims in the total amount of $ 300,567.37, leaving a balance of $132,405.58 for distribution to unsecured creditors. Global received $127,794.35, and the only two other unsecured creditors received a total of $4,611.23.

The bankruptcy court confirmed the amended plan, concluding that it met the requirements of subparagraph (A) of § 1191(c)(2). Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 at *9 (B.A.P. 9th Cir. 2022).

The Bankruptcy Appellate Panel ruled that the plan did not meet the requirements of subparagraph A because it did not provide for payment of the debtor's projected disposable income. "Instead," the court explained, "it provides for an effective date payment of $427,972.95 and possible payment of an unknown amount from Debtor's actual disposable income." *Id.* at *5.

The BAP rejected the debtor's argument that the plan complied with subparagraph B because the effective date payment of the liquidation proceeds plus the minimum payment of $181,000 was greater than projected disposable income over five years.

The court advanced two reasons. First, the plan made discharge contingent on the minimum payments, but it did not require the payment of any specific amount. Second, the effective-date value of the payments could not be determined because the plan did not specify the timing or actual amount of any future payment. *Id.* at *5.

Nevertheless, the BAP concluded that the plan satisfied § 1191(c)(2)(B) because the effective date payment of the liquidation proceeds (about $433,000) exceeded the debtor's projected disposable income (about $287,000) for the minimum three-year period. *Id.* at *6. Therefore, the BAP ruled that the bankruptcy court "did not clearly err in finding that the Plan is fair and equitable to [the objecting creditor]. Although the confirmation order referenced § 1191(c)(2)(A), any such error was harmless. And we may affirm on any ground fairly supported by the record." *Id.* (citations omitted).

Other courts have similarly relied on testimony from an accountant[41] or credible testimony from the debtor's principal[42] to conclude that a plan meets the feasibility requirement of § 1191(c)(2).

Page 124, add at end of section

The court in *In re Lupton Consulting LLC,* 2021 WL 3890593 (Bankr. E.D. Wisc. 2021), concluded that the plan was not feasible because the debtor's financial projections submitted by its principal were not reliable in view of historical data and discrepancies with operating reports.

VIII D 1 Classification of claims; unfair discrimination

Page 128, add at end of section

Unfair discrimination may also occur when a plan proposes to pay an undersecured creditor who exercises the § 1111(b)(2) election[43] more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.[44]

VIII D 2 Acceptance by all classes and effect of failure to vote.

Page 129, add at end of second line

Other bankruptcy courts in the Tenth Circuit have reached the same result.[45]

[41] *In re* Moore & Moore Trucking, LLC, 2022 WL 120189 (Bankr. E.D. La. 2022).
[42] *In re* Urgent Care Physicians, 2021 WL 6090985 (Bankr. E.D. Wisc. 2021).
[43] Section VIII(E)(1) discusses the § 1111(b)(2) election.
[44] *In re* Topp's Mechanical, Inc. 2021 WL 5496560 (Bankr. D. Neb. 2021). Section VIII(B)(3) discusses the case in the context of the "fair and equitable" requirement of § 1191(c).
[45] *In re* The Lost Cajun Enterprises, LLC, 2021 WL 6340185 at * 7 (Bankr. D. Col. 2021); *In re* Roundy, 2021 WL 5428891 at * 2 (Bankr. D. Utah 2021); *In re* Robinson*,* 632 B.R. 208, 218 (Bankr. D. Kansas 2021).

VIII E. § 129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases

VIII E 1. The § 1111(b)(2) election

Page 142, add to footnote 352

The court in *In re Topp's Mechanical, Inc.* 2021 WL 5496560 (Bankr. D. Neb. 2021), after explaining the competing views, adopted the majority view, concluding that "the interest component of a debtor's stream of payments may serve a dual purpose of satisfying the allowed claim of the creditor and providing present value to the creditor." *Id.* at *6. Because the debtor's plan proposed to pay the secured creditor more than it was entitled to receive as a result of the § 1111(b)(2) election, the debtor had less money to pay to unsecured creditors, who had not accepted the plan. The court therefore ruled that the plan discriminated unfairly and was not fair and equitable. Section VIII(B)(3) discusses the case in the context of the "fair and equitable" requirement of § 1191(c).

Page 142, last full paragraph, replace first two sentences

Three courts have considered a creditor's right to make the § 1111(b) election in a subchapter V case. The issue was whether the creditor could not invoke the election because its interest was "inconsequential."

Page 148, add at end of section

The third case is *In re Caribbean Motel Corp.,* 2022 WL 50401 (D. P.R. 2022). The creditor held a claim of about $ 3.1 million secured by collateral worth $ 550,000, about 15% of its claim. Without determining which approach to use, the court concluded that the value of the collateral was not inconsequential. *Id.* at *5-6.

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

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

Page 155, add text at end of page:

When the subchapter V trustee makes payments under the plan, the trustee will be entitled to compensation for that service. To avoid this expense, a debtor may propose that the debtor, rather than the subchapter V trustee, make all payments under the plan. Creditors may support such a procedure because, at least in theory, they can receive the benefits of the reduced cost. A subchapter V trustee may prefer that the debtor make payments because it relieves the trustee of a potentially tedious administrative burden and reduces the risk of nonpayment for such additional services.

Although chapter 13 caselaw, as earlier text discusses, generally does not permit the debtor to make all payments under a plan, subchapter V does not expressly prohibit it. Moreover, the chapter 13 situation is distinguishable because the chapter 13 trustee receives compensation based on a commission on disbursements the trustee makes, whereas the subchapter V trustee generally bills on an hourly basis.

Anecdotal evidence and a few cases (that do not discuss the issue)[46] indicate that at least some courts are permitting the debtor to make all payments under the plan in the absence of any objection.

[46] *See, e.g., In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 2 (Bankr. D. P.R. 2022).

The fact that the subchapter V trustee does not make payments under the plan does not, however, terminate the subchapter V trustee's services.[47]

X. Discharge

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

Page 163, add new paragraph at end of section

Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021), followed *Satellite Restaurants* and *Cleary Packaging* and likewise ruled that the exceptions to discharge in § 523(a) are not applicable to an entity in a sub V case.

XII. Default and Remedies After Confirmation

XII C Postconfirmation Dismissal or Conversion to Chapter 7

1. Postconfirmation Dismissal

Page 176, add text after last line on page, after "status":

The court in *In re Akamai Physics, Inc.,* 2022 WL 1195631 (Bankr. D. N.M. 2022), addressed the effect of dismissal or conversion after confirmation of a consensual plan under § 1191(a) that deferred discharge until completion of plan payments.[48] The plan provided for pro rata payments to unsecured creditors from the greater of $10,000 per month or the debtor's "Disposable Income as defined in 11 U.S.C. § 1191(d)." *Id.* at *2.

Consensual confirmation occurred after the debtor resolved the objection of the U.S. Trustee that the plan was not feasible by including a provision in the confirmation order for the

[47] *E.g., In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 8 (Bankr. D. P.R. 2022).
[48] When the court confirms a consensual subchapter V plan under § 1191(a), § 1141(d) governs the discharge. See Section X(A). Section 1141(d)(1)(A) provides that confirmation discharges the debtor unless the plan or confirmation order provides otherwise.

court to entertain a postconfirmation motion to dismiss or convert if the debtor did not generate any operating income within 120 days after confirmation. *Id.* at *2.

Although the debtor had timely made plan payments (through sales of assets or loans from its principal), it did not generate any operating income within 120 days. After concluding that the U.S. Trustee had not established cause for dismissal or conversion under § 1112(b)(4), *id.* at *3-5, the court considered the effect that the confirmed plan could have on the rights of the parties if it granted the motion, reasoning that the effect of dismissal or conversion is an issue to consider in determining a motion to dismiss or convert. *Id.* at *5.

The court determined that, in a traditional chapter 11 case, confirmation binds the reorganized debtor and creditor to the terms of the plan, revests property of the estate in the reorganized debtor, and discharges preconfirmation claims. The chapter 7 estate after conversion, therefore, has no assets because the plan vested all estate property in the debtor, the court explained, so conversion does not help creditors. Dismissal, the court continued, has no materially greater benefit because it does not "undo" the plan, which remains binding. *Id.* at *5.

The court concluded, *id.* at *6:

> In most standard chapter 11 cases with confirmed plans of reorganization, neither conversion nor dismissal materially benefits creditors. Instead, a creditor's remedy is to sue the debtor in state court to enforce the creditor's rights under the chapter 11 plan.

The *Akamai Physics* court then noted that a different rule applies to confirmed plans under chapters 12 and 13 and in individual cases under chapter 11, in which dismissal or conversion "negates the confirmation order and the plan, restoring parties to the *status quo ante.* *Id.* at 6. The court advanced two policy reasons for the distinction.

First, substituting disposable income for the absolute priority rule and other creditor protections in chapter 11 is a major benefit to creditors. If the debtor fails to make payments as the plan requires, the plan should not be binding. *Id.*

Second, discharge does not occur upon dismissal or conversion of such cases unless the debtor has completed plan payments. *Id.*

The court reasoned that a subchapter V cramdown plan is similar to plans in chapters 11, 12, and 13 that require payment of projected disposable income and deferral of discharge until completion of plan payments. The court suggested, therefore, that dismissal or conversion of a subchapter V case after cramdown confirmation might negate the plan. *Id.* at *6.

The court concluded that no reason existed "to think that 'consensual' subchapter V plans would be treated differently than typical chapter 11 plans." *Id.* at *7. In the case before it, however, the plan deferred discharge until completion of all plan payments, a key provision that also exists in disposable income plans under other chapters. Later dismissal or conversion, the court stated, might require it to determine whether such a "hybrid" plan would survive or be negated. *Id.*

XII C 2 Postconfirmation conversion

Page 179, insert paragraph after second line

In *In re Akamai Physics, Inc.,* 2022 WL 1195631 (Bankr. D. N.M. 2022), discussed in detail in Section XII(C)(1), the court suggested that property of the estate that vests in the debtor under a consensual plan in a subchapter V case confirmed under § 1191(a) is not property of the chapter 7 estate upon postconfirmation conversion. With regard to conversion after cramdown confirmation under § 1191(b), however, the court suggested that conversion negates the binding

effect of the plan because discharge does not occur until the completion of plan payments. *Id.* at *6.

XIII. Effective Date and Retroactive Application of Subchapter V

Pages 180-82, footnotes 462, 465, and 469. add at end of each Ventura citation:

rev'd on other grounds sub nom. Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

Pages 188 footnotes 500, 502, add at end of Ventura citation:

rev'd sub nom. Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

Page 190, after second full paragraph ending with footnote 508, add new paragraph:

The district court reversed, concluding that the bankruptcy court had not properly considered the substantial prejudice that the creditor faced due to the belated amendment to elect subchapter V. *Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (E.D. N.Y. 2022). The district court noted that the amendment did not occur until 16 months after the filing of the chapter 11 case and that allowing it caused "substantial prejudice" to the creditor. The district court observed, *id.* at *4 (emphasis in original; interior punctuation and citation omitted):

> By [the time of the amendment], both the parties and the Bankruptcy Court spent considerable time to get to a point in which [the creditor] was posed to confirm its plan. The Bankruptcy Court held numerous hearings and the parties, after significant negotiations, agreed [the creditor] could pursue its unopposed plan of reorganization if the Debtor failed to submit a plan by September 30, 2019. In reliance on this agreement and on the Debtor's representation that her petition would proceed under Chapter 11, [the creditor] Filed its plan of reorganization, solicited the necessary votes, and was on the

> cusp of confirming it when the Debtor sought to amend her petition. Moreover, because the SBRA grants the Debtor the sole right to confirm a plan of reorganization, the Debtor's amendment had the further prejudicial effect of terminating [the creditor's] right to pass *any* plan, thereby completing changing the rights of [the creditor] as a creditor and resetting the litigation posture of the proceedings.

The court concluded that the amendment to elect subchapter V "cannot be allowed to cause such prejudice." *Id.* In addition, the court observed, prejudice to the debtor did not outweigh prejudice to the creditor because "she remains in the Chapter 11 process. While this may prevent her from accessing some of the tools afforded by Subchapter V, the Debtor's interests are still protected by Chapter 11, which requires [the creditor's plan] to be 'fair and equitable,' 11 U.S.C. § 1191(c), proposed in good faith, deemed to be 'reasonable,' and in comportment with existing law. *Id.* § 1129(a)."[49] *Id.* Accordingly, the court held that the bankruptcy court abused its discretion by overruling the creditor's objection to the debtor's amendment of her petition to proceed under subchapter V.

[49] *Id.* It is unlikely that the requirements for confirmation the court referenced would provide any material protection for the interests of the debtor as compared to the provisions of her plan.

JUNE 2022 SUPPLEMENT

I. Introduction

Pages 1-2, delete second paragraph on page 1 and first two paragraphs on page 2 and replace deleted text with:

Subchapter V applies in cases in which a qualifying debtor elects its application. As originally enacted, SBRA provided that a "small business debtor," as defined in revised § 101(51D), could make the election. In the absence of the election, a small business debtor would be in a "small business case," which revised § 101(51C) defines as the case of a small business debtor that does not elect subchapter V. SBRA did not change the pre-SBRA provisions of chapter 11 that govern a small business case with one exception. SBRA amended § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in a small business case unless the court orders otherwise.[50]

A debtor is a small business debtor under § 101(51D) only if, among other things, its debts (with some exceptions) are within a specified debt limit. The debt limit at the time of SBRA's enactment was $ 2,725,625; on April 1, 2022, the debt limit was increased pursuant to § 104 to $ 3,024,725.

As Section III(B) discusses in detail, later legislation expanded the availability of subchapter V on a temporary basis to debtors whose debts do not exceed $ 7.5 million if they otherwise qualify as a small business debtor.[51] Under this legislation, § 1182(1) defines eligibility for subchapter V, with the same language that defines a "small business debtor" in

[50] SBRA, § 4(a)(11), 133 Stat. 1079, 1086.
[51] Between March 27, 2022, and June 20, 2022, a debtor had to be a small business debtor as defined in § 101(51D), and the debt limit was, therefore, $3,024,725. The change on June 21 was retroactive. See Section 3(B)(1); Part XIII.

§ 101(51D), except for the debt limit. On June 20, 2024, the provisions expire, and § 101(51D) will again govern eligibility for subchapter V.

An individual eligible for subchapter V will also be eligible for chapter 13 if the debtor has regular income and debts that do not exceed the chapter 13 debt limits.[52] Effective June 21, 2022, the debt limit in a chapter 13 case is temporarily increased to $ 2,750,000 for both secured and unsecured debts under the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA").[53] On June 20, 2024, the debt limits return to $ 465, 275 for unsecured debts and $ 1,395,875 for secured debts.[54]

Appendix E compares subchapter V with provisions that govern chapter 13 cases, small business cases, and traditional chapter 11 cases.

Page 4, add text at end of third line, after footnote 12

A study of 438 cases filed between subchapter V's effective date of February 19, 2020, and December 31, 2020, indicates that it is working as intended.[55]

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[52] § 109(e) governs chapter 13 eligibility.

[53] Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA") § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022). The increased debt limits apply retroactively in any bankruptcy case commenced on or after March 27, 2020, that is pending on the date of BTATCA's enactment. *Id.* § 2(h)(2(A).

[54] BTATCA § 2(i)(1)(A). The court may convert a chapter 11 case to chapter 13 if the debtor requests it. § 1112(c).

[55] Michelle M. Harner, Emily Lamasa, and Kinberly Goodwin-Maigetter, *Subchapter V Cases By the Numbers,* 40-Oct Am. Bankr. Inst. J. 12 (Oct. 2021). Of the 438 cases filed in the period, 117 (27 percent) were individual cases, of which 52 were jointly administered. As of June 30, 2021, confirmation had occurred in 221 cases, the debtor had filed a plan that had not yet been confirmed in 105 cases, and the court had dismissed 82 cases. *Id.* at 59. Thus, the debtor was able to confirm a plan in more than 62 percent of the cases not dismissed and in more than half of all of the cases in the study. *Id.*

In 130 of the 221 cases with confirmed plans, confirmation was consensual under § 1191(a) in 130 of them (69 percent). In the 91 cases where cramdown confirmation occurred, 40 involved at least one class of creditors voting against the plan and 51 had impaired classes that did not vote. *Id.*

The average number of days between filing of the case and confirmation was 184 days, and the median was 168. *Id.*

The authors concluded, *id.* at 60:

> 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.

Page 4, insert text after second full paragraph:

An individual eligible for subchapter V may also be eligible for chapter 13 if the debtor has regular income and debts that do not exceed the chapter 13 debt limit.[56] Effective June 21, 2022, the debt limit in a chapter 13 case is temporarily increased to $ 2,750,000 for both secured and unsecured debts under the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA").[57] On June 20, 2024, the debt limits return to $ 465, 275 for unsecured debts and $ 1,395,875 for secured debts.[58]

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III. Debtor's Election of Subchapter V and Eligibility for Subchapter V

Change title of Part III as shown above

A. Debtor's Election of Subchapter V

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002).

BTATCA generally reinstates the provisions for eligibility for subchapter V as they existed prior to expiration of the temporary legislation, with two changes relating to affiliates.

Specifically, BTATCA:

(1) Reinstates the debt limit for subchapter V eligibility to $7.5 million for two years. BTATCA, §§ 2(d), 2(i)(1)(B), and adjusts it for inflation under § 104, BTATCA § 2(b).

(2) Amends the definition of "small business debtor" in § 101(51D)(B):

> (A) to exclude from the definition of "small business debtor" in clause (iii) a debtor that is an affiliate of a public company instead of a debtor that is an affiliate of an issuer under the Securities Exchange Act of 1934. BTATCA § 2(a)(2);

[56] § 109(e) governs chapter 13 eligibility.
[57] Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA") § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022). The increased debt limits apply retroactively in any bankruptcy case commenced on or after March 27, 2020, that is pending on the date of BTATCA's enactment. *Id.* § 2(h)(2(A). The court may convert a chapter 11 case to chapter 13 if the debtor requests it. § 1112(c).
[58] BTATCA § 2(i)(1)(A).

(B) to add "under this title" after "affiliated debtors" in clause (i) so that the debts of affiliated debtors are included in the debt limit calculation only if the affiliate is a debtor in a bankruptcy case, and amends conforms the definition of a debtor eligible for subchapter V.

(3) Amends § 1182(1) for two years so that, except for the debt limit, the eligibility requirements for a debtor to elect subchapter V are the same as those that define a small business debtor. BTATCA §§ 2(d), 2(i)(1)(B).

(4) Provides that, after two years, a debtor must be a small business debtor to be eligible for subchapter V. BTATCA § 2(i)(1)(B).

B. Eligibility for Subchapter V; Revised Definitions of "Small Business Debtor" and "Small Business Case"

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). See note at beginning of Section III(A) in the June Supplement.

F. What Debts Are Included in Determination of Debt Limit

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). See note at beginning of Section III(A) in the June Supplement.

Revised Section III(F) moves the discussion of *In re 305 Petroleum, Inc.,* 622 B.R. 209 (Bankr. S.D. Miss. 2020) (dealing with inclusion of debts of an affiliated SARE debtor for purposes of the debt limit) to a footnote because BTATCA resolved the issue.

G. Ineligibility of Corporations Subject to SEC Reporting Requirements and of Affiliates of Such Corporations

Change title of Section III(G) as shown above.

Sections A, B, F, and G of Part III have been revised and reorganized to reflect enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). See note at beginning of Section III(A) in the June Supplement.

Revised Section III(G) moves the discussion of *In re Phenomenon Market & Entertainment, LLC,* 2002 WL 162001 (Bankr. C.D. Cal. 2022) (holding that a debtor was not eligible to be a subchapter V debtor because it was an affiliate or an "issuer" under the Securities Exchange Act of 1934) to a footnote because BTATCA changes the result.

IV. The Subchapter V Trustee

B. Role and Duties of the Subchapter V Trustee

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

Page 54, insert at beginning of page:

Nevertheless, the trustee's monitoring and supervisory responsibilities include oversight of the debtor's compliance with the Bankruptcy Code.[59]

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

Page 51, first paragraph, insert after footnote 90:

Because the subchapter V trustee is a fair and impartial fiduciary with monitoring and supervisory duties and the duty to facilitate a consensual plan, courts are likely to request that the subchapter V advise the court of the trustee's positions and recommendations concerning issues affecting administration of the case.[60]

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

Page 55, delete second sentence of section, after footnote 107, and replace with:

In addition, § 1183(b)(5)(B) authorizes the trustee to operate the debtor's business when the debtor is removed from possession.[61]

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[59] *See In re* Major Model Management, Inc., 2022 WL 2203143 at *16 (Bankr. S.D.N.Y. 2022) (The subchapter V trustee "has a fiduciary duty to ensure compliance with the Bankruptcy Code.").

[60] *E.g., In re* Model Management, Inc., 2022 WL 2203143 at *16 (Bankr. S.D.N.Y. 2022) (Requesting sub V trustee's views concerning whether class proof of claim should be permitted and agreeing that claims allowance process was the better approach).

[61] As originally enacted, § 1183(b)(5) required that, upon removal of the debtor in possession, the trustee "perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of [§ 1106(a)], including operating the business of the debtor.

The Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATAC"), effective June 3, 2022, amended § 1183(b)(5), dividing it into two subparagraphs. Subparagraph (A) retains the requirement that the trustee perform the duties specified in the enumerated sections of § 1106(a). Subparagraph (B) states that the trustee

E. Compensation of Subchapter V Trustee

2. Compensation of non-standing subchapter V trustee

Page 62, add footnote at end of fourth full paragraph:

See generally In re Louis, 2022 WL 2055290 at * 11 n. 10 (Bankr. C.D. Ill. 2022) (Noting that the absence of a cap on compensation may have been a drafting error but that the United States Trustee Program's position is that compensation may be awarded without regard to a cap, the court awarded compensation to the subchapter V trustee without applying a cap and without deciding the issue in the absence of any objections).

V. Debtor as Debtor in Possession and Duties of Debtor

C. Removal of Debtor in Possession

Page 78, line 4, insert after footnote 175:

An incurable conflict of interest between the debtor's principal and the estate – such as the possibility of claims against the debtor's principal insiders – may establish cause.[62]

Page 140, add footnote at end of first full paragraph:

Accord, see In re No Rust Rebar, Inc., 2022 WL 1639322 at * 8 n. 48 (Bankr. S.D. Fla. 2022

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is "authorized to operate the business of the debtor," thus removing operation of the business as a mandatory requirement. BTATCA § 2(e). The amendment applies in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

[62] *In re* No Rust Rebar, Inc., 2022 WL 1639322 at * 8 (Bankr. S.D. Fla. 2022).

In situations in which potential disputes between the estate and insiders exist, the debtor should consider ways to avoid losing possession through effective management of the conflict. This includes transparency and full and accurate disclosure of information relating to potential claims. If creditors, the subchapter V trustee, or the U.S. Trustee raise substantial issues about the potential claims, the debtor should consider asking the court, pursuant to § 1183(b)(5), to expand the subchapter V trustee's duties to include duties under § 1106(b)(3) and (4) to investigate the potential claims and to file a report of the investigation.

If a dispute over claims against insiders cannot be resolved consensually, a potential solution is to provide in the plan for the subchapter V trustee, or perhaps a creditor, to prosecute potential claims for the benefit of creditors. Although the provisions of subchapter V do not contemplate that the subchapter V trustee prosecute claims of the estate, such an approach seems possible under the procedure developed in traditional chapter 11 cases under which the court authorizes the committee of unsecured creditors or a creditor to pursue claims against insiders through "derivative standing.".

Page 83, insert after first full paragraph

The court in *In re National Small Business Alliance,* 2022 WL 2347699 (Bankr. D.C. 2022), revoked the subchapter V election of a debtor who had been removed from possession so that the case would proceed as a traditional chapter 11 case and directed the appointment of a chapter 11 trustee. The court took this action after the debtor's efforts for over a year to confirm a plan after removal from possession had been unsuccessful because neither conversion to chapter 7 nor dismissal of the case was in the best interest of creditors and the estate.

Although subchapter V does not expressly permit revocation of the election, the court concluded that "the ability to revoke a Subchapter V election is consistent with the Bankruptcy Code [and] the Congressional goals of ensuring that Subchapter V cases provide a quicker reorganization process" and that the revocation option "provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter 11." *Id.* at *3. The court noted that is powers under § 105(a) authorized the revocation was "consistent with the right of a debtor to convert the case to another chapter under § 1112(a). *Id.*

The court concluded that revocation of the subchapter V election, although not expressly authorized, is permissible "in appropriate situations and based upon a totality of the circumstances." *Id.* at 3.

Revocation of the election is arguably inconsistent with the right of the debtor to control its own destiny under the provisions of subchapter V that permit only the debtor to make the subchapter V election and to file a plan. Nevertheless, the result from the debtor's standpoint is no different from conversion to chapter 7, in which the debtor also loses control over its assets and operation of its business.

VI. Administrative and Procedural Features of Subchapter V

I. Filing of Proof of Claim; Bar Date

Page 100, insert at end of section:

The court in *In re Major Model Management, Inc.,* 2022 WL 2203143 (Bankr. S.D.N.Y. 2022), also declined to permit the filing of a class proof of claim based on the analysis of factors that apply in traditional chapter 11 cases.

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

Page 116, add subheading:

1. Review of confirmation requirements in traditional chapter 11 cases and summary of changes for subchapter V confirmation

Page 119, after 4th line, delete first full paragraph and insert:

2. Differences in requirements for and consequences of consensual and cramdown confirmation

In a subchapter V case, the effects of confirmation differ depending on whether confirmation occurs under §1191(a) (where all classes have accepted it) or under §1191(b) (where one or more – or even all – classes have not accepted it).[63]

Some effects of consensual confirmation are more advantageous to a debtor – particularly an individual – than the effects of cramdown confirmation. Some effects of cramdown confirmation, however, are more advantageous than consensual confirmation.

[63] 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)); deferral of administrative expenses (Section VII(C)); 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).

In addition, cramdown confirmation imposes different requirements that provide opportunities for creditors to object to confirmation. Resolution of the objections may require an evidentiary hearing that exposes the debtor to uncertainty and additional legal fees and other expenses required for the debtor to prepare for trial and to prevail.

Counsel for a subchapter V debtor must understand these differences in proposing a plan and engaging in negotiations about it with creditors and the sub V trustee, who must also understand them to fulfill the duty to facilitate a consensual plan.[64]

Differences in requirements for confirmation

Whether consensual or cramdown confirmation occurs, confirmation in a sub V case requires satisfaction of all the applicable confirmation requirements of § 1129(a) except for acceptance by all impaired classes (§ 1129(a)(8) and (a)(10)), and, in an individual case, compliance with the projected disposable income requirement of §1129(a)(15).

Consensual confirmation of a sub V plan under § 1191(a) requires acceptance by all impaired classes, as § 1129(a)(8) mandates. (This necessarily means that the plan complies with § 1129(a)(10), requiring acceptance by at least one class of claims.)

If one or more classes of impaired claims do not accept the plan, cramdown confirmation under § 1191(b) requires that the plan not discriminate unfairly and that it be "fair and equitable" under the provisions of § 1191(c), as Section VIII(B) discusses.

Section 1191(c)(1) requires treatment of a secured claim in compliance with § 1129(b)(2)(A), which applies in a traditional chapter 11 case.[65] Because the typical method for meeting this requirement is periodic payments with a value equal to the value of the encumbered

[64] *See In re* Louis, 2022 WL 2055290 (Bankr. C.D. Ill. 2022).
[65] See Section VIII(B)(2).

property, compliance with this requirement may require an evidentiary hearing regarding the property's value and the proposed rate of interest.

Section 1191(c)(2) requires compliance with the projected disposable income requirement, which Section VIII(B)(4) discusses. Determination of the issues may require an evidentiary hearing regarding the amount of the projected disposable income and the period over which the debtor must pay it.

Finally, § 1191(c)(3) requires the court to find either that the debtor will be able to make payments under the plan or that it is reasonably likely that the debtor will do so. If the court determines that it is reasonably likely that the debtor will make plan payments, the plan must also include "appropriate remedies. Section VIII(B)(5) explains these provisions. Resolution of an objection based on the debtor's ability to make plan payments may, like other cramdown issues, require an evidentiary hearing.

Different consequences of consensual and cramdown confirmation

In a subchapter V case, both the effects of confirmation differ depending on whether consensual or cramdown confirmation occurs. Later text in this Section discusses the advantages and disadvantages for the debtor of consensual or cramdown confirmation based on these differences.

Discharge. Discharge occurs immediately upon confirmation of a consensual plan. Discharge does not occur after cramdown confirmation until the debtor completes payments under the plan. A cramdown discharge does not discharge debts on which the last payment is due after the three to five year term of the plan. In the case of any entity, courts disagree about whether a debt excepted from discharge under § 523(a) is excepted from a cramdown discharge,

as they are in an individual case regardless of the type of discharge. Part X discusses these issues.

Property of the estate. Unless the confirmation order or plan provides otherwise, confirmation of a consensual plan vests property of the estate in the debtor, whereas cramdown confirmation results in the retention of property of the estate in the debtor. Moreover, after cramdown confirmation, property of the estate includes property that the debtor acquires after the filing of the petition and postpetition earnings. See Part XI.

Payments under the plan. When cramdown confirmation occurs, the sub V trustee makes payments under the plan, unless the confirmation order or plan provides otherwise. Under a consensual plan, the debtor makes payments. See Part IX.

Termination of services of subchapter V trustee. If the court confirms a consensual plan, the services of the trustee terminate upon the plan's substantial confirmation. In the cramdown situation, the subchapter V continues to serve as trustee. See Part IX.

Deferral of payment of administrative expenses. The debtor may pay administrative expenses, such as compensation for the subchapter V trustee and the debtor's attorneys and other professionals, if the court confirms a plan under the cramdown provisions. A consensual plan cannot defer administrative expenses without the agreement of the administrative expense claimant. See Section VII(C).

Postconfirmation modification of the plan. After substantial consummation of a consensual plan, the debtor may not modify it. The debtor may modify the plan after confirmation under the cramdown provisions within three to five years after confirmation, as the court determines. See Section VIII(C).

The type of confirmation also affects the remedies available to creditors upon postconfirmation default, as Part XII discusses.

3. Benefits to debtor of consensual or cramdown confirmation

Two features of subchapter V reflect a policy of encouragement of consensual plans. One is the unique duty of a subchapter V trustee in § 1183(b)(7) to "facilitate the development of a consensual plan of reorganization."[66] The other is the requirement in § 1188(c) that the debtor file a report prior to the mandatory status conference that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."

A strategic question is whether the debtor wants consensual confirmation.[67] Cramdown confirmation is advantageous to the debtor in one important way: a debtor may seek postconfirmation modification of a confirmed cramdown plan even if it has been substantially consummated, but a debtor cannot modify a confirmed consensual plan after substantial consummation.[68]

A debtor who faces default after cramdown confirmation because of unanticipated postconfirmation business conditions (for example, a material decrease in income or unexpected expenses) may thus seek postconfirmation modification to deal with the issue, but a debtor operating under a confirmed consensual plan cannot. Moreover, a debtor may need to modify a plan for other reasons necessary or helpful to its business or financial condition.[69]

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[66] See Section IV(B)(1).

[67] For a discussion of the advantages of consensual confirmation in an individual case, see *In re* Louis, 2022 WL 2055290 at * 14-16 & nn. 11, 12 (Bankr. C.D. Ill. 2022).

[68] See Section VIII(C). Section VIII(C)(1) discusses substantial consummation.

[69] The debtor in *In re National Tractor Parts, Inc.,* 2022 WL 2070923 (Bankr. N.D. Ill. 2022), sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVD-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA's claim as a general unsecured claim, payable in quarterly payments.

Because postconfirmation modification may be necessary for or helpful to the debtor's postconfirmation success, a debtor may want to preserve the flexibility of postconfirmation modification through cramdown, rather than consensual, confirmation.

Another potential advantage of cramdown confirmation is that postconfirmation payment of administrative expenses, usually compensation of the subchapter V trustee and the debtor's attorney and other professionals, is permissible in a cramdown plan under § 1191(3).[70] As a practical matter, however, it is likely that the same result can occur under a consensual plan.

If the debtor has proposed a feasible plan that all impaired classes have accepted but does not have the ability to pay administrative expenses in full on its effective date, the subchapter V trustee and debtor professionals will be hard-pressed to thwart confirmation of a consensual plan by insisting on immediate payment in full. The facts that deferral can happen anyway through cramdown confirmation and that the trustee and the debtor are charged with achieving consensual confirmation should lead to their agreement to deferred payment so that the plan complies with § 1129(a)(9)(A).

Several consequences of consensual confirmation are more beneficial to a debtor than cramdown confirmation. Some of these advantages may be achievable through a cramdown plan

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The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made *de minimis* payments totaling $ 1,428.20 to creditors in two classes but had not yet made a $ 50,000 payment to a creditor in another class or begun quarterly payments to generally unsecured creditors.

The court held that commencement of payments occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

[70] See Section VIII(B)(6).

or may be relatively unimportant. Two of them that a cramdown plan cannot deal with, however, are important – one for individual debtors and one for entity debtors.

In an individual case, an important consequence of cramdown confirmation is that property of the estate under § 1186(a) includes property that the debtor acquires after the filing of the petition and postpetition earnings. This means that, if conversion to chapter 7 occurs after confirmation, the chapter 7 estate includes postpetition property and earnings.[71] The result is the same in a traditional chapter 11 case.[72] Section 1186(a), however, does not apply if consensual confirmation occurs, so an individual debtor retains postpetition property and earnings upon conversion of a case after consensual confirmation.[73]

This difference is not important in the case of an entity because the distinction between postpetition and prepetition assets and earnings it immaterial.[74]

In the case of an entity, the critical advantage of consensual confirmation is that it is clear that the exceptions to discharge in § 523(a) do not apply. Upon confirmation of a consensual plan, an entity receives a discharge under § 1141(d)(1), and the exceptions to discharge under § 523(a) apply only to an individual under § 1141(d)(2).[75]

Cramdown confirmation, however, results in a discharge under § 1192. Section 1192 does not discharge debts "of the kind" specified in § 523(a), which states that a § 1192 discharge does not discharge an "individual debtor" from any of the specified debts. Courts disagree about whether the § 523(a) exceptions apply to the discharge of an entity under § 1192.[76]

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[71] See Section XI(B)(2).
[72] See Section XI(A).
[73] See Section XI(B)(2).
[74] See Section XI(B)(1).
[75] See Section X(A).
[76] See Section X(B).

Note that an entity can achieve this advantage of consensual confirmation only if the claim of the creditor asserting an exception to discharge (1) is not in a separate class; and (2) is not so large that the creditor controls acceptance of the class in which it is placed. Rejection by a creditor in a separate class prevents consensual confirmation. If the creditor is in a class with other creditors, such as the class of general unsecured claims, its rejection of the plan can prevent confirmation if the amount of its claim is more than one-third of the amount of all of the claims in the class that vote.

Although provisions in a plan or confirmation order cannot provide these advantages in a cramdown situation, they can provide other advantages that automatically accompany consensual confirmation.

Confirmation of a consensual plan results in termination of the sub V trustee's services upon "substantial consummation" and distributions to creditors by the debtor.[77] The sub V trustee continues to serve after cramdown confirmation and makes payments under the plan, unless the plan or confirmation order provides otherwise.[78] The postconfirmation role of the sub V trustee and the trustee's disbursement of funds requires compensation of the trustee, which increases expenses in the case.

This may not matter to the debtor. A carefully drafted plan will provide for the trustee's compensation to be paid from the debtor's plan payments. If so, creditors effectively bear the burden of the trustee's compensation, not the debtor.

For this reason, creditors may support or even encourage payment by the debtor rather than the trustee. Moreover, the sub V trustee may prefer to avoid the ministerial duty of making disbursements. In short, parties opposed to confirmation of a cramdown plan may nevertheless

[77] See Section IX(A).
[78] See Section IX(B).

have no objection to provisions of a plan or confirmation order for the debtor to make disbursements.

Two differences in the consequences of confirmation relating to the discharge may be somewhat less important to the debtor. One difference is that discharge occurs upon confirmation of a consensual plan under § 1141(d)(1)[79] but not until completion of payments after three to five years, as fixed by the court, upon cramdown confirmation under § 1192.[80] The other is that debts on which the last payment is due after the three-to-five year period are not discharged under the cramdown discharge under § 1192(1). These differences may be of more concern to an individual debtor than to an entity.[81]

A significant advantage of consensual confirmation is that the projected disposable income and feasibility components of the fair and equitable rule do not apply. The debtor therefore does not face litigation over those and other potential issues that may arise in cramdown confirmation, such as valuation of a secured creditor's collateral and the appropriate interest rate. Consensual confirmation thus eliminates uncertainty about confirmation and the expense of litigating cramdown issues.

These benefits are potentially achievable in the cramdown context.

A plan under § 1190(1)(C) must in any event include projections with regard to the debtor's ability to make payments as proposed. In many cases it is likely that creditors or the subchapter V trustee will expect commitment of the equivalent of projected disposable income as a condition for support of a consensual plan. If the debtor has addressed the amount of payments

[79] See Section IX(A).
[80] See Section IX(B).
[81] See *In re* Louis, 2022 WL 2055290 at *14 nn. 11, 12 (Bankr. C.D. Ill. 2022) (Noting that discharge occurs immediately upon confirmation in consensual plan and that long-term mortgage debts to be paid by owners of property rather than debtor may not be included in cramdown discharge.).

to be made to creditors satisfactorily to the sub V trustee and creditors active in the case, projected disposable income, as well as feasibility, may not be significant issues at confirmation.

Similarly, negotiations with secured creditors may result in settlement of valuation and interest rate issues.

Thus, it is possible that careful drafting of the plan, negotiations with objecting parties, and the resolution of objections to confirmation through modification of the plan to address them can result in cramdown confirmation without objection – what might be called "consensual nonconsensual confirmation." If objections cannot be resolved such that the debtor must litigate them, it is unlikely that consensual confirmation would be possible anyway.

In summary, the primary advantage of cramdown confirmation is the availability of postconfirmation modification. For an individual, the primary disadvantage of cramdown confirmation is the inclusion of postpetition property and earnings as property of the estate if the case later converts to chapter 7.

4. Whether balloting on plan is necessary

Balloting on the plan is obviously necessary if the debtor wants to achieve consensual confirmation under § 1191(a) because all classes of impaired creditors must accept the plan to meet the confirmation requirement of § 1129(a)(8).

When the debtor expects that at least one class of claims – typically a major secured lender in its separate class – will not accept any plan that the debtor can realistically propose, or when the debtor wants cramdown rather than consensual confirmation based on its evaluation of the consequences just discussed, the question is whether balloting is required.

As Section VIII(A)(3) discusses, subchapter V contemplates efforts to achieve a consensual plan by imposing a duty on the sub V trustee to facilitate development of a

consensual plan and by requiring the debtor to report at the status conference on the efforts that it has undertaken and will undertake to attain a consensual plan. Courts have been critical of sub V trustees and attorneys for debtors who have not attempted to achieve confirmation of a consensual plan.[82]

Subchapter V's emphasis on consensual confirmation supports a conclusion that balloting should ordinarily be required and that the debtor should at least try to obtain consensual confirmation. Nevertheless, circumstances may exist where doing so would be a fruitless exercise that does not justify the time and expense of doing so.

One such circumstance arises when a creditor with the ability to prevent consensual confirmation of a plan clearly intends to do so. Because even acceptance by all other impaired classes will not result in consensual confirmation, no legal reason exists for asking them to vote.

A debtor who expects acceptances from other classes, however, may find it advantageous to go through the balloting exercise.

As an initial matter, balloting even in the face of expected rejection eliminates the need for the debtor to explain why balloting should not be required and the efforts it has undertaken to negotiate with the creditor. It shows that the debtor is trying and lets the court see the effort.

In addition, it is always possible that, once the plan is filed, and maybe even after the creditor has rejected it, the creditor may re-evaluate its position and be amenable to further negotiations that will resolve its issues. If all other class have accepted the plan, the creditor's acceptance may permit consensual confirmation.

[82] *See, e.g., In re* Louis*,* 2022 WL 2055290 (Bankr. C.D. Ill. 2022); *In re* 218 Jackson LLC*,* 631 B.R. 937 (Bankr. M.D. Fla. 2021). In *Louis,* the court observed that the subchapter V trustee had an "absolute duty" to work with the debtor, the debtor's attorney, and creditors to try to achieve consensual confirmation of a plan. *Louis,* 2022 WL 2055290 at * 18.

Moreover, acceptance by other creditors may as a practical matter be helpful in convincing the court to confirm a cramdown plan. If cramdown confirmation issues are close calls, a court may be sympathetic to resolving them in favor of confirmation when other creditors have accepted the plan.

The issue is more difficult when the debtor does not want consensual confirmation. It is arguable that the good faith requirement precludes cramdown confirmation when the debtor has not attempted confirmation of a consensual plan.[83] It would seem, however, that a debtor's good faith efforts to propose a plan that meets cramdown requirements and that resolves objections of the subchapter V trustee and creditors should satisfy the good faith requirement and permit cramdown confirmation, if that is the type of confirmation that the debtor has determined is in the debtor's best interests. Cramdown confirmation of a plan without balloting that draws no objections or that is modified to resolve them by agreement – a "consensual nonconsensual plan" – is consistent with subchapter V's objectives.

5. Final decree and closing of case

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[83] *See In re* Louis, 2022 WL 2055290 at *16 (Bankr. C.D. Ill. 2022) ("This Court interprets the provisions of Chapter 11 Subchapter V to require at least some attempt at consensual confirmation for a plan to be put forth in good faith.").

B. Cramdown Confirmation Under § 1191(b)

5. Requirements for feasibility and remedies for default

Page 140, delete two paragraphs and replace with:

SBRA added a feasibility requirement in § 1191(c)(3) as part of the "fair and equitable" test. The Bankruptcy Threshold Adjustments and Technical Corrections Act ("BTATCA")[84] amended it to clarify its operation. [85]

As amended, § 1191(c)(3) states two alternative standards.

The first alternative, § 1191(c)(3)(A), requires a finding that the debtor *"will"* be able to make all payments under the plan.

The second alternative requires only a *"reasonable likelihood"* that the debtor will be able to make plan payments, § 1191(c)(3)(B)(i), but in this situation it further requires that the plan provide "appropriate remedies, which may include the liquidation of nonexempt assets, to

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[84] Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA") § 2(f), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002). The amendment applies in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

[85] Prior to BTATCA, § 1191(c)(3) had three parts.

Paragraph (3) had three parts. Subparagraph (3)(A) contained two of them, stated in the alternative. Clause (3)(A)(i) required that the debtor *will* be able to make all payments under the plan, while clause (3)(A)(ii) required only a *reasonable likelihood* that the debtor will be able to make the plan payments. The two alternative provisions made no sense because the first necessarily incorporates the second. (If the debtor will be able to make all payments it must be true that there is a reasonable likelihood that it will.) The first provision is superfluous as a practical matter because the court never has to make a distinction and decide that a debtor will be able to make payments; finding a reasonable likelihood is always sufficient.

The third part of paragraph (3) was subparagraph (B), which required that the plan contain appropriate remedies. It made sense as an independent directive. Moreover, it is connected to subparagraph (A) with "and"; such a connection between two requirements normally means that both must be satisfied.

The puzzling language in subparagraph (A), however, provided the basis for an argument that a drafting error occurred. Thus, it was arguable that former § 1191(c)(3) did not require that the plan provide appropriate remedies if the court concluded that the debtor will be able to make all plan payments.

The three parts made more sense if the remedies requirement applied only when the court concluded there is a reasonable likelihood that the debtor will make payments, not that it will be able to. Under such an interpretation, the alternative requirements are: (1) a finding that the debtor will be able to make payments; or (2) a finding that there is a reasonable likelihood that the debtor will make payments *and* the plan provides appropriate remedies. This reading gives meaning to both parts of subparagraph (A).

BTATCA changed § 1191(c)(3) to resolve the issue by requiring appropriate remedies if there is a "reasonable likelihood" that the debtor will make plan payments but not if the court finds that it will, as the text explains.

protect the holders of claims or interests in the event that the payments are not made. § 1181(c)(3)(B)(ii). Section XII(B) discusses remedies for default in the plan.

A debtor may obtain cramdown confirmation of a plan that does not include "appropriate remedies" upon default, but doing so subjects the plan to the more stringent feasibility requirement. It seems risky to let confirmation depend on a bankruptcy judge's willingness to make a fine distinction between the two feasibility standards and, more critically, a determination that the debtor satisfies the higher one.

Each of the alternative feasibility standards is higher than the requirement in § 1129(a)(11) that confirmation is "not likely to be followed by liquidation, or the need for further reorganization" of the debtor, unless the plan contemplates it. Although the § 1129(a)(11) requirement remains applicable to subchapter V confirmation as one of the provisions of § 1129(a) that must be satisfied for consensual or cramdown confirmation, a finding that the debtor will make, or is reasonably likely to make, plan payments necessarily means that liquidation or further reorganization will not follow.

Page 141, add text at end of first paragraph:

In *In re Hyde,* 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), the court concluded that a provision for the debtor and the debtor's non-filing spouse to grant a second mortgage on their home to the trustee for the benefit of creditors in the event of default in payments of projected disposable was an appropriate remedy.

Page 144, add text after first paragraph:

In an individual case, the court in *In re Hyde,* 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), the court concluded that testimony from the debtor and the debtor's non-filing spouse about the debtor's income from Social Security benefits and part-time work, the non-filing

spouse's income and commitment to assist in the funding of the plan, and annual household expenses established that the debtor could realistically carry out the plan providing for payment of projected disposable income for five years.

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C. Postconfirmation Modification of Plan

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

Page 144, insert at end of page:

Section 1101(2), defines "substantial consummation." It requires that three events occur. The first is the "transfer of all or substantially all of the property proposed by the plan to be transferred." § 1101(2)(A). The second is the "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). The third is the "commencement of distribution under the plan." § 1101(2)(C).

Typically, the determining factor for substantial consummation is the commencement of distribution.

In re National Tractor Parts, Inc., 2022 WL 2070923 (Bankr. N.D. Ill. 2022), considered when distributions commence. There, the debtor sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVD-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA's claim as a general unsecured claim, payable in quarterly payments.

The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim under the original plan provisions if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made de minimis payments totaling $ 1,428.20 to creditors in two classes but had not yet made a $ 50,000 payment to a creditor in another class or begun quarterly payments to general unsecured creditors.

The *National Tractor Parts* court held that "commencement of distribution" occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

The *National Tractor Parts* court concluded that § 1101(2)(C) is plain and unambiguous. The court explained, *id.* at * 4:

> The plain language of [§ 1101(2)(C)] does not require commencement of distribution to every creditor, or every class, or even substantially all creditors or classes. It means, simply, that the process contemplated in the confirmed plan is underway.

The court observed, further, that the language in § 1101(2)(A) and (B) refers to "all or substantially all" of property to be transferred or dealt with by the plan, whereas such language is "conspicuous in its absence from § 1101(2)(C). *Id.* at *4.

National Tractor Parts is consistent with other cases dealing with other cases addressing the issue in traditional chapter 11 cases.[86]

[86] *E.g., In re* Centrix Fin. LLC, 394 F. App'x 485, 489 (10th Cir. 2010) ("[The] construction of § 1102(A) as requiring completion of substantially all payments to creditors would render meaningless § 1102(C), which requires

Some courts, however, have concluded that commencement of distribution does not incur merely because the debtor has made some payments under the plan.[87] As one court explained:[88]

> Applying the plain meaning approach of statutory interpretation, it seems that commencement should mean not just the beginning of payments to a single creditor, but the commencement of distribution to all or substantially all creditors.

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

IX C. Unclaimed Funds

Page 172, end of page, add new subtitle as above and insert this text:

When a disbursement to a creditor occurs in a bankruptcy case but the creditor does not timely claim it, § 347 governs the disposition of the unclaimed property.[89] Unclaimed property typically arises when a check is mailed to the creditor at its address shown on its proof of claim or the debtor's records, but the creditor has changed its address or the creditor simply does not negotiate the check.

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only that distributions under the plan be commenced.") (Unpublished). *In re* Wade*,* 991 F.2d 402, 406 n. 2 (7th Cir. 1993) ("Section 1101(2) states that substantial consummation is reached when, *inter alia*, distribution has *commenced* but not necessarily been completed." (Emphasis in original); *In re* JCP Properties, Ltd.*,* 540 B.R. 596, 607 (Bankr. S. D. Tex. 2015) ("To require a substantiality of distribution payments rather than a mere existence of distribution payments, where the very same definition expressly includes a substantiality component for transferred property, would render § 1102's 'all or substantially all' a mere surplusage within § 1101(2)."); *In re* Western Capital Partners, LLC, 2015 WL 400536 (Bankr. D. Colo. 2015).

[87] *E.g., In re* Dean Hardwoods, Inc., 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010); *In re* Litton, 222 B.R. 788 (Bankr. W.D. Va. 1998) (holding plan not substantially consummated because one distribution made to one creditor), aff'd on other grounds, 232 B.R. 666 (W.D Va. 1999); *In re* Heatron, Inc., 34 B.R. 526, 529 (Bankr. W.D. Mo. 1983)(holding plan not substantially consummated 29 months after confirmation when 53% of payments under the confirmed plan had been made). *See also In re* McDonnell Horticulture, Inc. 2015 WL 1344254 at *3 (Bankr. E.D.N.C. 2015) (Noting that "courts in this District have held that distribution of payments under a plan needs to have commenced with respect to 'all or substantially all' creditors," the court concluded that payments had commenced.); *In re* Archway Homes, Inc., 2013 WL 5835714 at * 4 (Bankr. E.D.N.C. 2013) (citing *Dean Hardwoods, supra,* with approval but concluding distributions had commenced.).

The *National Tractors* court characterized this approach as the minority view. *In re National Parts, Inc.,* 2022 WL. 2070923 at *5 (Bankr. N.D. Ill. 2022).

[88] *In re* Dean Hardwoods, Inc., 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010).

[89] SBRA amended § 347 to provide for disposition of unclaimed funds in subchapter V cases, SBRA § 4(a)(5), and the CARES ACT made a technical amendment to it. CARES Act §1113 (a)(4)(B).

Disposition of unclaimed funds in a subchapter V case depends on who makes the distribution.

For distributions that the subchapter V trustee makes, § 347(a) requires that, 90 days after the final distribution, the trustee stop payment on any check remaining unpaid and pay the money into the court for disposition under chapter 129 of title 28. The applicable provisions of chapter 129 direct the Court to disburse unclaimed funds to the "rightful owners," 28 U.S.C. § 2041, upon "full proof of the right thereto." 28 U.S.C. § 2042. Accordingly, a creditor may later seek to recover the unclaimed funds. This is the same rule that applies to a trustee's disbursements in cases under chapters 7, 12, and 13.

For payments that the debtor makes, § 347(b) provides that any funds that remain unclaimed at the expiration of the time allowed to claim the funds become property of the debtor or of the entity acquiring the asses of the debtor under the plan. This rule also applies in chapter 9 and traditional chapter 11 cases and to distributions that a debtor or party other than the trustee makes in chapter 12 cases.

Section 347(b) does not prescribe the method by which the time to claim the funds is determined. A well-drafted plan, therefore, should establish the deadline, or the debtor or other party may request that the court fix one. Plans in traditional chapter 11 cases that do not provide for full payment of unsecured creditors often provide that no further distributions will be made to creditors who do not timely claim their distribution and for the pro rata distribution of unclaimed funds to creditors who have claimed their distributions.[90]

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[90] If funds in the final distribution are unclaimed, the provision might result in an administrative burden if the amount of unclaimed funds is insufficient to make a meaningful distribution to other creditors. A plan could resolve this problem by providing that, if the unclaimed funds in the final distribution are below a specified threshold, the funds will become property of the debtor instead of being distributed to creditors.

X. Discharge

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

Page 178, insert after second full paragraph:

A plan may provide for so-called "lien-stripping" of a junior lien on the debtor's property. "Strip-off" of a junior lien may occur it property's value is less than the amount of senior liens; "strip-down" reduces the amount of the lien to the value of the property in excess of the amount of the senior liens. In a chapter 13 case, lien-stripping does not occur until the end of the case, when the debtor receives a discharge.[91] In a subchapter V case, however, consensual confirmation of a plan may result in immediate stripping of the lien.[92]

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

Pages 180-85

The text beginning with the last paragraph of page 180 through the end of Section X(B) has been deleted and replaced with new text that revises and reorganizes existing text and that adds an expanded analysis of the applicability of exceptions to discharge in § 523(a) to the cramdown discharge of § 1192 that an entity receives upon confirmation of a cramdown plan under § 1191(b).

[91] § 1325(a)(5)(B)(i)(I). *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:11. *See also id.* § 21:23 (discussing whether "strip-off" or "strip-down" may occur when a chapter 13 debtor completes payments under a plan but is not entitled to a discharge).

[92] *In re* Vega Cruz, 2022 WL 2309798 (Bankr. D. P.R. 2022).

XIII. Effective Dates and Retroactive Application of Subchapter V

Page 203, Delete first line of second paragraph and insert this text:

As later text discusses, courts upon enactment of SBRA had to decide whether SBRA applied retroactively and, if so, whether a debtor could amend its petition to elect subchapter V when mandatory deadlines for the status conference[93] and the filing of a plan[94] had expired.

The provisions in the Bankruptcy Threshold Adjustment and Technical Correction Act ("BTATCA")[95] for retroactive application of the $7.5 million debt limit for subchapter V eligibility present a similar issue when mandatory deadlines have passed in a pending case where a debtor ineligible for subchapter V becomes eligible under BTATCA. As Section III(B) explains, the temporary increase in the debt limit to $7.5 million under the CARES Act, as amended, expired on March 27, 2022. BTATCA, effective June 21, 2022, reinstated the $7.5 million. BTATCA provided for application of the $7.5 million limit (and other technical amendments to the eligibility requirements) in any case commenced on or after March 27, 2020 that was pending on the date of enactment.[96] A debtor otherwise eligible for subchapter V with debts in excess of the debt limit of $ 3,024,725 applicable on that date but not in excess of $ 7.5 million who filed a case between March 27 and June 20, 2022 could not elect subchapter V but became an eligible subchapter V debtor on June 21, 2022. The issue is whether the debtor may amend the petition to elect subchapter V in cases filed during this time if a mandatory deadline has passed.

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[93] See Section VI(C).
[94] See Section VI(D).
[95] Bankruptcy Threshold Adjustment and Technical Corrections Act, "), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2002).
[96] BTATCA § 2(h)(2).

A number of cases have addressed retroactive application of SBRA. This caselaw may provide guidance in the determination of retroactive application of the BTATCA amendments.

One court rejected the debtor's argument that SBRA applied retroactively to pending cases, concluding, "Nothing in the SBRA enabling