Subchapter V After V Years

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I. INTRODUCTION

The Small Business Reorganization Act of 2019 (the "SBRA")[1] enacted subchapter V of chapter 11 of the Bankruptcy Code (codified at 11 U.S.C. §§ 1181-95) to "streamline the process by which small business debtors reorganize and rehabilitate their financial affairs." [2] It took effect on February 19, 2020, 180 days after its enactment on August 23, 2019.

Subchapter V applies in chapter 11 cases in which a qualifying debtor elects its application. Later legislation amended the requirements for subchapter V eligibility, including a temporary increase in the debt limit to $ 7.5 million that expired on June 21, 2025.[3] As adjusted under § 104, the current debt limit is $ 3,424,000.

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[1] Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.) [hereinafter "SBRA"].
[2] H.R. REP. NO. 116-171, at 1 (2019), *available at* https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf.
[3] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020); Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021); Bankruptcy Threshold Adjustment and Technical Corrections Act, §§ 2(a), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022). In addition to the temporary debt limit increase, the legislation provided for the inclusion of debts of affiliates in calculating the debt limit only if the affiliates are debtors in a bankruptcy case and clarified the exclusion for affiliates of a public company. See Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (June 2022*), available at* https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf [hereinafter "*SBRA Guide*"], notes 88-94 and accompanying text.

Subchapter V has been hailed as highly successful. The Subchapter V Task Force of the American Bankruptcy Institute, after a year of study of subchapter V, issued the *ABI Subchapter V Task Force Final Repor*t that concluded:[4]

> After extensive study, the Task Force has concluded that the overwhelming consensus of bankruptcy professionals, bankruptcy judges, and academics is that Subchapter V is functioning as Congress intended. Many have commented that Subchapter V is the most effective and useful bankruptcy legislation passed since enactment of the Bankruptcy Code in 1978.
>
> The data show that confirmation in Subchapter V cases occurs more often, more quickly, and at lower cost than in non-Subchapter V small business cases and standard Chapter 11 cases, and that creditors are receiving more money in Subchapter V.

Like any new legislation, Subchapter V raised a number of interpretative issues. In addition, smaller business cases often involve circumstances that are not common in traditional chapter 11 cases. For example, a smaller business case is more likely to involve conflicts of interest between the estate and principals arising from questionable transactions with insiders or personal guarantees of debts by the principals; accounting and bookkeeping systems that are less than ideal; and the lack of resources to deal with reporting, disclosure, and plan filing requirements (or, perhaps, the lack of inclination or ability to do so).

Moreover, subchapter V provides a viable alternative for an individual to deal with distressed financial circumstances arising from a failed business that did not previously exist in

[4] American Bankruptcy Institute, *Final Report of the American Bankruptcy Institute Subchapter V Task Force* at 5 (2024) [hereinafter "*ABI Subchapter V Task Force Final Report*"], *available at* https://www.abi.org/education-events/sessions/subchapter-v-task-force-report-and-recommendations (ABI 2024 Annual Spring Meeting Materials; Final Report begins on page 12 of PDF). A copy of the report may be requested at https://connect.abi.org/l/107412/2024-04-22/6wj4lm.

chapter 13 (because of debts in excess of the debt limits) or in a traditional chapter 11 case (because of the absolute priority rule, the projected disposable income rule, and the expense of a traditional case). When individuals file a subchapter V petition after having previously engaged in "self-help" without the benefit of counsel (think of transfers of assets to spouse or family for "estate planning purposes"), problems arise that did not exist when reorganization was not a feasible option.

As a result, courts in subchapter V cases have not only had to address legal issues about the operation and application of subchapter V; they have also dealt with non-subchapter V issues that govern the case in the context of a subchapter V case.

After five years of case law development and practical experience in subchapter V cases,[5] it is time to review some issues where consensus has developed, some where controversies are still being argued, and others where new developments are under way.

II. ELIGIBILITY FOR SUBCHAPTER V

Subchapter V applies in a chapter 11 case in which a debtor (as defined in § 1182[6]) elects its application.[7] Section 1182 defines "debtor" as a "small business debtor." A debtor is eligible for subchapter V, therefore, if it is a "small business debtor" as defined in § 101(51)(D). Under the now-expired temporary legislation that increased the debt limit for subchapter V eligibility to $ 7.5 million, § 1182(1) defined "debtor" (and thus stated the eligibility requirements) in the

[5] Purists will note that it is actually more than six years since enactment of subchapter V and more than five and a half years since its effective date. Rounding is necessary in the interests of artistic license to avoid an awkward title such as "Subchapter V After VI Years" or "Subchapter V After V.v Years".
[6] References to sections are to sections of the Bankruptcy Code, 11 U.S.C § 101*, et seq*.
[7] § 103(i).

same language that defines "small business debtor" in § 101(51D), except for the amount of the debt limit.[8]

A debtor is a small business debtor under § 101(51D), and is therefore eligible to elect subchapter V, if the debtor: (1) is a "person;"[9] (2) is engaged in "commercial or business activities;" (3) does not have aggregate liquidated, noncontingent debts in excess of the debt limit; and (4) has at least 50 percent of debts that arise from the debtor's commercial or business activities, subject to certain exceptions. The debt limit at the time of enactment was $ 2,725,625; as adjusted under § 104, the current debt limit is $ 3,424,000.

A debtor is ineligible for subchapter V if: (1) its primary activity is the business of owning single asset real estate; (2) it is a member of a group of affiliated debtors that has aggregate debts in excess of the debt limit; (3) it is a corporation subject to reporting requirements under the Securities Exchange Act of 1934; or (4) it is an affiliate of a reporting corporation.

Ordinarily, when new legislation incorporates an existing term, existing case law provides guidance for its application, but this could not occur with regard to subchapter V eligibility for two reasons. First, the SBRA also changed the definition of "small business debtor" in significant ways.[10] Second, whether a debtor qualified as a "small business debtor" before enactment of subchapter V rarely attracted any attention, perhaps because the effects of

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[8] *See SBRA Guide*, *supra* note 3, at § III(B)(1), (2); Paul W. Bonapfel, *Subchapter V Update* § XVI(K) (September 2025) [hereinafter "*Update*"]. Under this statutory framework, the debt limit in the definition of a "small business debtor" did not change. Thus, although all small business debtors could be subchapter V debtors, a subchapter V debtor would not be a small business debtor if its debts exceeded the debt limit for a small business debtor.

[9] "Person" under § 101(41) includes an individual, corporation, or partnership but does not generally include a governmental unit. A limited liability company is a "person." *E.g., In re* QDN, LLC, 363 Fed. Appx. 873, 876 n. 4 (3d Cir. 2010); *In re* CWNevada, LLC, 602 B.R. 717 (Bankr. D. Nev. 2019); *In re* 4 Whip, LLC, 332 B.R. 670, 672 (Bankr. D. Conn. 2005); *In re* ICLNDS Acquisition, LLC, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio (2001); *see In re* Asociación de Titulares de Condominio Castillo, 581 B.R. 346, 358-60 (B.A.P. 1st Cir. 2018) (collecting cases).

[10] *SBRA Guide, supra* note 3, at § III(B)(3).

being a small business debtor primarily involved deadlines and procedures for filing and confirmation of a plan and additional reporting requirements. Qualifying as a small business debtor provided no advantage to a debtor; as a result, many sought to avoid application of the small business provisions.[11]

In contrast, subchapter V's provisions that eliminated the absolute priority rule and the requirement that at least one impaired class of claims accept the plan as conditions for cramdown confirmation made it significantly easier for a debtor to effect a successful reorganization in a subchapter V case. Individual debtors in a subchapter V case could seek chapter 11 relief without subjecting postpetition assets and earnings to becoming property of the estate, could obtain consensual confirmation without the prospect of having to commit projected disposable income to the plan for a minimum of five years, and could retain their assets without having to worry about the absolute priority rule.

In addition to using subchapter V to reorganize a business as a going concern, debtors who had terminated ordinary business activities invoked subchapter V to deal with the aftermath of the business failure. In particular, individual debtors sought subchapter V relief to deal with personal guarantees of the debts of their companies that had gone out of business.

Eligibility for subchapter V – essentially, whether the debtor qualifies as a "small business debtor" – became an issue with important consequences. Eligibility issues thus arose immediately when subchapter V became effective.

The primary eligibility issues that courts have considered are whether a debtor is engaged in "commercial or business activities;" whether certain debts are "contingent" or "unliquidated" such that they are excluded in the calculation of the debt limit; when debts of affiliates are

[11] See *SBRA Guide*, *supra* note 3, at § I at n. 6.

included in calculation of the debt limit; what debts "arise from commercial or business activities"; and whether a debtor is a "single asset real estate" (SARE) debtor.

This Part reviews the caselaw on each of these issues.

A. Whether the Debtor Is Engaged in Commercial or Business Activities

Although a few early cases ruled that a debtor was "engaged in commercial or business activities" for purposes of subchapter V eligibility if it had been engaged in commercial or business activities in the past,[12] most courts conclude that the debtor must be engaged in commercial or business activities on the date of the filing of the subchapter V petition.[13] Cessation of business operations after filing does not make the debtor ineligible.[14]

The requirement of contemporaneous activities, however, does not mean that the debtor must be conducting active business operations. Courts have construed "activities" broadly to include the winding-up of a business or dealing with its assets or creditors.[15] The prosecution of claims of the debtor or the defense of liability on guarantees may be sufficient to constitute "commercial or business activities."[16]

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[12] *E.g., In re* Bonert, 619 B.R. 248, 255 (Bankr. C.D. Cal. 2020); *In re* Wright, 2020 WL 2193240 (Bankr. D. S.C. 2020); *see In re* Blanchard, 2020 WL 4032411 (Bankr. E.D. La. 2020).

[13] *E.g.,* NetJets Aviation, Inc. v. RS Air, LLC (*In re* RS Air, LLC), 638 B.R. 403 (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); *In re* Blue, 630 B.R. 179, 188-89 (Bankr. M.D.N.C. 2021) (collecting and discussing cases); *In re* Offer Space, LLC, 629 B.R. 299, 305-06 (Bankr. D. Utah 2021); *In re* Ikalowych, 629 B.R. 261, 280-83 (Bankr. D. Colo. 2021); *In re* Johnson, 2021 WL 825156 (N.D. Tex. 2021); *In re* Two Wheels Properties, LLC, 625 B.R. 869 (Bankr. S.D. Tex. 2020); *In re* Thurmon, 625 B.R. 417 (Bankr. W.D. Mo. 2020); *see SBRA Guide*, *supra* note 3, at § III(C)(1); *Update, supra* note 8, at § XVI(A).

[14] *In re* Free Speech Systems, LLC, 649 B.R. 729, 733 n.14 (Bankr. S.D. Tex. 2023); *In re* Vertical Mac Construction, LLC, 2021 WL 3668037 (Bankr. M.D. Fla. 2021).

[15] *E.g., In re* Zarifian Enterprises, LLC, 2024 WL 5165920 (Bankr. N.D. Ill. 2024); *In re* Robinson, 2023 WL 2975630 (Bankr. S.D. Miss. 2023); *In re* Blue, 630 B.R. 179 (Bankr. M.D.N.C. 2021); *In re* Port Arthur Steam Energy, L.P., 629 B.R. 233 (Bankr. S.D. Tex. 2021); *In re* Vertical Mac Construction, LLC, 2021 WL 3668037 (Bankr. M.D. Fla. 2021); *In re* Offer Space, LLC, 629 B.R. 299 (Bankr. D. Utah 2021); *see SBRA Guide*, *supra* note 3, at § III(C)(2); *Update, supra* note 8, at § XVI(A).

[16] *E.g., In re* Fama-Chiarizia, 655 B.R. 48 (Bankr. E.D.N.Y. 2023); *In re* Fama, 655 B.R. 648 (Bankr. E.D.N.Y. 2023); *In re Hillman,* 2023 WL 3804195 (Bankr. N.D.N.Y. 2023). *But see* in *In re* Bohman, 663 B.R. 831 (Bankr. D Utah 2024) (defense of guaranty not sufficient to establish commercial or business activity where debtor was not or presently actively involved in appeal).

A profit-motive is not essential to being engaged in commercial or business activities.[17] A company that is preparing to engage in business but has not yet begun business operations, similarly, is engaged in commercial or business activities.[18]

One court suggested that even a W-2 employee could be engaged in commercial or business activities and eligible for subchapter V if the employee had debts arising from commercial or business activities,[19] but other courts have rejected this conclusion.[20] Nevertheless, an employee with an equity interest in his employer who is an officer with significant managerial responsibilities may be engaged in commercial or business activities.[21]

B. Whether Debts Are Contingent or Unliquidated

A debt is excluded for purposes of calculating the subchapter V debt limit if it is contingent or unliquidated. Chapters 12[22] and 13[23] similarly exclude such debts for purposes of their debt limits, but the requirement is a new one in the chapter 11 context.

The principles are rather straightforward. A debt is liquidated if the amount is capable of ready and precise determination. It is contingent if liability is dependent upon some future event. A dispute over liability or amount does not necessarily make the debt unliquidated or contingent. A number of bankruptcy courts have addressed these issues.[24]

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[17] Guan v. Ellingsworth Residential Community Association, Inc., (*In re* Ellingsworth Residential Community Association, Inc.), 125 F.4th 1365 (11th Cir. 2025) (homeowner's association); NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC), 638 B.R. 403,411 (B.A.P. 9th Cir. 2022) (private entity allegedly functions as intermediary with no profit motive).
[18] *In re* GCPS Holdings, LLC, 2024 WL 4847831 (Bankr. S.D. Tex. 2024).
[19] *In re* Ikalowych, 629 B.R. 261, 286-87 (Bankr. D. Colo. 2021),
[20] *In re* Wilson, 666 B.R. 828 (Bankr. M.D. Ga. 2024); National Loan Invs., L.P. v. Rickerson (*In re* Rickerson), 636 B.R. 416, 426 (Bankr. W.D. Pa. 2021);
[21] *In re* Wilson, 666 B.R. 828 (Bankr. M.D. Ga. 2024).
[22] §§ 109(f), 101(19) (Definition of family fisherman), 101(18) (definition of family farmer).
[23] § 109(e). For a discussion of what debts are "liquidated" and "noncontingent" for purposes of the debt limitation in chapter 13 cases, *see generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE [hereinafter "CHAPTER 13 PRACTICE AND PROCEDURE"] §§ 12:8, 12:9.
[24] The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (*In re* Alecto Healthcare Services, LLC), 2025 WL 961482 at * 10-11 (D. Del. 2025) (claim is contingent because it does not arise until demand for payment,

The question is particularly important when the debtor is the tenant under a lease. The issue is whether the debtor's liability for future, postpetition rent is included in the calculation of the debt limit in addition to prepetition rent owed at the time of filing. Courts disagree as to whether the liability for future rent is[25] or is not[26] contingent and unliquidated. The ABI Subchapter V Task Force in its Final Report agreed that a debtor's liability for future rent is contingent and unliquidated and recommended a statutory amendment to clarify the issue.[27]

C. When Debts of Affiliates Are Included in Calculation of Debt Limit

As originally enacted, § 101(51D) required that the combined debts of a debtor and all its affiliates be less than the debt limit. Thus, if the debts of affiliated debtors exceeded the debt limit, none were eligible for subchapter V.[28]

An amendment in 2022 provided for inclusion of an affiliate's debt for purposes of the debt limit only if the affiliate is a debtor in a bankruptcy case.[29] A debtor is, therefore, eligible for

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which did not occur prepetition); *In re* Wilson, 666 B.R. 828 (Bankr. M.D. Ga. 2024) (claim of debtor's former employer for damages arising from debtor's taking customers to new employer is unliquidated); *In re* McKenzie Contracting, LLC, 2024 WL 3508375 (Bankr. M.D. Fla. 2024) (claims arising under merchant cash advance contracts were contingent and unliquidated for purposes of eligibility because the claims were purchases of receivables, not loans where the creditor assumed the risk of non-payment); *In re* Power Block Coin, LLC, 2024 WL 4456657 at * 2-3 (Bankr. C.D. Cal. 2024); In re Burdock and Associates, Inc., 622 B.R. 16 (Bankr. M.D. Fla. 2024) (claim for lost profits for breach of contract is unliquidated because not capable of ready determination); *In re* Zhang Medical P.C., 655 B.R. 403 (Bankr. S.D.N.Y. 2023) (claim for rent accruing postpetition is contingent and unliquidated); *In re* Macedon Consulting, Inc., 2023 WL 400484 (Bankr. E.D. Va. 2023) (claim for rent accruing postpetition is liquidated and noncontingent); *In re* Hall, 650 B.R. 595 (Bankr. M.D. Fla. 2023) (disputed liability based on fraud in the inducement, intentional misrepresentation, negligent misrepresentation and fraud in the inducement did not make claim unliquidated); *In re* Parking Management, Inc., 620 B.R. 544 (Bankr. D. Md. 2020) (claim for rent accruing postpetition is contingent and unliquidated). For detailed discussion of the cases, see *Update*, *supra* note 8, at §§ XVI(C), (D).

[25] *In re* Macedon Consulting, Inc., 2023 WL 400484 (Bankr. E.D. Va. 2023).

[26] *In re* Zhang Medical P.C., 655 B.R. 403 (Bankr. S.D.N.Y. 2023); *In re* Parking Management, Inc., 620 B.R. 544 (Bankr. D. Md. 2020).

[27] *ABI Subchapter V Task Force Final Report*. *supra* note 4, at 17.

[28] *In re* 305 Petroleum, Inc., 622 B.R. 209 (Bankr. S.D. Miss. 2020).

[29] Bankruptcy Threshold Adjustments and Technical Corrections Act ("BTATCA"), § 2(a)(1), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022). At the time of this amendment, § 1182(1) stated the eligibility requirements for subchapter V and § 101(51D) stated the definition of a "small business debtor." BTATCA amended both sections in the same way. Under current law, a debtor must be a small business debtor to be eligible for subchapter V. §§ 103(i), 1182(1).

subchapter V if its debts do not exceed the debt limit even if it has a non-filing affiliate with debts that, when combined with the filing debtor's, would exceed the debt limit.[30]

When the affiliate later files a bankruptcy case, the affiliate is not eligible for subchapter V because the total debts of all the affiliates exceed the debt limit.[31] Upon the affiliate's filing, the total debts of the first debtor and its affiliate in a bankruptcy case also exceed the debt limit. The issue is whether, therefore, the original debtor loses its subchapter V eligibility.

Courts have concluded that determination of subchapter V eligibility occurs on the date of filing of the debtor's petition and that an affiliate's later filing does not affect the debtor's eligibility at that time.[32] Accordingly, individuals with debts below the debt limit remain eligible for subchapter V even when their affiliated company with debts that would put the individuals over the debt limit files a chapter 7 petition the next day.[33]

D. What Debts Arise From Commercial or Business Activities

For a debtor to be eligible for Subchapter V, not less than 50 percent of the debtor's debts must arise from commercial or business activities. Chapter 12 similarly requires that a specified percentage of debts arise from a debtor's farming[34] or fishing[35] operation. The issue typically arises in individual cases.

[30] *See, e.g., In re* Free Speech Systems, LLC, 649 B.R. 729 (Bankr. S.D. Tex. 2023).
[31] *In re* Carter, 2023 WL 9103614 (Bankr. N.D. Ga. 2023) (Individual who is controlling shareholder of corporations whose chapter 7 cases have been pending for five years is not eligible where combined debts of individual and corporations exceed the debt limit.).
[32] *In re* Dobson, 2023 WL 3520546 (Bankr. W.D. Va. 2023); *In re* Free Speech Systems, LLC, 649 B.R. 729 (Bankr. S.D. Tex. 2023).
[33] *In re* Dobson, 2023 WL 3520546 at * 6 (Bankr. W.D. Va. 2023) (The court rejected the U.S. Trustee's argument that the timing of the filing demonstrated an abuse, stating, "[T]he U.S. Trustee has failed to show how professional advice and deliberate planning of the timing of a bankruptcy petition is unlawful or abusive.").
[34] § 101(18) (50 percent).
[35] § 101(19A) (80 percent).

Applying chapter 12 caselaw, the court in *In re Ikalowych*[36] concluded that qualifying business debts "must be directly and substantially connected to the 'commercial or business activities' of the debtor."[37] The court determined that the individual debtor's liability on guarantees of certain debts of a limited liability company that he managed and was winding down and of his wholly-owned operating company through which he provided his services and that owned 30 percent of the limited liability company met this standard.

In *In re Sullivan,*[38] the court extensively examined the question of whether the debtor's obligation in a divorce decree to pay the former spouse an "equalization payment" for the former spouse's share of the value of the debtor's business that the debtor retained was a consumer or business debt. Based on the court's analysis of the definition of "consumer debt" in § 101(8), caselaw under the Truth in Lending Act dealing with the definition of consumer debt, and federal tax law that distinguishes between consumer and business debts for deductibility purposes, the court concluded that the debt was a personal one.

Courts have concluded that a debtor's liability for taxes on business income,[39] a student loan,[40] and medical debts incurred by an individual after an injury while performing work within the scope of the debtor's business but voluntarily for a relative[41] are not debts that arise from a debtor's commercial or business activities. A mortgage debt incurred by a debtor to purchase a residence does not become a debt arising from commercial or business activity when the debtor

[36] 629 B.R. 261 (Bankr. D. Colo. 2021).
[37] *Id.* at 288. The court quoted *In re* Woods*,* 743 F.3d 689, 698 (10th Cir. 2014), which in the chapter 12 context stated, "a debt 'for' a principal residence 'arises out of' a farming operation only if the debt is directly and substantially connected to the farming operation."
[38] 626 B.R. 326 (Bankr. D. Colo. 2021).
[39] National Loan Invs., L.P. v. Rickerson (*In re* Rickerson), 636 B.R. 416 (Bankr. W.D. Pa. 2021).
[40] *In re* Reis*,* 2023 WL 3215833 (Bankr. D. Idaho 2023), *aff'd* Reis v. Garvin (*In re* Reis), 2024 WL 4051674 (D. Idaho 2024) The court noted that it was not establishing a *per se* rule that all student loans are not business debts.
[41] *In re* Bennion, 2022 WL 3021675 (Bankr. D. Idaho 2022).

buys another residence and begins to rent the former residence, but debts incurred for repairs to the rental property do.[42]

Courts disagree as to whether a nexus must[43] or need not[44] exist between the debtor's current commercial or business activity and the debtor's commercial or business debts for purposes of the fifty percent requirement.

E. Exclusion of Single Asset Real Estate Debtor From Subchapter V Eligibility

If a debtor owns "single asset real estate," as defined in § 101(51B), § 362(d)(3) contains specific rules governing relief from the automatic stay with regard to the real property.

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

In a small business case, section 362(d)(3) requires relief from the automatic stay unless, not later than the later of the date that is 90 days after the order for relief or 30 days after the court determines that the debtor owns single asset real estate, the debtor either "has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time" or has commenced monthly payments equal to the amount of interest at the applicable nondefault contract rate on the value of the real estate.

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[42] *In re* Blue, 630 B.R. 179 (Bankr. M.D.N.C. 2021).
[43] *In re* Hillman, 2023 WL 3804195, at *4-5 (Bankr. N.D.N.Y. 2023); *In re* Ikalowych, 629 B.R. 261, 286-87 (Bankr. D. Colo. 2021)
[44] *In re* Reis, 2023 WL 3215833, at *4-5 (Bankr. D. Idaho 2023), *aff'd* Reis v. Garvin (*In re* Reis), 2024 WL 4051674 (D. Idaho 2024); *In re* Fama-Chiarizia, 655 B.R. 48 (Bankr. E.D.N.Y. 2023); *In re* Fama, 655 B.R. 648 (Bankr. E.D.N.Y. 2023); *In re* Blue, 630 B.R. 179 (Bankr. M.D.N.C. 2021).

Before the SBRA amendments changed the definition of "small business debtor" in § 101(51D), a debtor did not qualify as a small business debtor if its "principal activity [was] the business of owning or operating real property."[45] By definition, a debtor with "single asset real estate" fell within this exclusion, but the definition also excluded a debtor with multiple real estate properties.

Whether a debtor was a "SARE debtor" did not matter for confirmation – or any other – purposes prior to SBRA other than the special stay relief provisions in § 362(d)(c) that required significant progress toward a confirmable plan or the commencement of monthly interest payments in a timely fashion. In particular, a debtor in a real estate case – SARE or otherwise – faced significant confirmation obstacles over the objection of a secured lender under the absolute priority rule and the requirement that at least one impaired class of creditors accept the plan.[46]

SBRA changed the exclusion so that only a SARE debtor is not a small business debtor and is not eligible for subchapter V.[47] Thus, a debtor engaged in the business of owning or operating real property is eligible for subchapter V unless it is a SARE debtor.

Whether a real estate debtor is a SARE debtor became an important issue in subchapter V cases beyond its effect on stay relief because the requirements for cramdown confirmation in § 1191(b) do not include the absolute priority rule or the requirement that at least one impaired class accept the plan. The issue of whether a debtor owns single asset real estate has arisen in a number of cases.

[45] *See SBRA Guide*, *supra* note 3, at § III(B)(3).
[46] *See generally SBRA Guide*, *supra* note 3, at §§ VIII(A), (B).
[47] *See SBRA Guide*, *supra* note 3, at § III(B)(3).

Courts have ruled that a hotel is not single asset real estate because operation of a hotel involves substantial services[48] and that a condominium owners' association is not a single asset real estate debtor because its income is from services it provides to unit owners, not from the property.[49]

A debtor who owns separate but contiguous parcels of real estate, purchased at the same time and all subject to the same deed of trust, may nevertheless be a SARE debtor where the debtor treated the lots as a single economic unit with the common purpose of leasing them.[50] Similarly, a debtor is a SARE debtor when its business is the development of a master-planned recreational community, even though it had acquired its seven parcels separately with different financing.[51]

A debtor who does not use adjacent properties together in a common scheme and is likely to conduct substantial business on one of them, however, is not a SARE.[52] Ownership of three adjacent properties that a debtor leases to an affiliate for use as an event venue does not make the debtor a SARE when it also owns another parcel several miles away and the properties do not constitute a single or unified real estate project.[53]

III. ISSUES IN THE ADMINISTRATION OF SUBCHAPTER V CASES

Subchapter V introduced several new features regarding case administration that are different from those in a traditional chapter 11 case. These include the appointment of a trustee

[48] *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); *In* re NKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021) (collecting cases).
[49] *In re* 255 North Front Street Condos, Inc., 2025 WL 1068714 (Bankr. E.D.N.C. 2025)
[50] *In re* Amerivest, LLC, 2025 WL 1210562 (Bankr. E.D. Va. 2025).
[51] *In re* Bridle Path Partners, LLC, 2024 WL 86601 (Bankr. D. Utah 2024)
[52] *In re* Evergreen Site Holdings, 652 B.R. 307 (Bankr. S.D. Ohio 2023).
[53] *In re* Celebration Cottage AB, LLC, 663 B.R. 846 (Bankr. E.D.N.C. 2024).

in every case;[54] the appointment of a committee of creditors only if the court orders such appointment for cause;[55] the exclusive right of the debtor to file a plan[56] and the requirement that the debtor file a plan within 90 days, unless the court extends the time based on "circumstances for which the debtor should not justly be held accountable";[57] a mandatory status conference within 60 days of the filing;[58] and a requirement that, at least 14 days before the conference, the debtor file a report "that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."[59]

This Part reviews caselaw dealing with these new features and the practices that bankruptcy professionals and judges have developed in implementing these provisions in subchapter V cases.

A. The Subchapter V Trustee

1. Duties and role of the subchapter V trustee

Like chapters 12[60] and 13,[61] subchapter V provides for the appointment of a trustee in every case[62] while the debtor remains in possession of its assets and operates its business as a debtor in possession.[63] Like a debtor in possession in a traditional chapter 11 case, a subchapter V debtor in possession has the rights and powers of a trustee and must perform the duties of a chapter 11 trustee under § 1106(a), other than the trustee's investigatory duties.[64]

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[54] § 1183(a).
[55] § 1181(b).
[56] § 1189(a).
[57] § 1189(b).
[58] § 1188(a).
[59] § 1188(c).
[60] § 1202.
[61] § 1302.
[62] § 1183.
[63] § 1184.
[64] § 1184. The trustee duties that a debtor in possession does not have are those specified in paragraphs (2), (3), and (4) of § 1106(a). Paragraphs (3) and (4), respectively, require the trustee to conduct certain investigations and to file a statement of any such investigation. Paragraph (2) requires the trustee to file any list, schedule, or statement that

In general, the role of the subchapter V trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan. The subchapter V trustee's role arises from the duties that § 1183(b) requires the subchapter V trustee to perform, which are the same as those in chapter 12 cases, with some significant additions.[65]

A unique duty of a subchapter V trustee is to "facilitate the development of a consensual plan of reorganization."[66] No other trustee has this duty, although a chapter 13 trustee has the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan."[67]

The trustee must appear and be heard at the status conference that §1188(a) requires "to further the expeditious and economical resolution" of the subchapter V case[68] and at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.[69] The trustee's duty to appear and be heard regarding confirmation gives the trustee standing to object to confirmation.[70]

Although a chapter 11 trustee in a traditional case has a broad duty under § 1106(a)(3) and (4) to investigate the affairs of the debtor and to file a statement of such investigation, unless

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§ 521(a)(1) requires the debtor to file if the debtor has not done so. The debtor itself, of course, has the duty to file such papers.

[65] 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). *SBRA Guide*, *supra* note 3, at § IV(B) discusses the specific duties that a subchapter V trustee has under § 1183(b).

[66] § 1183(b)(7).

[67] § 1302(b)(4).

[68] § 1183(b)(3). *See* U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), *available at* https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials [hereinafter "SUBCHAPTER V TRUSTEE HANDBOOK"] at 3-8 ("The trustee should review the debtor's report carefully. . ." and "should be prepared to discuss the debtor's report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.").

[69] § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

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

the court orders otherwise, a subchapter V trustee does not have these duties as a matter of course. Section 1183(b)(2), however, permits the court to order the subchapter V trustee to perform these duties, for cause on request of a party in interest, the subchapter V trustee, or the U.S. Trustee.[71]

Despite the absence of an investigative duty, the duties of the subchapter V trustee to participate in the plan process, to appear at the status conference, and to be heard on plan and other matters imply a right to obtain information about the debtor's property, business, and financial condition.[72]

At the time of subchapter V's effective day in February 2020, the United States Trustee Program published its *Handbook for Small Business Subchapter V Trustees.*[73] The *Handbook* set the tone for subchapter V trustees to assume a facilitative role in subchapter V cases with regard to the objectives of both confirming a plan and monitoring administration of cases for compliance by debtors with reporting and other duties under the Bankruptcy Code.

For example, the *Handbook* provides the following overview of a subchapter V trustee's role in a case: "In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports."[74]

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[71] See Section IV(B).
[72] *In re* Ozcelebi*,* 639 B.R. 365, 382 (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.").
[73] U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), *available at* https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials.
[74] *Id.* at 1-1.

The *Handbook* also notes, "The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case."[75]

Courts have taken the same view of the role of the subchapter V trustee. For example, the court in *In re Corinthian Communications, Inc.,* observed:[76]

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

Courts rely on the subchapter V trustee to provide valuable information on the progress of a case and candid advice on a debtor's compliance with its duties.[77] Courts regularly consider the views or testimony of a subchapter V trustee on confirmation and other issues in subchapter V cases.[78]

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[75] *Id.* at 2-2. For a summary of the U.S. Trustee Program's views of the subchapter V trustee's duties, see *id.* at 1-5 to 1-7.

[76] 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022). *Accord, e.g., In re* New York Hand & Physical Therapy PLLC., 2023 WL 2962204, at *1 (Bankr. S.D.N.Y. 2023).

[77] *In re* New York Hand & Physical Therapy PLLC., 2023 WL 2962204, at *1 (Bankr. S.D.N.Y. 2023).

[78] *E.g., In re* Central Florida Civil, LLC, 649 B.R. 77 (Bankr. M.D. Fla. 2023) (Input of subchapter V trustee on confirmation issues was "especially instructive."); *In re* Sameh H. Aknouk Dental Services, P.C., 648 B.R. 755, 766 (Bankr. S.D.N.Y. 2023) (Subchapter V trustee's involvement in case provides "additional comfort" to the court that debtor's dental operations were being appropriately monitored such that appointment of patient ombudsman under § 333 is not required.); *In re* Channel Clarity Holdings, LLC, 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022) (projections) ("The [subchapter V] Trustee's expertise as a financial advisor is integral to this process of attempting to bridge the gap between debtors in distress and creditors seeking repayment."); *In re* Lapeer Aviation, Inc., 2022 WL 7204871 (Bankr. E.D. Mich. 2022) (trustee's role in developing financial projections); *In re* Rosa Mosaic & Tile Company, 643 B.R. 865 (Bankr. W.D. Ky. 2022) (noting testimony of subchapter V trustee at hearing on rejection of collective bargaining agreement); *In re* Major Model Management, Inc., 2022 WL 2203143 at *16 (Bankr. S.D.N.Y.

Because of the subchapter V trustee's facilitative role, one view is that a subchapter V trustee may function as a mediator.[79] The problem with the subchapter V trustee as a formal mediator is that serving as a mediator is inconsistent with the subchapter V trustee's duties as a party in interest in the case with fiduciary duties. As a fiduciary party in interest, the trustee is not a neutral, as a mediator is. Moreover, a trustee's fiduciary duties may require the disclosure of information acquired during the mediation, contrary to a mediator's duty to maintain the confidentiality of such information.[80]

The *ABI Subchapter V Task Force Final Report* provides guidance on the issue, recommending that, if formal mediation is appropriate, someone other than the subchapter V trustee should be the mediator. When parties and the court consider use of the subchapter V trustee as mediator, the Task Force urged caution, acknowledgement of the issues involved, and entry of a mediation order that "would provide structure for the mediation and clarity about obligations of the Subchapter V trustee serving as mediator" and should "waive confidentiality in the context of the mediation to the extent necessary for the trustee to fulfill those duties."[81]

When the circumstances of the case require the expansion of the trustee's duties to include investigation under § 1183(b)(2) or removal of the debtor from possession under § 1185(a), the duties and role of the subchapter V trustee change. Part IV discusses the trustee's duties and role in the context of those remedies.

2022) (requesting subchapter V trustee's views concerning whether class proof of claim should be permitted and agreeing that claims allowance process was better approach).

[79] *See, e.g., In re* Ozcelebi, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022); *In re* 218 Jackson LLC, 631 B.R. 937, 947 (2021); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020) ("A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors."); Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 Am. Bankr. Inst. L. Rev. 25 (2020); Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers,* 38 Amer. Bankr. Inst. J. 8 (Nov. 2019) (the statutory goal of a consensual plan suggests that the trustee also fill a mediation role).

[80] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 34-38.

[81] *Id.* at 38.

2. *Appointment of the subchapter V trustee*

The drafters of subchapter V[82] and almost everyone else in the bankruptcy community anticipated that the subchapter V trustee would be a standing trustee, like standing trustees in chapter 12 and 13 cases. Thus, § 1183(a) provides for a standing trustee appointed under 28 U.S.C. § 586(b) to serve as the trustee in the subchapter V case if the United States trustee has appointed a standing trustee (and the standing trustee qualifies for appointment under § 322). "Otherwise," the statute continues, the United States trustee shall appoint "one disinterested person" to serve as the trustee.

It came as a surprise – if not a shock – when the United States Trustee Program decided to appoint trustees on a case-by-case basis rather than to utilize standing trustees.[83] The Program implemented procedures for the creation of a "pool" in each district of subchapter V trustees from which the United States Trustee would appoint a trustee in each case. After public advertising and outreach to recruit applications from lawyers, accountants, restructuring consultants, and financial advisors with strong business acumen and diverse backgrounds in business, law, accounting, turnaround management, and mediation, the Program selected and trained approximately 250 persons from over 3,000 applicants to serve as subchapter V trustees.[84]

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[82] In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated, "There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee." *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), *available at* https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

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

[84] Clifford J. White, III, *Small Business Reorganization Act: Implementation and Trends*, 40 AM. BANKR. INST. J. 54 (Jan. 2021).

SBRA amended 28 U.S.C.§ 586(e)[85] so that a standing subchapter V trustee receives compensation in the same way as standing trustees in chapter 12 and 13 cases. Thus, a standing subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.[86]

Appointment of subchapter V trustees on a case-by-case basis raised concerns about whether the subchapter V trustee could receive compensation on an hourly basis and whether a cap on compensation of the subchapter V trustee of five percent of payments under the plan applied.[87] Reported cases addressing the issue allowed compensation on an hourly basis without a cap,[88] and this has become established practice.

Another concern was that trustees appointed on a case-by-case basis would seek to employ attorneys and other professionals on a regular basis, which could substantially increase administrative expenses in subchapter V cases.[89]

The United States Trustee Program in its *Subchapter V Trustee Handbook* noted that the statutory purpose of the SBRA was to limit expenses in subchapter V cases and that the "services of outside professionals will be limited in many cases."[90] The *Handbook* directs subchapter V trustees to "keep the statutory purpose of SBRA in mind when carefully considering whether the employment of the professional is warranted under the specific circumstances of each case."[91]

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[85] SBRA, *supra* note 1, § 4(b)(1)(D).
[86] *See SBRA Guide, supra* note 3, at § IV(E)(2).
[87] *See id.*
[88] *In re* Tri-State Roofing, 2020 WL 7345741 (Bankr. D. Idaho 2020). *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).
[89] *See SBRA Guide*, *supra* note 3, at § IV(F). A related concern was that a non-attorney subchapter V trustee could not appear in the case without an attorney under the general federal rule that only an individual may appear in a federal court *pro se. SBRA Guide*, *supra* note 3, at § IV(F) addresses the issue and concludes that the rule does not prohibit a non-attorney trustee from appearing in a bankruptcy case without an attorney.
[90] SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 68, at 3-17 to 3-18.
[91] *Id.*

In a case decided shortly after subchapter V's effective date, the court declined to approve a subchapter V trustee's application to employ the trustee's law firm, stating, "[A]uthorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA."[92]

Perhaps as a result of the *Handbook's* admonition and the early ruling that subchapter V trustees should not seek to employ professionals without specific justification, the usual practice in subchapter V cases is for the subchapter V trustee to administer the case without employing professionals.

3. *Effectiveness of subchapter V trustees*

The work of subchapter V trustees has validated the decision of the United States Trustee Program to appoint trustees on a case-by-case basis. Indeed, much of the success of subchapter V is attributable to the Program's selection and training of subchapter V trustees who regularly make important contributions in subchapter V cases.

The ABI Subchapter V Task force collected data and received input from bankruptcy professionals about the effectiveness of subchapter V trustees. The Task Force's summary of its conclusions includes these observations:[93]

> Most think the use of case-by-case trustees has been largely effective. Throughout hearings, bankruptcy judges emphasized that the success of any Subchapter V case is due in large part to a skilled and engaged Subchapter V trustee. The consensus view is that the successes enjoyed by debtors and creditors alike under the subchapter is due in no small part to the work performed by the Subchapter V trustees. One court described the

[92] *In re* Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 at *2 (Bankr. E.D.N.C. 2020).
[93] *ABI Subchapter V Task Force Final Report*, *supra* note 4, at 22-23 (footnotes omitted).

Subchapter V trustees as "honest brokers" who have provided "credibility in evaluating the debtor's business's prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor's stakeholders, thereby enabling small businesses to reorganize."[94]

The testimony of bankruptcy professionals and judges shows that, in practice, the extent to which the Subchapter V trustee's role emphasizes any one of the duties set forth in 11 U.S.C. § 1183(b) shifts both from case to case and over time within a single case. The Subchapter V trustee has been described as a "utility player" in cases, deploying different skills and abilities as needed to resolve whatever problems a case presents. One Subchapter V trustee, who had been appointed in about 40 cases, explained that she fills in anywhere there are "gaps or she is needed to facilitate the administration of the bankruptcy case." In addition to working with debtors and creditors to reach agreement on a consensual plan, Subchapter V trustees in some circumstances assist the debtor's counsel by informing them about deadlines, revising plans, and drafting pleadings, cash collateral orders and stipulations, as appropriate.

B. No Creditors' Committee Unless Court Orders Otherwise for Cause

A subchapter V case does not have a creditor's committee unless the court orders otherwise for cause.[95] The provision is consistent with the objectives of subchapter V to provide an expedited process for the quick, inexpensive, and efficient reorganization of smaller businesses.[96] It is also consistent with the practical reality that, prior to enactment of subchapter

[94] *In re* Corinthian Communications, Inc., 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022).
[95] In a traditional case, § 1102(a)(1) provides for the U.S. Trustee to appoint a committee of creditors holding unsecured claims. In a subchapter V case, § 1181(a)(2) provides that § 1102(a)(1) does not apply unless the court orders otherwise for cause.
[96] *See, e.g., In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 339-340 (Bankr. S.D. Fla. 2020).

V, many cases of smaller business did not have a creditors' committee due to the lack of creditors willing to serve on the committee.

Moreover, the subchapter V trustee's oversight duties under § 1183(b)(1) and (3), together with the court's authority under § 1183(b)(2) to expand the trustee's duties to include investigative responsibilities, give the subchapter V trustee a role in the case that serves many of the purposes of a creditors' committee and makes a creditors' committee less necessary.[97]

In *In re Cinemex Holdings USA, Inc.,* 2025 WL 2489585 (Bankr. S. D. Fla. 2025), a creditor requested that the court appoint a creditors' committee. As cause for the appointment, the creditor asserted the need to investigate the eligibility of the three related debtors for subchapter V because the debtor was close to the debt ceiling, to investigate a $ 50 million claim of the debtor's parent and determine whether it should be recharacterized as equity, and to provide a "unified voice" for unsecured creditors in the case.[98]

The court noted[99] that *In re Sharity Ministries*[100] was the only subchapter V case it had found in which a court appointed an official committee. In *Sharity Ministries,* the court at a hearing *sua sponte* ordered the appointment of a members' committee so that approximately 10,000 members could "have a voice" in their treatment "without individual members having to incur the costs of doing so."[101] The U.S. Trustee had filed a motion to remove the debtor from possession or to expand the subchapter V trustee's duties to include investigatory duties and presented evidence "that the debtor had misled its members, was an insurance company

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[97] *E.g., In re* Cinemex Holdings USA, Inc., 2025 WL 2489585 at *3 (Bankr. S.D. Fla. 2025); 7 COLLIER ON BANKRUPTCY ¶ 1102.04[1] (16th ed.); *cf. In re* Peak Serum, Inc. 623 B.R. 609, 634 (Bankr. D. Colo. 2020) (Because appointment of a trustee is mandatory in a subchapter V case, debtor is subject to "some level of oversight by a neutral third party.").
[98] *Id.* at *2.
[99] *Id.* at *4.
[100] Case No. 21-11001, Tr. Of Aug. 9, 2021 H'rg, Doc. No. 150 at 61-63 (Bankr. D. Del. Aug. 10, 2021).
[101] *Id.*

operating without licensure and regulation, and that a substantial amount of the members' contributions were used to pay a third party rather than the members' medical expenses."[102]

The *Cinemex Holding* court found no guidance on the standards for determining "cause" for the appointment of a committee in two other cases.

One was *In re* B*onert*,[103] where the debtor in a traditional case sought to amend its petition to elect subchapter V. The committee, appointed a few weeks prior to the filing of the amendment, objected that allowing the case to proceed under subchapter V would prejudice it. In rejecting the committee's argument, the court noted, "The Committee will not be disbanded if it can demonstrate that its continued existence will improve recoveries to creditors, will assist in the prompt resolution of this case, and is necessary to provide effective oversight of the Debtors." [104]

The other was *In re Wildwood Villages, LLC*.[105] In rejecting a request for the filing of a class proof of claim, the *Wildwood Villages* court remarked, "While true that creditor committees are disfavored in Subchapter V cases, the statute permits a bankruptcy court to use its discretion and appoint a creditors' committee in an appropriate case."

After reviewing the provisions of § 1183(b)(2), which permits expansion of the trustee's duties to include investigatory duties for cause, and § 1185(a), which permits removal of the debtor from possession for cause, the *Cinemex Holdings* court quoted a leading treatise:[106]

> The provision authorizing the court to appoint a committee for cause allows the court to take into account all of the relevant facts and circumstances. The court will balance the

[102] *See Cinemex Holdings,* 2025 WL 2489585 at * 4 (summarizing the record in *Sharity Ministries*).
[103] 619 B.R. 248 (Bankr. C.D. Cal. 2020).
[104] *Id.* at 254.
[105] 2021 WL 1784408 (Bankr. M.D. Fla. 2021).
[106] *Cinemex Holdings,* 2025 WL 2489585 at *5, *quoting* 7 COLLIER ON BANKRUPTCY ¶ 1102.04[1] (16th ed.).

potential cost of a committee against the need to protect the interests of creditors in the reorganization process, taking into account the enhanced role of the United States trustee or the appointment of a subchapter V trustee.

"In sum," the court reasoned, "in determining whether a committee should be appointed in a Subchapter V case a court should take into consideration factors that cannot, or logically should not, be addressed by the remedies provided by section 1183(b)(2) or factors which rise to the level of cause for removal of a debtor in possession under section 1185."[107]

In exercising its discretion, the court concluded, it must "consider balancing the potential cost of a committee against the need to protect the interests of creditors; in other words, whether the needs of moving the case forward and controlling costs is outweighed by the needs of creditors."[108]

Taking into account the "enhanced role" of the subchapter V trustee, the court listed seven non-exclusive factors that a court should consider in determining whether cause for appointment of a committee exists:[109]

1. The size and complexity of the case (whether the case is one which more closely resembles a traditional chapter 11 case);

2. The number of creditors involved in the case and the nature of their debt;

3. The nature of the debtor's assets;

4. The nature of the debtor's business and how it is regulated;

5. The amount of secured debt, the number of secured creditors, and the nature of the collateral in which such creditors assert a lien;

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[107] *Id.* at * 5.
[108] *Id.*
[109] *Id.* at * 5-6.

6. Whether and to what extent any other creditor or other party in interest supports the relief requested; and

7. Whether any other factors are present in the case that, notwithstanding § 1183(b)(2), would interfere with the ability of the Subchapter V trustee to perform the trustee's normal statutory duties effectively.

Applying these factors, the court determined that the creditor had not established sufficient cause for appointment of a creditors' committee. The case was not complex, no other party had joined in the request, and the fact that the debts were "close to the debt ceiling" was "not persuasive" because the debtors would qualify for subchapter V under the debt limit Congress set even if they were "only one penny under the ceiling."[110]

The need to investigate the parent company's $50 million claim was not cause because the subchapter V trustee could investigate the claim and object to its allowance if appropriate and, in any event, the debtor had not yet filed a plan, so "no one even knows how the Debtors propose to treat the insider claim."[111] The trustee and the creditor could object to the plan.

The court rejected the argument that the unsecured creditors "needed a voice" in the case. The court observed that the creditors in the case were primarily landlords with some vendors that numbered in the hundreds at most, unlike the 10,000 members in *Sharity Ministries.*[112]

C. Status Conference and Report

Section 1188(a) directs the court to convene a status conference within 60 days of the filing of a subchapter V case "to further the expeditious and economical resolution" of the case. The court may extend the deadline for the status conference if the need for an extension is

[110] *Id.* at *6.
[111] *Id.*
[112] *Id.*

"attributable to circumstances for which the debtor should not justly be accountable."[113] Not later than 14 days before the status conference, the debtor must file a report that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."[114] The subchapter V trustee must attend the status conference.[115]

The timing of the status conference, its agenda, and requirements for the status report are matters of local practice and procedure. Some courts schedule the status conference without further direction, while others provide direction for what the status report must cover.[116]

The status conference and report have become a regular part of subchapter V practice. The requirements provide an opportunity for the debtor, creditors, and the subchapter V trustee to bring matters to the attention of the court and for the court to exercise its discretion based on the circumstances of the case to provide appropriate direction to make sure the case is progressing to a resolution and is being properly administered.

D. Deadline For Filing of Plan and Extension of the Deadline

The debtor in a subchapter V case has the exclusive right to file a plan[117] and must do so within 90 days after the order for relief.[118] The court may extend the deadline if the need for the extension is "attributable to circumstances for which the debtor should not justly be held accountable."[119] Although confirmation of the plan in a small business case must occur within

[113] § 1188(b).
[114] § 1188(c).
[115] § 1183(b)(3).
[116] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 39-42; *SBRA Guide, supra* note 3, at 92-95.
[117] § 1189(a).
[118] § 1189(b).
[119] § 1189(b).

45 days after its filing unless the court extends it,[120] subchapter V does not have a deadline for confirmation.

A debtor's failure to timely file a plan constitutes cause for conversion to chapter 7 or dismissal under § 1112(4)(J). Compliance with the deadline for filing a plan, therefore, is important for a debtor.

A debtor who is not prepared or able to file a plan that it expects the court to confirm by the deadline has two alternatives. Because subchapter V has no deadline for confirmation and permits preconfirmation modification of a plan,[121] one strategy is to file a plan by the deadline that the debtor will later amend, sometimes called a "placeholder plan." The more conventional alternative is to seek an extension of the deadline.

Courts have criticized the filing of "placeholder plans" as "a waste of time and resources for all parties-in-interest [that] does not represent Congress's intent in enacting subchapter V . . . . The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans."[122] One court concluded that the filing of a plan that promised the liquidation analysis and financial projections that § 1190(1) requires on or before 21 days before the confirmation hearing did not meet the requirement of § 1189(b) for filing a plan within 90 days and that cause therefore existed for conversion.[123]

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[120] § 1129(e). The deadline for the debtor in a small business case to file the plan is 300 days after the order for relief, unless the court extends it. § 1121(e)(2).
[121] § 1193(a).
[122] *In re* Baker, 625 B.R. 27, 38 (Bankr. S.D. Tex. 2020); *accord, e.g. In re* Waterville Redevelopment Co. IV, LLC, 2024 WL 3658765 at *6 n.9 (Bankr. D. Me. 2024); *In re* Signia, Ltd., 2024 WL 331967 at * 1 (Bankr. D. Colo. 2024) (Placeholder plans "seem to be filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement while obviously skirting the import of the statute.").
[123] *In re* United Safety and Alarms, Inc., 2024 WL 973674 (Bankr. S.D. Fla. 2024).

Courts have taken different approaches to the determination of whether the need for an extension is "attributable to circumstances for which the debtor should not justly be held accountable."[124]

In re Signia, Ltd.,[125] illustrates the "beyond-the-debtor's control" view. Under this interpretation, the debtor must establish external circumstances beyond the debtor's control to obtain an extension of the plan deadline.[126] Under the plain meaning of the statutory language and the caselaw and legislative history of the identical language in chapter 12 for extension of the deadline for filing a plan,[127] the court concluded that § 1189(b) permits extension of the deadline only because of external events that the debtor did not cause.

The *Signia* court denied the debtor's motion to extend the deadline because the only basis for the extension was an unresolved dispute concerning financing. This circumstance, the court concluded, was not beyond the debtor's control because it could have filed its financing motion earlier, asked for an expedited hearing, reached some agreement with the objecting party, or drafted around the issue in a plan with differing provisions depending on whether the debtor prevailed.[128]

Other courts have applied a more flexible standard in determining whether to extend the plan deadline.

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[124] Two cases, discussed in the text *infra,* review the different approaches and discuss and collect cases on the issue. *In re* Signia, 2024 WL 331967 (Bankr. D. Colo. 2024); *In re* Trinity Legacy Consortium, LLC*,* 656 B.R. 429 (Bankr. D.N.M. 2023). *See also SBRA Guide*, *supra* note 3, at § VI(J); *Update*, *supra* note 8, at Part X.
[125] 2024 WL 331967 (Bankr. D. Colo. 2024).
[126] *Accord, e.g., In re* Majestic Gardens Condo. C Ass'n, Inc., 637 B.R. 755, 756 (Bankr. S.D. Fla. 2022); *In re* Keffer, 628 B.R. 897, 910 (Bankr. S.D.W. Va. 2021); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 346 (Bankr. S.D. Fla. 2020).
[127] § 1221.
[128] 2024 WL 331967 at *12 (Bankr. D. Colo. 2024).

In re Baker[129] identified four factors for a court to consider in determining whether to extend the deadline for the filing of a plan: (1) whether the circumstances raised by the debtor were within the debtor's control; (2) whether the debtor had made progress in drafting a plan; (3) whether the deficiencies preventing that draft from being filed were reasonably related to the identified circumstances; and (4) whether any party-in-interest had moved to dismiss or convert the case or otherwise objected to a deadline extension in any way.

The court in *In re Trinity Legacy Consortium, LLC,*[130] identified and applied a third approach that involves an equitable inquiry into whether the debtor is "fairly responsible for his inability" to file a plan by the deadline.[131] The court concluded that the determination of whether the need for an extension under § 1189(b) is "attributable to circumstances for which the debtor should not justly be held accountable" allows an equitable inquiry "to take into account all relevant circumstances surrounding the debtor's need for an extension of time to file a plan and to balance the interests of the affected parties."[132]

Such an equitable inquiry, the court explained, seeks to "strike the correct balance of [subchapter V's] goals of speed and access to a realistic reorganization scheme" and takes into account "whether the debtor manipulated the timing of his bankruptcy case, potential prejudice to creditors, and whether the debtor [is complying] with his obligations under the Code."[133]

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[129] 625 B.R. 27 (Bankr. S.D. Tex. 2020).
[130] *Trinity Legacy Consortium,* 656 B.R. 429 (Bankr. D.N.M. 2023).
[131] *Id.* at 436-37, quoting *In re* Trepetin, 617 B.R. 841, 849 (Bankr. D. Md. 2020). The court also cited: *In re* HBL SNF, LLC, 635 B.R. 725, 730 (Bankr. S.D.N.Y. 2022) (considering prejudice to parties); *In re* Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742, 746 (Bankr. M.D. Fla. 2020) (considering prejudice to creditors). The *Trinity Legacy Consortium* court observed that *Trepetin* stated that it was following the "circumstances beyond the control of the debtor" test but that the test *Trepetin* actually applied was an equitable one. 656 B.R. at 437.
[132] 656 B.R. at 437 (footnotes omitted).
[133] *Trinity Legacy Consortium,* 656 B.R. at 437, discussing *In re* Trepetin, 617 B.R. 841, 848-49 (Bankr. D. Md. 2020).

In striking that balance, the *Trinity Legacy Consortium* court continued, "the Court should be guided by the overarching goals of subchapter V to (i) provide a process by which debtors may reorganize and rehabilitate their financial affairs, (ii) provide a framework for an expeditious and economical resolution of the case under subchapter V, and (iii) facilitate the development of a consensual plan. In striking the proper balance, the court should give due regard to the particularly important protection § 1189(b) affords creditors because subchapter V eliminates various creditor protections available to creditors in chapter 11 cases not governed by subchapter V.[134]

The court then identified specific factors to consider: whether the need for the extension is within the debtor's reasonable control, the danger of prejudice by granting or refusing to grant the extension, the length of the extension, the debtor's good faith, the debtor's progress in formulating a meaningful plan, and the views of creditors as a whole and the subchapter V trustee.

The debtor in *Trinity Legacy Consortium* sought an extension because it was still engaged in mediation with creditors that showed promise of resulting in settlements that would permit the debtor to file a meaningful and confirmable plan. Applying the standards of the "equitable inquiry" approach, the court granted the extension, finding that the debtor was close to concluding its negotiations with creditors in the mediation and that the extension would not unduly prejudice creditors.[135]

The court in *In re Mateos,*[136] granted an extension in similar circumstances. The married debtors who had personally guaranteed debts of a company in chapter 11 sought an extension of

[134] *Trinity Legacy Consortium,* 656 B.R. at 440.
[135] *Id.* at 442-43.
[136] 2023 WL 4842301 (Bankr. M.D. Fl. 2023).

time based on the need to resolve matters in the company's chapter 11 case so that their plan could properly take account of that resolution. The court found that the ability to settle matters in the company's case was important to their cases and granted the extension.

Under the "beyond-the-debtor's control" interpretation, the debtors in *Trinity Legacy Consortium* and *Mateo* would not have qualified for an extension based on the prospective settlements and resolution of issues in the related case because, among other things, each debtor could have proposed a plan with differing provisions depending on the outcome of the settlements or related case.

In a case in which the bankruptcy judge has not indicated what standards for an extension of the plan deadline govern, the careful debtor's lawyer in need of an extension for good reasons that are nevertheless within the debtor's control under the *Signia* approach must file a motion for an extension of the plan deadline and request a hearing well in advance of the plan deadline so that, if the court denies the extension, the debtor will have sufficient time to meet the deadline.

E. Payment of Compensation of Subchapter V Trustee

Like all trustees in bankruptcy cases, a subchapter V trustee is entitled to compensation for the trustee's services and reimbursement of expenses.[137] If a plan is confirmed as a consensual plan under § 1191(a), it must provide for payment of the trustee's allowed fees and expenses as an administrative expense on the effective date of the plan (unless the trustee agrees to a different payment schedule).[138] If cramdown confirmation occurs under § 1191(b), the plan may provide for payment of the fees and expenses under the plan.[139]

[137] *See supra* § III(A)(2).
[138] § 1129(a)(9)(A).
[139] § 1191(e).

If no plan is confirmed, the subchapter V case will end in conversion to chapter 7 or dismissal. If conversion occurs, the trustee's allowed fees and expenses will be an administrative expense entitled to priority under § 503(b)(1), subject in priority to administrative expenses in the chapter 7 case.[140] If the case is dismissed, the trustee must seek to collect under applicable nonbankruptcy law.

In either situation, the subchapter V trustee faces uncertain prospects for payment of allowed compensation and expenses. And unlike the debtor's professionals, the subchapter V trustee takes cases that the U.S. Trustee assigns and has no opportunity to minimize the risk of nonpayment with a prepetition retainer.

Practices are developing that enhance the prospects for payment of the subchapter V trustee's allowed fees and expenses.

One method is a requirement that the debtor set aside money for payment of the subchapter V trustee on a regular basis.[141] The practice is similar in concept to a "carve-out" for payment of professional fees in a cash collateral or debtor-in-possession financing order in a traditional chapter 11 case.[142]

Bankruptcy judges in the Middle District of Florida initiated such a procedure by including a provision for interim trustee compensation in subchapter V cases in an "Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference,"[143] which is entered in each subchapter V case. The standard order requires the debtor to pay $ 1,000 as interim compensation to the subchapter V trustee within 30

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[140] § 726(b).
[141] *See generally SBRA Guide*, *supra* note 3, at §IV(E)(2); *Update*, *supra* note 8, at § VIII(C).
[142] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 27-28.
[143] *E.g., In re* Nostalgia Family Medicine P.A., Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Bankr. M.D. Fla. Mar. 26, 2021).

days of the petition date and monthly thereafter. The amount is subject to adjustment upon request of any interested party and to the court's approval of the trustee's compensation under § 330. The debtor must include the interim compensation in any cash collateral budget. Other courts have adopted similar procedures.[144]

Courts that have not adopted such a procedure may order that the debtor fund an escrow account for use in paying the trustee's allowed fees and expenses.[145] Some subchapter V trustees have requested that the funding be in the form of a postpetition retainer. Such characterization would make the funds available only to pay the subchapter V trustee.[146] Although a court may authorize a postpetition retainer in appropriate circumstances,[147] it may decline to approve a postpetition retainer and, instead, require that funds in the account be set aside for the benefit of all administrative expense claimants on a *pro rata* basis rather than for the sole benefit of the subchapter V trustee.[148]

The *ABI Subchapter V Task Force Report* recommended that courts adopt practices for ensuring payment of compensation of subchapter V trustees.[149]

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[144] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 26.
[145] *In re* Soul Wellness, LLC, 669 B.R. 848 (Bankr. S.D. Fla. 2025); *In re* Roe, 2024 WL 206678 (Bankr. D. Ore. 2024).
[146] *See In re* Soul Wellness, LLC, 669 B.R. 848, 850 (Bankr. S.D. Fla. 2025) (explaining distinction in context of request of debtor's counsel for postpetition retainer).
[147] *E.g. In re* Soul Wellness, LLC, 669 B.R. 848 (Bankr. S.D. Fla. 2025) (collecting cases and identifying factors for consideration in determining whether to approve postpetition retainer); *In re* Golden Fleece Beverages, Inc., 2021 WL 6015422 (Bankr. N.D. Ill. 2021); *see In re* Knudsen Corp., 84 B.R. 668 (B.A.P. 9th Cir. 1988) (approving procedure for postpetition payments to professionals without prior court approval); *In re* Raocore Tech, LLC, 2025 WL 828880 (Bankr. D.D.C. 2025) (postpetition "evergreen" retainers); *In re* Mariner Post-Acute Network, Inc., 257 B.R. 723 (Bankr. D. Del. 2000).
[148] *In re* Roe, 2024 WL 206678 (Bankr. D. Ore. 2024).

In *In re Soul Wellness, LLC,* 669 B.R. 848 (Bankr. S.D. Fla. 2025), the court declined to approve the request of debtor's counsel that the debtor set aside funds as a postpetition retainer solely to pay fees of debtor's counsel and required that the deposits be available for all administrative expense claimants. The court noted that the U.S. Trustee did not object to the proposed postpetition retainer for the subchapter V trustee that the debtor had proposed because, the U.S. Trustee argued, a subchapter V trustee does not have the opportunity to obtain a retainer before the case is filed. *Id.* at 851-52 & n. 6.
[149] *ABI Subchapter V Task Force Final Report*, *supra* note 4, at 24-28.

When the debtor seeks voluntary dismissal of its case, some courts have conditioned dismissal on payment of the trustee's allowed fees and expenses.[150] The rationale is that, although § 349(b) revests property of the estate in the debtor, the Supreme Court in *Czyzewski v. Jevic Holding Corp.*[151] recognized that the court may order otherwise "for cause." Reliance of the subchapter V trustee on provisions of the Bankruptcy Code for payment of compensation for required services constitutes "cause" under § 349(b) for conditioning dismissal on payment of the allowed fees and expenses of the subchapter V trustee.[152] A court may decline to require payment of the subchapter V trustee as a condition to dismissal in the absence of evidence that all other administrative expenses have been paid.[153]

IV. DISMISSAL OR CONVERSION, REMOVAL OF DEBTOR FROM POSSESSION, AND EXPANSION OF DUTIES AND POWERS OF SUBCHAPTER V TRUSTEE

Subchapter V,[154] like traditional chapter 11,[155] contemplates that the debtor, as debtor in possession, remains in charge of property of the estate, the debtor's business, and administration of the case. In addition, the debtor in possession in a subchapter V case under § 1184 has all the rights and powers of the trustee (except the right to compensation). The debtor in possession's

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[150] *In re* New York Hand & Physical Therapy PLLC, 2023 WL 2962204 (Bankr. S.D.N.Y. 2023); *In re* Hunts Point Enterprises, LLC*,* 2021 WL 1536389 (Bankr. E.D.N.Y. 2021); *cf. In re* Slidebelts, Inc.*,* 2020 WL 3816290 (Bankr. E.D. Cal. 2020) (conditioning dismissal of a traditional chapter 11 case on payment of fees of professionals of the committee of unsecured creditors when the debtor requested dismissal for the purpose of obtaining a loan under the Paycheck Protection Funding Program of the CARES Act of the case and then re-filing a case under subchapter V). *See generally SBRA Guide*, *supra* note 3, at §IV(E)(2); *Update*, *supra* note 8, at § VIII(E).

[151] 50 U.S. 451, 456 (2017).

[152] *Cf. In re* Slidebelts, Inc.*,* 2020 WL 3816290 at * 3 (Bankr. E.D. Cal. 2020) (conditioning dismissal of traditional chapter 11 case requested by the debtor on payment of fees of professionals of committee of unsecured creditors).

[153] *In re* East Coast Diesel, LLC, 2022 WL 19078763 (Bankr. M.D.N.C. 2022); *see In re* Baby Blue of Junction, LLC, 2024 WL 1241940 (E.D.N.Y. 2024) (The bankruptcy court had conditioned dismissal of the debtor's subchapter V case on payment of the trustee's compensation over the objection of the landlord who had received no postpetition rent for 10 months and sought conversion of the case instead. The district court reversed, concluding that the bankruptcy court had not analyzed whether conversion or dismissal was in the best interests of creditors.)

[154] § 1184.

[155] § 1107.

duties do not include any investigative duties,[156] and the subchapter V trustee does not have them, either, unless the court orders otherwise.[157]

In some cases, however, circumstances may require a departure from this norm.

One set of circumstances involves problems (often many problems) in the administration of the case or operation of the business, including things like debtor misconduct, continuing losses from business operations, or lack of any reasonable prospects for confirmation of a feasible plan. The misconduct may be, among other things, the failure to file required papers (often the monthly operating reports), failure to make proper disclosures (or worse, intentional concealment or misstatement of information required to be disclosed), and improper use of estate assets (such as improper transfers of money or property to insiders).

When these circumstances arise, the court may dismiss or convert the case under § 1112 or remove the debtor from possession under § 1185(a). The court may also expand the trustee's duties to require an investigation of such matters under § 1183(b)(2).

A second set of circumstances involves a conflict of interest between the debtor's principals and the estate. For example, the estate may have potential claims against insiders for the avoidance of prepetition transfers to insiders. A conflict of interest is cause for conversion, dismissal, or removal of the debtor from possession. An alternative possibility is expansion of the trustee's powers to authorize the trustee to investigate, and prosecute if appropriate, claims that involve a conflict of interest.

This Part begins with a discussion of the alternatives of conversion, dismissal, or removal of the debtor from possession (Section IV(A)) and expansion of the trustee's duties to include

[156] § 1184 requires the debtor in possession to perform all of the trustee's duties in a traditional chapter 11 case except the trustee's investigative duties under § 1106(a)(3) and (4) and the duty to file schedules and other papers if the debtor has not done so under § 1106(a)(2).
[157] § 1183(b)(2).

investigation (Section IV(B)). Section IV(C) deals with expansion of the trustee's powers to include authority to prosecute claims of the estate as a way to manage conflicts of interest in a subchapter V case. Section IV(D) explores issues that arise upon removal of the debtor from possession.

A. The Alternatives of Dismissal, Conversion, or Removal of Debtor From Possession

In a traditional chapter 11 case, § 1112 provides for dismissal or conversion to chapter 7 for "cause," § 1104(a) authorizes appointment of a trustee for cause or in the best interests of the estate, and § 1104(b) provides for the appointment of an examiner if it is in the interests of creditors, equity security holders or the estate or if fixed, liquidated, unsecured debts other than for goods, services, taxes, or owing to insiders exceed $ 5,000,000.

Section 1112 applies in a subchapter V case. Because § 1112 applies in both traditional and subchapter V cases, the issues of whether "cause" for conversion or dismissal exists under § 1112(c)(4)[158] and whether "unusual circumstances" nevertheless preclude dismissal or conversion despite such cause under § 1112(b)(2)[159] are the same.

The provisions in § 1104 for the appointment of a trustee or examiner, however, do not apply in a subchapter V case.[160] Instead, subchapter V has different remedies that serve similar purposes as appointment of a trustee or examiner.

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[158] § 1112(c)(4) defines "cause" as including 16 separate circumstances.
[159] § 1112(b)(2) provides that the court may not dismiss or convert a case if it "finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate" if the debtor or other party establishes a reasonable likelihood that a plan will be confirmed within a reasonable time (or within the time required by §§ 1121(e) and 1129(e) in a small business case) and the grounds for conversion or dismissal include an act or omission of the debtor (1) for which a reasonable justification exists and (2) cure will occur within a reasonable period of time that the court fixes.
[160] § 1181(a).

A subchapter V trustee already exists, so the substitute for appointment of a trustee is the removal of the debtor from possession under § 1185(a). Chapter 12 has a similar provision.[161] The effect of removal of the debtor from possession in a subchapter V case is the same as appointment of a trustee in a traditional case, except that a subchapter V trustee cannot file a plan.[162]

An examiner's duties are to perform the trustee's investigative duties under § 1104(a)(3) and (4) and "any other duties of the trustee that the court orders the debtor in possession not to perform."[163] As Sections IV(B) and IV(C) explain below, § 1183(b)(2) permits the court in a subchapter V case, for cause, to expand the trustee's duties to include these investigatory duties,[164] and § 1184 permits the court to limit the rights, powers, and duties of the debtor in possession, thereby transferring them to the subchapter V trustee.

The statutory language in § 1185(a) for removal of a debtor from possession in a subchapter V case is materially the same as the statutory language in § 1104(a)(1) that describes "cause" for appointment of a trustee in a traditional case: the court must appoint a trustee in a traditional case or remove the debtor from possession in a subchapter V case "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case."[165]

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[161] § 1204.

[162] § 1189(a). The duties of a subchapter V trustee in § 1183 are the same as the duties of a trustee in a traditional case, except that the subchapter V trustee's duties do not include the traditional trustee's duty under § 1106(a)(5) to file a plan, file a report of why the trustee will not file a plan, or recommend conversion or dismissal of the case.

[163] § 1106(b).

[164] § 1183(2).

[165] §§ 1104(a)(1), § 1185(a). Section 1104(a)(1) adds "or similar cause" to the specific grounds, which § 1185(a) does not include. Section 1185(a)(1) adds failure of the debtor to perform the obligations of the debtor under the confirmed plan as a ground for removal of the debtor in possession. Section 1104(a)(1) does not state this circumstance as a ground for appointment of a trustee, but inability to effectuate substantial consummation of a confirmed plan and material default under a confirmed plan are grounds for conversion or dismissal under § 1112(a)(4)(M) and (N), and § 1112(b)(1) permits appointment of a trustee as an alternative to conversion or dismissal.

Because § 1185(a) states that "cause" for removal *includes* the specified circumstances, other reasons may support removal of the debtor in possession. Courts have found guidance in the caselaw under § 1104(a) since removal of the debtor in a subchapter V case effects the same result as appointment of a trustee in a traditional case.[166]

A request for conversion, dismissal, or removal of the debtor from possession in a subchapter V case usually asserts some type of debtor misconduct in the management of the business or property of the estate (such as gross mismanagement or improper use of estate assets), deficiencies in case administration (such as improper disclosure of required information or failure to file timely reports or other papers), failure to file a plan timely or lack of any reasonable prospects for a confirmable plan, the existence of conflicts of interest between the principals or insiders of the debtor and the estate (often arising from potentially avoidable transfers), or some combination (or all) of these circumstances. Frequently, a request for one remedy alternatively seeks one of the others for the same reasons. Although conversion, dismissal, or removal of the debtor from possession usually occurs upon the request of a party in interest, the court may raise such issues *sua sponte.* [167]

A common thread in subchapter V cases considering dismissal, conversion, or removal of the debtor from possession is inaccurate or incomplete disclosure of required information, failure to file proper operating reports, or both. Cases may also involve questionable transactions with, or transfers to, insiders and failure to disclose information about them or conflicts of interest arising from them. They often involve a noncooperative relationship with the subchapter V

[166] *See* COLLIER ON BANKRUPTCY ¶ 1185.01[1] (16th ed.).
[167] *In re* Coeptis Equity Fund, LLC, 2002 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff'd* 2024 WL 1133580 (9th Cir. 2024) (unpublished); *In re* Corinthian Communications, Inc., 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re* Ozcelebi, 639 B.R. 365, 425 (Bankr. S.D. Tex. 2022).

trustee that may border on hostility, failure to timely comply with court orders, and feasibility issues. Gross mismanagement of the estate or continuing losses may also be issues.[168]

If "cause" exists and no unusual circumstances preclude conversion or dismissal,[169] § 1112(a)(1) requires the court to convert or dismiss a case if cause exists unless "the court determines that the appointment *under section 1104(a)* of a trustee or examiner is in the best interests of creditors and the estate."[170] Because § 1104 does not apply in a subchapter V case and a subchapter V trustee already exists, the language of § 1112(a)(1) does not expressly permit removal of the debtor from possession as an alternative to otherwise mandatory conversion or dismissal in a subchapter V case.

At the same time, the directive in § 1185(a) that the court "shall" order that the debtor shall not be a debtor in possession if cause exists makes removal of the debtor mandatory.[171]

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[168] E.g., *In re* Coeptis Equity Fund, LLC, 2022 WL 17581986 (B.A.P. 9th Cir. 2022) (unpublished), *aff'd* 2024 WL 1133578, 2024 WL 1133580, and 2024 WL 1155450 (9th Cir. 2024) (all unpublished); *In re* Kadiric, 670 B.R. 307 (Bankr. W.D. Mich. 2025) (case converted to chapter 7 based on continuing loss to estate and lack of reasonable likelihood of rehabilitation, failure to timely file plan, and debtors' bad faith and unfitness as fiduciaries as shown by prepetition transfers designed to hinder, delay, or defraud creditors); *In re* Earthsnap, Inc., 670 B.R. 49 (Bankr. E.D. Tex. 2025) (cases of corporation and individual principal converted to chapter 7 based on gross mismanagement (including failure to file reports and failure to open DIP bank accounts), failure to comply with discovery orders, and absence of confirmable plan); *In re* TLC Medical Group, 2024 WL 4283801 (Bankr. S.D. Fla. 2024) (case dismissed due to failure to provide information reasonably requested by U.S. Trustee in a timely manner, unauthorized use of cash collateral, and lack of application to retain debtor's counsel); *In re* Lashley, 664 B.R. 408 (Bankr. W.D. Ky. 2024) (case converted to chapter 7 for cause, including (1) debtor's untimely filing of operating reports that were deficient because they did not explain $57,920 in cash withdrawals and cash app transactions; (2) debtor's failure to file or confirm plan within reasonable period of time; (3) debtor's little prospect for reorganization; and (4) payment of accountant to prepare tax returns without court permission. Under the circumstances, conversion was in best interest of creditors to permit trustee to administer unencumbered assets.); *In re* United Safety and Alarms, Inc., 2024 WL 973674 (Bankr. S.D. Fla. 2024); In re Exigent Landscaping, LLC, 656 B.R. 757 (Bankr. E.D. Mich. 2024); *In re* Jar 259 Food Corp., 2023 WL 6201739 (E.D.N.Y. 2023); *In re* California Palms Addiction, Recovery Campus, Inc., 2023 WL 2664284 (N.D. Ohio 2023), *aff'd* 87 F.4th 734 (6th Cir. 2023); *In re* Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. 2023); *In re* East Coast Diesel, 2022 WL 19078763 (Bankr. M.D.N.C. 2022)**;** *In re* No Rust Rebar, Inc., 641 B.R. 412 (Bankr. S.D. Fla. 2022). In re Hao, 644 B.R. 339 (Bankr. E.D. Va. 2022); In re Corinthian Communications, Inc., 642 B.R. 224 (Bankr. S.D.N.Y. 2022); *In re* KLMKH, Inc., 2022 WL 4281478 (Bankr. W.D.N.C. 2022); *In re* Neosho Concrete Products Co., 2021 WL 1821444 (Bankr. W.D. Mo. 2021).

[169] § 1112(b)(2), discussed *supra* note 158.

[170] § 1112(b)(1) (emphasis added).

[171] *In re* No Rust Rebar, Inc., 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022); *see In re* Duling Sons, Inc., 650 B.R. 578, 582 (Bankr. D.S.D. 2023).

Because both alternatives are mandatory, the court implicitly has the authority to determine which is the better one.

Further, although § 1104(a) does not apply in a subchapter V case, one court reasoned, "[S]ubchapter 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."[172] The court noted that removal of a debtor from possession is "simply a lesser form of the conversion option" and that § 1112(b)(1) in a traditional case requires consideration "in every instance where cause is shown whether the appointment of a trustee might better serve the interests of creditors and the estate." [173] The court thus concluded that removal of the debtor is an available alternative to dismissal or conversion in a subchapter V case.

Accordingly, when cause exists for both conversion or dismissal and removal of the debtor from possession, courts have considered which alternative is in the best interests of creditors and the estate.[174]

Determination of whether conversion, dismissal, or removal of the debtor from possession is the best choice is a discretionary one involving an assessment of which alternative provides the best prospects for a distribution to creditors. If the business is viable such that confirmation of a plan based on its continued operations may be possible or a sale of the business

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[172] *In re* Pittner, 638 B.R. 255, 258 (Bankr. D. Mass. 2022).
[173] *Id.* at 259.
[174] *E.g., In re* Pinnacle Foods of California, LLC, 2025 WL 951650 (Bankr. E.D. Cal. 2025); *In re* M.A.R. Designs & Construction, Inc., 653 B.R. 843 (Bankr. S.D. Tex. 2023); *In re* Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. 2023); *In re* No Rust Rebar, Inc., 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022); *In re* Pittner, 638 B.R. 255, 258-59 (Bankr. D. Mass. 2022); *In re* Young, 2021 WL 1191621 at *7 (Bankr. D.N.M. 2021).

Because § 1104 does not apply in a subchapter V case, 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, 639 B.R. 365, 383 (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.

in the subchapter V case may produce more value that sale in a chapter 7 case, removal of the debtor may be the better choice.

Courts have removed the debtor from possession rather than converting or dismissing the case when continuation of the case in subchapter V with the subchapter V trustee in possession provides better prospects for a distribution to creditors than conversion or dismissal,[175] but not when subchapter V administration is not likely to enhance recovery by creditors.[176]

B. Expansion of the Subchapter V Trustee's Duties

A subchapter V trustee's duties do not include the broad investigative duties of a trustee in a traditional chapter 11 case under § 1106(a)(3)[177] and the duty under § 1106(a)(4) to file a statement of any investigation.

Section 1183(b)(2) authorizes the court to expand the trustee's duties to include investigative duties for "cause," but it does not define "cause."

Courts have not formulated a specific definition of "cause" to expand the trustee's duties. Rather, they have identified circumstances that provide appropriate reasons for the trustee to undertake an investigation. Thus, a court may expand the trustee's duties when the case involves potential claims against insiders or affiliates or 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, or the accuracy and completeness of the debtor's disclosures and

[175] *In re* Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. 2023); *In re* Pittner, 638 B.R. 255, 258-59 (Bankr. D. Mass. 2022).
[176] *In re* Exigent Landscaping, Inc., 656 B.R. 757 (Bankr. E.D. Mich. 2024); *In re* M.A.R. Designs & Construction, Inc., 653 B.R. 843 (Bankr. S.D. Tex. 2023); *In re* No Rust Rebar, Inc., 641 B.R. 412, 429 (Bankr. S.D. Fla. 2022).
[177] Under § 1104(a)(3), a chapter 11 trustee has the duty to investigate the "acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan."

reports.[178] The court may consider whether the subchapter V trustee is satisfied with the debtor's disclosures and administration of the case and whether the asserted need for the trustee to investigate justifies the additional fees of the trustee in conducting it.[179]

The decision is a discretionary one; § 1183(b)(2) requires the trustee to perform investigative duties if the court "so orders," but does not require the court to do so. The court may limit the scope of the trustee's investigation to specified issues of concern.[180]

C. Management of Conflicts of Interest Through Expansion of the Subchapter V Trustee's Rights and Powers

In a subchapter V case, § 1184, like § 1107(a) in a traditional chapter 11 case, vests the rights and powers of a trustee under the Bankruptcy Code in the debtor in possession.[181] The trustee's powers include the rights to use, sell, or lease property of the estate under § 363(b) other than in the ordinary course of business, to obtain postpetition financing under § 364, to assume, reject, or assume executory contracts and unexpired leases under § 365, and to pursue avoidance actions under §§ 545, 547, 548, 549.

Section 1183(b)(2) permits the court to expand the subchapter V trustee's *duties,* as Section IV(B) discusses, but it does not address the expansion of the trustee's *powers*.

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[178] *In re* Velsicol Chemical LLC, 2024 WL 4879960 at *3 (Bankr. N.D. Ill. 2024); *In re* Corinthian Communications, Inc., 642 B.R. 224, 233 (Bankr. S.D.N.Y. 2022); *In re* Ozcelebi, 639 B.R. 365, 383 (Bankr. S.D. Tex. 2022); *In re* AJEM Hosp., LLC, 2020 WL 3125276 at *2 (Bankr. M.D.N.C. 2020).

[179] *In re* Velsicol Chemical LLC, 2024 WL 4879960 at * 3 (Bankr. N.D. Ill. 2024).

[180] *In re* AJEM Hosp., LLC, 2020 WL 3125276 at *2 (Bankr. M.D.N.C. 2020).

[181] § 1184. *See* Singh v. Price (*In re* Turkey Leg Hut & Co., LLC), 659 B.R. 539 (Bankr. S.D. Tex. 2024). *But see In re* Roe, 2024 WL 206678 at *2 (Bankr. D. Ore. 2024).

The *Roe* court concluded that a subchapter V has concurrent authority with the debtor to exercise trustee powers "to fulfill the statutory duties given to subchapter V trustees in section 1183." *In re* Roe, 2024 WL 206678 at *2. The court held that the subchapter V trustee had the authority to request an order requiring the use of estate property under § 363(b)(1) to fund an escrow account for the payment of administrative claims. *Roe* at best states a limited exception to the general rule, but the exception arguably is not necessary to support the result. The authority of the court in § 1184 to limit the rights and powers of a debtor in possession provides ample authority for the court to require the use of funds for such a purpose.

The question is whether the court may nevertheless authorize a subchapter V trustee, rather than the subchapter V debtor, to exercise specified powers of the trustee. The issue does not arise in a traditional chapter 11 case because the debtor in possession and the trustee do not exist at the same time.

The issue is important when a creditor or the subchapter V trustee identifies, or the debtor's schedules disclose, potential claims of the estate against the debtor's principals, insiders, or affiliates. The potential claims create a conflict of interest because the debtor's principals control the debtor and, therefore, are responsible for investigating and, if necessary, prosecuting, claims against themselves, their own other entities, or other insiders and affiliates such as family members. A subchapter V plan must include a liquidation analysis,[182] and a plan must take the likely recovery on potential claims into account for purposes of establishing that it meets the "best interest of creditors" requirement for confirmation in § 1129(a)(7).[183]

Resolution of potential claims may occur through a plan if the court at the confirmation hearing determines that the potential claims have no merit[184] or that their proposed settlement in the plan is reasonable.[185] But a creditor or the subchapter V trustee may assert that the existence of the conflict of interest is cause for conversion, dismissal, or removal of the debtor from possession.

In a traditional chapter 11 case, the court may manage a conflict of interest situation by granting derivative standing to the creditors' committee to pursue the potential claims[186] or by

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[182] § 1190(1)(B).
[183] *In re* Lapeer Aviation, Inc., 2022 WL 7204871 (Bankr. E.D. Mich. 2022); *see* The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (*In re* Alecto Healthcare Services, LLC), 2025 WL 961482 at * 10-11 (D. Del. 2025); *In re* Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024).
[184] *In re* Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024).
[185] The Reed Action Judgment Creditors v. Alecto Healthcare Services, LLC (*In re* Alecto Healthcare Services, LLC), 2025 WL 961482 at * 10-11 (D. Del. 2025).
[186] *See* NORTON BANKRUPTCY LAW AND PRACTICE (3D ED.) § 98:33.

appointing an examiner,[187] but subchapter V does not provide for an examiner[188] and committees do not ordinarily exist.[189] Expansion of the subchapter V trustee's powers to include authority to investigate and prosecute potential claims involving a conflict of interest similarly provides for an independent fiduciary to handle the potential claims while permitting the debtor to proceed in the case.

Analysis of whether the court has the authority to expand the trustee's powers to prosecute claims starts with § 1184. Although § 1184 vests the trustee's powers in the subchapter V debtor in possession, it is not unconditional.

Importantly, § 1184 begins with the limitation that the debtor's trustee powers are "subject to such limitations or conditions as the court may prescribe."

Because § 1184 permits the court to condition or limit the trustee's powers, it provides authority for the court to remove specified trustee powers from the debtor in possession, thereby necessarily vesting them in the trustee.

The fact that § 1182(b) does not impose a *duty* on the subchapter V trustee to pursue avoidance actions or exercise other trustee powers does not mean that the trustee does not have the *power* to exercise trustee powers that the court removes from the debtor in possession.

Indeed, a trustee's authority in a traditional chapter 11 case to pursue such matters does not arise from the trustee's duties under § 1106(a), which do not include any duty to pursue claims of the estate or liquidate its assets. The trustee's authority instead derives from § 323,

[187] § 1104(c).
[188] § 1181(a).
[189] § 1181(b).

which makes the trustee the representative of the estate,[190] and gives the trustee the capacity to sue and be sued.[191]

Two reported cases deal with the trustee's authority to pursue claims of the estate but do not control the issue and are distinguishable.

In *Singh v. Price (In re Turkey Leg Hut & Co., LLC)*,[192] the subchapter V trustee filed a complaint and motion for a temporary restraining order and preliminary injunction on behalf of the debtor in possession to restrain the spouse of the debtor's principal from interfering with the debtor.

The court dismissed the complaint and motion *sua sponte* for lack of standing, concluding that the subchapter V trustee had no statutory authority to bring an action on behalf of the debtor. The court ruled: "None of the subchapter V trustee's general duties authorize the Subchapter V Trustee to pursue claims belonging to the estate on behalf of the estate. Therefore, this Court finds that the debtor in possession has exclusive standing to pursue causes of action pursuant to 11 U.S.C. § 1184." [193]

Turkey Leg does not address whether the authority of the court in § 1184 to limit or condition the debtor's right to exercise the trustee's powers permits the court to exercise its discretion to authorize a subchapter V trustee to pursue claims where a conflict of interest exists or, more generally, to authorize a trustee to exercise other estate powers (such as liquidation of the debtor's assets) in appropriate circumstances.

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[190] § 323(a).
[191] § 323(b). *See* Thomas T. McClendon, *Is It In the Name? A Sub V Trustee's Pursuit of Avoidance Actions*, 44-May AMER. BANKR. INST. J. 5, 16-17, 56-57 (2025).
[192] 659 B.R. 539 (Bankr. S.D. Tex. 2024).
[193] *Id.* at 544.

The other case is *Ghatanfard v. Zivkovic (In re Ghatanfard)*.[194] There, the bankruptcy court in an oral ruling had converted an individual's subchapter V case to chapter 7 because of conflicts of interest between the debtor and the estate arising from substantial prepetition transfers to his "life partner." The debtor had acknowledged the conflict of interest and proposed that the subchapter V trustee's powers be expanded to permit the trustee to take over the fraudulent transfer claims. The bankruptcy court, however, determined that it could not order such relief over the opposition of a creditor and the subchapter V trustee.[195]

The district court affirmed the bankruptcy court's ruling that the conflict of interest was cause for conversion to chapter 7 and ruled that the bankruptcy court had not "abused its discretion in determining that it did not have the authority, over the objection of a creditor, to expand the Subchapter V Trustee's powers to include litigation of the fraudulent conveyance claims on behalf of the estate."[196]

The district court's ruling in *Ghatanfard* is correct to the extent of its holding that a bankruptcy court has discretion to determine whether a conflict of interest requires conversion as opposed to expansion of the subchapter V trustee's powers to handle litigation that the conflict involves. But *Ghatanfard* does not hold that a court may not do so.

The recitation of the bankruptcy judge's oral ruling in the district court's opinion in *Ghatanfard* indicates that the bankruptcy judge may have preferred expansion of the trustee's powers to permit the trustee to prosecute the claim, but it does not discuss the bankruptcy judge's reasoning for the conclusion that the statute did not authorize such expansion.[197]

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[194] 666 B.R. 14 (S.D.N.Y. 2024).
[195] *Id.* at 19-20.
[196] *Id.* at 27. In its analysis, the district court observed that the debtor had provided no authority for the proposition that a subchapter V trustee can be empowered to pursue avoidance actions and that *Singh v. Price (In re Turkey Leg Hut & Co., LLC),* 659 B.R. 539 (Bankr. S.D. Tex. 2024), discussed in earlier text, held to the contrary. *Ghatanfard*, 666 B.R. at 26. As earlier text explains, *Turkey Leg* did not address this issue and is distinguishable.
[197] *Ghatanfard,* 66 B.R at 19-20.

It is arguable that, having concluded that the conflict of interest was cause for conversion, the bankruptcy court in *Ghatanfard* had no option to expand the trustee's powers rather than convert the case because § 1112(b)(1) mandates conversion if cause exists. But if a conflict of interest is manageable through expansion of the trustee's powers, that remedy should be an alternative to conversion for one of two reasons.

First, a court could conclude that "cause" does not include a conflict of interest that is manageable.[198]

Second, a court could decide that managing the conflict of interest by expansion of the trustee's powers satisfies the requirements of § 1112(b)(2) that preclude conversion if "unusual circumstances" establish that conversion is not in the best interests of creditors and the estate,[199] a reasonable likelihood exists that a plan will be confirmed within a reasonable time,[200] a reasonable justification for the act or omission that constitutes grounds for conversion exists,[201] and cure of the grounds for conversion will occur within a reasonable time fixed by the court.[202]

Where the cause for conversion is a conflict of interest, the conflict is manageable, a plan is confirmable within a reasonable time, and creditors are better off under a plan than in a chapter 7 case, unusual circumstances establish that conversion is not in the best interests of creditors and the estate.

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[198] *See In re* Neosho Concrete Products Co., 2021 WL 1821444 at *8-9 (Bankr. W.D. Mo. 2021) (Cause for removal of debtor from possession based on conflicts of interest does not exist where debtor's principal had "competently managed the estate and adapted to challenges as it encountered them," had agreed to reimburse the estate for the value of preferential transfers he had received, had retained separate counsel, and had prioritized the interests of the debtor above his own.).

[199] § 1112(b)(2).

[200] § 1112(b)(2)(A). The applicable time is a "reasonable period of time" because a subchapter V case is not a small business case in which §§ 1121(e) and 1129(e) apply.

[201] § 1112(b)(2)(B)(i).

[202] § 1112(b)(2)(B)(ii).

The conflict of interest exists because of prepetition events that the debtor cannot change. The cause for conversion is the need to investigate and prosecute the potential claims, not the existence of the claims themselves. As such, cause for conversion based on a conflict of interest does not involve an "act or omission" for which the debtor could provide a "reasonable justification." Nevertheless, the fact that the conflict of interest arises from prepetition events that the debtor cannot change provides a "reasonable justification" for the grounds for conversion. Management of the conflict by permitting the trustee to investigate and prosecute the claims that give rise to the conflict of interest provides an immediate cure of the problem.

The ability of the bankruptcy court to exercise its discretion to authorize a subchapter V trustee to exercise certain trustee powers instead of the debtor is important. Conflicts of interest in subchapter V cases are not uncommon, and the enlistment of the trustee to handle such matters on an independent, fiduciary basis permits the other aspects of the reorganization of the debtor to continue under the debtor in possession. A subchapter V debtor who candidly discloses potential claims involving a conflict of interest at the outset of the case should not face conversion or dismissal if the conflict can be managed by putting the trustee in charge of matters involving the conflict.

Moreover, if the court must convert, dismiss, or remove the debtor from possession based on *allegations* of potential claims and the debtor contends that the claims are meritless, rather than authorize the trustee to investigate and pursue the claims, the court might determine that a hearing on the viability of the claims is necessary. Independent evaluation of the claims by the trustee seems a better approach to the problem not only because it permits the debtor to proceed in the subchapter V case on all other matters but also because it permits the trustee and potential defendants to settle the claims and removes the debtor as an advocate against the claims.

D. Issues When Removal of Debtor from Possession Occurs

When the court removes the debtor from possession under § 1185(a), the parties – and the court – must figure out how the case will proceed and what the exit strategy will be.

The business question is whether reorganization of the debtor as a going concern is feasible or if liquidation of its assets will occur. The legal question is how to effect either alternative in view of the fact that, because only the debtor may file a plan in a subchapter V case,[203] the trustee may not.

If the exit strategy is a confirmed plan that the debtor files, the question is whether compensation of the debtor's professionals for post-removal services is permissible under the Supreme Court's decision in *Lamie v. United States Trustee*.[204] In *Lamie* the Court ruled that an attorney for a former chapter 11 debtor in possession who provided services after conversion to chapter 7 was not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney.

One court avoided exit strategy issues in a subchapter V case by revoking the debtor's subchapter V election after removal of the debtor in possession, thus "converting" the case to a traditional chapter 11 case, and appointing a chapter 11 trustee under § 1104 so that the trustee and creditors could file a plan.[205] Other courts in declining to revoke the subchapter V election based on the circumstances of the case have expressed doubt that a court has the authority to do so in view of the fact that § 103(i) provides for the debtor to control the subchapter V election.[206]

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[203] § 1189(a).
[204] 540 U.S. 526 (2004).
[205] *In re* National Small Business Alliance, 642 B.R. 345 (Bankr. D.C. 2022); *cf. In re* CYMA Cleaning Contractors, Inc., 2023 WL 7117445 at *2-3 (Bankr. D.P.R. 2023) (concluding that the court has authority to revoke subchapter V election of ineligible debtor even after expiration of time for objection to election and agreeing with analysis in *National Small Business Alliance*). *See SBRA Guide*, *supra* note 3, at § V(C); *Update, supra* note 8, at Part V.
[206] *In re* Pinnacle Foods of California, LLC, 2024 WL 3873478 at *5 (Bankr. E.D. Cal. 2024); *In re* Free Speech Systems, LLC, 649 B.R. 729, 734-35 (Bankr. S.D. Tex. 2023); *In re* ComedyMX, LLC, 647 B.R. 457, 463-64 (Bankr. D. Del. 2022). *See generally Update*, *supra* note 8, at Part V.

Another way to avoid exit strategy issues is reinstatement of the debtor to possession under § 1185(b). The debtor thus has 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 or dismissal. As a practical matter, it is unlikely that a debtor could convince the court to order reinstatement if the trustee does not support it.

Most cases, however, proceed under subchapter V with the debtor removed from possession and replaced by the subchapter V trustee. Section IV(D)(1) considers alternative exit strategies in this situation, and Section IV(D)(2) deals with the *Lamie* issue.

1. Alternative exit strategies after removal of the debtor from possession

Upon removal of the debtor from possession, the initial business question is whether the trustee will operate the debtor's business, as § 1183(b)(5)(B) permits. As a practical matter, the trustee's operation of the business will usually require the debtor's cooperation because it is unlikely that the business can operate without day-to-day management by the principals of the debtors. Moreover, the trustee, as well as creditors and the court, must have confidence in the commitment of the debtor's principals to operate the business under the trustee's control and in compliance with the Bankruptcy Code.

When the trustee does not continue business operations, continuation of the subchapter V case usually serves no purpose. Conversion or dismissal is the end of the subchapter V case.

If the trustee will operate the business, the business question is whether to reorganize the debtor or liquidate its business as a going concern. If reorganization is feasible, the trustee will operate the business while the debtor pursues confirmation of a plan.[207]

[207] *See In re* Athena Medical Group, LLC, 2025 WL 2125130 (Bankr. D. Ariz. 2025) (dealing with compensation of debtor's attorneys after confirmation of plan for reorganization of debtor following removal of debtor from possession); *In re* National Small Business Alliance, 642 B.R. 345 (Bankr. D.C. 2022) (Over a year after removal of

The subchapter V trustee has the duty under § 1183(b)(7) to "facilitate the development of a consensual plan of reorganization." This duty continues after removal of the debtor in possession, so it is appropriate for the trustee to explore the possibility of a plan with the debtor and other parties in interest, which could include the drafting of a proposed plan for review by the debtor and its counsel.[208]

In this situation, the subchapter V case will conclude either upon confirmation of a plan or denial of confirmation, resulting in conversion, dismissal, or liquidation in subchapter V.

When reorganization is not feasible and the debtor's business has value as a going concern, the question is whether to conduct a sale in the subchapter V case or convert it to chapter 7.

Liquidation by the subchapter V trustee may result in more value for the estate than chapter 7 liquidation. Although the court may authorize a chapter 7 trustee to operate the debtor's business under § 721 "for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate," sale of a business as a going concern in a chapter 7 case raises significant problems.[209] Moreover, the subchapter V trustee's

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the debtor from possession and trustee's operation of business, the court revoked subchapter V election, converted case to traditional chapter 11 case, and appointed trustee under § 1104).

[208] *ABI Subchapter V Task Force Final Report*, *supra* note 4, at 44. *See also In re* Duling Sons, Inc., 650 B.R. 578, 582 (Bankr. D.S.D. 2023) (requiring filing of joint plan by debtor and subchapter V trustee after removal of debtor from possession within 90 days, in the absence of which conversion would occur).

[209] *ABI Subchapter V Task Force Final Report*, *supra* note 4, at 45. The Final Report observes: "Conversion to Chapter 7 may adversely affect the business's relationships with its customers, suppliers, and employees, who may perceive Chapter 7 as the end of the debtor's business. If the Subchapter V trustee is not appointed as the Chapter 7 trustee, it may be difficult to effect an optimal continuation of the business pending sale." *Id.* The Report also noted that the trustee's duty under § 704(a)(1) to liquidate assets "as expeditiously as is compatible with the best interests of parties in interest" may result in the realization of less value than would occur in a Subchapter V case." *Id. See also In re* Boteilho Hawaii Enterprises Inc., 2023 WL 7117223 at *2 (Bankr. D. Haw. 2023) (Discussing hypothetical liquidation of subchapter V debtor's assets in a chapter 7 case, the court noted that a trustee under § 704(a)(1) must "always dispose of the property quickly (although not necessarily at 'fire sale' prices.)").

familiarity with the case and the debtor's business and the trustee's pre-removal relationships with the debtor and creditors may favor sale of the business through continuation of the subchapter V case,[210] although appointment of the subchapter V trustee to serve in the chapter 7 case, as § 701(a)(1) permits,[211] also has these benefits. Whether liquidation should proceed under subchapter V or chapter 7 after removal of the debtor from possession is a fact-specific determination.

A subchapter V trustee's sale of the debtor's business as a going concern produces money for the estate. Administration of the case and distribution of the proceeds may procced in one of three ways.

One alternative is confirmation of a liquidation plan proposed by the debtor.[212] If the debtor declines to file a plan or proposes one that is unconfirmable, the trustee and creditors may consider either conversion to chapter 7 or disbursement of the proceeds through a structured dismissal.[213]

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[210] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 45-46.

[211] §§ 701(a)(1) (The United States trustee shall appoint as interim trustee "one disinterested person" that is a panel trustee or that "is serving as trustee in the case immediately before" conversion of the case.); 701(b)(d) (Interim trustee serves as trustee in the case unless creditors elect a trustee at § 341 meeting of creditors.).

[212] *See In re* Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. 2023) (In removing debtor from possession rather than converting case, court required filing of joint liquidation plan by debtor and subchapter V trustee within 90 days, in absence of which conversion would occur.).

[213] A so-called "structured dismissal" involves payment of allowed administrative expenses and distributions on allowed claims, followed by dismissal of the case. *See generally,* Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017). The Supreme Court observed in *Jevic Holding Corp., id.* at 456-57:

> [T]he [Bankruptcy] Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a
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> > "hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).
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> Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." Ibid., n. 973.

Conversion is necessary if the estate has claims to recover avoidable transfers or other claims against principals or others, such as breach of fiduciary duty claims, accounts receivable, or loans that the debtor made. Conversion may also be required if disputed claims must be resolved through the claims allowance process.

If a chapter 7 estate is likely to have no other assets, a structured dismissal[214] providing for distributions to creditors in accordance with their priorities under the Bankruptcy Code may be preferable because it will result in creditors receiving more money more promptly, without the delay and expenses of chapter 7 administration. A structured dismissal could include provisions for resolution of disputed claims prior to dismissal and disbursement of funds.

In some cases, the debtor, creditors, and the subchapter V trustee may reach consensus as to the appropriate exit strategy after removal of the debtor in possession. When they do not, questions may arise concerning the role of the subchapter V trustee and the authority of the trustee to exercise trustee powers after the debtor's removal.[215]

A subchapter V trustee has the authority to operate the debtor's business upon removal of the debtor from possession,[216] the authority to sell assets under § 363, and the rights under the Bankruptcy Code (among others) to avoid transfers under §§ 544-549. Nevertheless, parties opposed to the trustee's sale of the debtor's business or to the trustee's exercise of avoidance powers may assert that the trustee lacks authority to do such things without a court order.[217]

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[214] See *supra* note 212.

[215] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 46 ("A court may want to hear and consider the Subchapter V trustee's perspective regarding the discussions, negotiations, and dealings among all the parties in the case before deciding to keep a case in Subchapter V after removal of the debtor in possession. . . . Otherwise, questions may arise concerning the trustee's authority to sell the debtor's assets under section 363 or to pursue avoidance claims arising from the trustee's initial role in the case with the responsibility to facilitate a consensual plan.").

[216] § 1183(b)(5).

[217] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 31-32. The Report explains and rejects the argument:

Although the argument is not well-founded,[218] subchapter V trustees may be concerned that the scope of their powers after the debtor's removal may be unclear.[219] Accordingly, the *ABI Subchapter V Task Force Final Report* encouraged courts "to be specific in the role, duties, and powers of the Subchapter V trustee after removal of the debtor in possession to ensure that all parties have clarity concerning the timing, cost, and anticipated actions to resolve the Subchapter V case."[220]

2. Compensation of debtor's professionals after removal of debtor in possession

When a dispossessed subchapter V debtor wants to pursue confirmation of a plan, to seek reinstatement as the debtor in possession, or to otherwise participate in the case, it must have a lawyer, and perhaps other professionals, as a practical matter. Indeed, an entity cannot appear in a bankruptcy case without a lawyer.[221] This section discusses whether the reasonable fees and expenses of a subchapter V debtor's attorney or other professionals for post-removal services are payable as an administrative expense.

Because a chapter 11 debtor in possession has the rights and powers of a trustee,[222] the debtor in possession has the trustee's right to employ attorneys and other professionals under

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> This view is that the statutory rights, powers, and functions that revert to the trustee upon removal of a debtor from possession in standard Chapter 11 cases and Subchapter V cases are not the same because section 1181 makes section 1106 inapplicable in Subchapter V cases except as otherwise stated in section 1183. Close scrutiny of section 1183's references to section 1106 indicates that when the debtor has been removed from possession, there are no material differences in duties, and the powers necessary to exercise those duties, between the trustee in a standard Chapter 11 case and the trustee in Subchapter V except for the ability to file a plan.

Id. at 32 n. 8.

[218] *See ABI Subchapter V Task Force Final Report*, *supra* note 4, at 32 n. 8 (quoted in note 219 *supra*).

[219] *See id.* at 31-32.

[220] *Id.* at 44-45.

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

[222] § 1107(a) (traditional chapter 11 case); § 1184 (subchapter V case).

§ 327(a). Section 330(a) provides that professionals employed under § 327(a) are entitled to allowance of reasonable compensation and reimbursement of expenses.[223] An award of compensation and reimbursement under § 330(a) is an administrative expense under § 503(b)(2).

Simply put, the language of these statutes provides for allowance of an administrative expense for compensation and reimbursement of professionals employed by the *trustee*, which includes a chapter 11 or subchapter V debtor in possession. Section 330(a) does not provide for allowance of compensation and reimbursement of a *debtor's* professionals (as opposed to a *debtor in possession's* professionals), except for the provision in § 330(a)(4) that authorizes compensation for an individual debtor's attorneys in a chapter 12 or 13 case.

A debtor removed from possession under § 1185(a) is no longer a debtor in possession. Thus, the debtor's professionals now represent the debtor, not the debtor in possession.

In a traditional chapter 11 case, a debtor's professionals are not entitled to allowance of compensation and reimbursement for services rendered under § 330 after conversion of the case to chapter 7 or appointment of a chapter 11 trustee, both of which terminate the debtor's status as a debtor in possession, under the Supreme Court's decision in *Lamie v. United States Trustee*.[224]

In *Lamie,* the attorney for the debtor sought compensation under § 330(a) for services after conversion of the case to chapter 7. The Court ruled that the attorney was not entitled to compensation under § 330(a) for postconversion services because, after conversion, the debtor in possession no longer existed, and the attorneys were not employed by the trustee. The same

[223] § 330(a) also provides for allowance of compensation and expenses of a trustee, an examiner, a professional employed by a committee under § 1103, and an ombudsman appointed under § 332 or § 333. A debtor in possession does not have the trustee's right to compensation. §§ 1107(a) (traditional case), § 1184 (subchapter V case).
[224] 540 U.S. 526 (2004),

principle applies when a trustee is appointed in a traditional chapter 11 case, thus removing the debtor as debtor in possession.[225]

Subchapter V does not address this issue. If the *Lamie* ruling precludes payment from the estate of a subchapter V debtor's professionals after removal, the debtor must find an alternative way to pay them (or find professionals willing to work for free) to have a realistic chance of pursuing a plan, obtaining reinstatement, or otherwise participating in the case. And a debtor who is not an individual will not be able to file anything or be heard without a lawyer. (When the services of the debtor's professionals in the administration of the case would be useful to the trustee because of their familiarity with the debtor and its business – for example, assisting the trustee in connection with the sale of the debtor's business – the trustee may employ the debtor's counsel for specific purposes under § 327(e)[226]).

The question is whether anything in subchapter V requires a conclusion that, notwithstanding *Lamie,* a debtor's professionals are entitled to allowance of an administrative expense for services rendered after removal of the debtor from possession.

In *In re ComedyMX, LLC*,[227] the court entered an unreported order, without objection by the U.S. Trustee or any other party after notice and a hearing, that granted an application for an

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[225] *In re* Sunergy California, LLC, 646 B.R. 840, 845 (Bankr. E.D. Cal. 2022), *aff'd* 2023 WL 4184860 (B.A.P. 9th Cir. 2023); *In re* Flying Roadrunner, Inc., 2015 WL 1344445 at *9 (Bankr. W.D. Pa. 2015)*; In re* Johnson, 397 B.R. 486, 490 (Bankr. E.D. Cal. 2008).

[226] *In re* Johnson, 397 B.R. 486 (Bankr. E.D. Cal. 2008). *Lamie v. United States Trustee*, 504 U.S. 526, 538-39 (2004), recognized that a trustee may employ debtor's counsel under § 327(e); *see In re* Athena Medical Group, LLC, 2025 WL 2125130 at *7 n. 35 (Bankr. D. Ariz. 2025) (noting that subchapter V trustee had employed debtor's lawyers after removal as special counsel for non-plan work under § 327(e)).

Section 327(e) authorizes a trustee, with the court's approval, to employ an attorney who has represented the debtor for "a specified special purpose, other than to represent the trustee in conducing the case," if such employment is in the best interest of the estate and if the attorney does not hold or represent any interest adverse to the debtor or the estate with respect to the representation.

[227] *In re ComedyMX, LLC,* Case No. 22-11181, Dkt. No. 153 (Bankr. D. Del. Apr. 25, 2023).

order permitting attorneys for the dispossessed subchapter V debtor to seek compensation for services to be rendered after the debtor's removal.

The court identified three potential bases to support compensation of the debtor's attorneys for post-removal services:

1. The fees may be awarded on the ground that they are actual, necessary costs and expenses of preserving the estate under § 503(b)(1)(A).

2. An award of fees is appropriate under § 330 on the ground that, as prior counsel to the debtor, the firm is a professional person employed under § 327.

3. Only a debtor may file a plan under § 1189(a). The effect of § 1189(a) is to leave a dispossessed debtor with certain limited obligations of a trustee, such that the dispossessed debtor may retain counsel under § 327(a) to carry out that role.

The *ComedyMX* court noted that each ground is subject to counterarguments and expressly stated that its order did not resolve any of the issues. Noting that, in an adversary system, circumstances may make it appropriate to grant relief that is unopposed,[228] the court concluded that, in the absence of any objection, the attorneys could be awarded compensation from the estate for actual, necessary work performed for the benefit of the estate after the debtor's dispossession.

In *In re Athena Medical Group, LLC,*[229] the debtor's lawyers sought compensation for services rendered after the dispossession of the debtor that resulted in confirmation of a plan for the reorganization of the debtor. The court held that *Lamie* precluded allowance of compensation

[228] The court cited its unreported decision in *In re Arsenal Intermediate Holdings*, LLC, Case No. 23-10097, Dkt. No. 176 (Bankr. D. Del. March 27, 2023), which addresses addressing the circumstances in which it may be appropriate, in an adversary system, for a court to grant relief on the ground that it is unopposed.
[229] 2025 WL 2125130 (Bankr. D. Ariz. 2025).

under § 330(a) for services after removal of the debtor from possession[230] and rejected the debtor's arguments for allowance of the fees based on the three theories the *ComedyMX* court mentioned.[231]

The court acknowledged that the legal services had resulted in a successful confirmation to the benefit of the estate but ruled that § 523(a)(1)(A)'s allowance of an administrative expense for "actual, necessary costs and expenses of preserving the estate" does not include fees for a debtor's lawyers.[232] Sections 317, 330, and 503(b)(2) specifically govern fees and expenses of the debtor's attorney, the court explained, while allowance of an administrative expense under § 503(b)(1) applies more generically. Allowance of the fees under § 503(b)(1), the court concluded, "would improperly circumvent more specific provisions of the Code that do not allow for such fees."[233]

The fact that the attorneys had been employed under § 327(a) to represent the debtor in possession at the outset of the case also provided no basis for allowance of the fees. Upon removal of the debtor from possession, the court explained, the debtor no longer functioned as a trustee, and attorneys it hired are no longer employed under § 327 unless the trustee retained them.[234]

The *Athena Medical Group* court rejected the contention that, because only the debtor can file a plan in a subchapter V case, a removed debtor retains the limited obligation of a trustee to file a plan that authorizes the retention of counsel under § 327(a), entitled to compensation under § 330(a), to perform that function.

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[230] *Id.* at *4-6. *Accord, In re* NIR West Coast, Inc., 638 B.R. 441, 452-53 (Bankr. E.D. Cal. 2022).
[231] *Id.* at *6-11.
[232] *Id.* at *9-11.
[233] *Id.* at *11.
[234] *Id.* at * 8-9.

The court noted that a trustee in a traditional chapter 11 case has a duty to file a plan under § 1106(a)(5), which does not apply in a subchapter V case, and that the debtor's right to file a plan arises under § 1189(a), not from a duty of a trustee. "Therefore," the court reasoned, "it is illogical to argue that a debtor continues to retain the rights of the trustee to file a plan, when the debtor's right never emanated from the trustee's rights in the first place."[235]

Recognizing the need for a subchapter V debtor to be able to retain and compensate professionals after removal in appropriate circumstances,[236] the *ABI Subchapter V Task Force Final Report* recommended an amendment to § 1185 to add a new section to permit the court, after notice and a hearing, to authorize the employment and compensation of professionals by the debtor after removal if the court finds that one of three circumstances exist:[237]

1. There is a reasonable likelihood that the debtor can file a confirmable plan within a reasonable period of time and the debtor requires the services of a professional to do so;

2. The debtor requires the services of a professional to perform any duties of the debtor; or

3. The debtors' employment of a professional is in the best interests of creditors and the estate.

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[235] *Id.* at *7.

[236] *ABI Subchapter V Task Force Final Report*, *supra* note 4, at 47-51.

[237] *Id.* at 50-51. The proposed amendment incorporates the standards of § 330 for allowance of compensation:

> The court after notice and a hearing may award to a professional employed under this subsection reasonable compensation for actual, necessary services rendered by the professional and by any paraprofessional person employed by such person and reimbursement for actual, necessary expenses based on a consideration of the necessity and benefit of such services and the other factors set forth in section 330.

Id. at 51. The proposed amendment further provides that the court may limit the scope of the services of any professional that the debtor employs.

In the absence of legislation that permits payment of a subchapter V debtor's professionals after removal, the ability of the debtor to obtain an unopposed order like the one in *ComedyMX,* or persuading the court to disregard the *Athena Medical Group* reasoning and grant such relief despite an objection, the debtor and its professionals must make arrangements for compensation of the professionals other than from the estate. Under the *Athena Medical Group* ruling, the debtor will be able to pay the professionals only if a plan is confirmed, and then only after payments to creditors have occurred.[238]

The logical source for payment of post-removal compensation and reimbursement is the holders of the equity interests in the debtor. The debtor (out of possession, and therefore with no fiduciary duties), the professional, and the equity holders could agree that the equity holders will pay the fees and expenses. Because the debtor (not the debtor in possession as trustee) is employing the professional, the court's approval under § 327(a) is not necessary.

Nevertheless, with regard to attorneys and perhaps other professionals, the arrangement requires attention to ethical considerations relating to payment of fees by a person other than the client, including provisions in the terms of the engagement that deal with waiver of potential conflicts of interest after informed consent.[239] Absent unusual circumstances, the arrangement should not involve a nonwaivable conflict of interest because the debtor and its equity holders have the same objective: confirmation of a plan and reinstatement of the debtor in possession.[240]

In addition, § 329(a) requires disclosure of any agreement between the debtor and an attorney, and any payment made, for services rendered or to be rendered in connection with the

[238] *See In re* Athena Medical Group, LLC, 2025 WL 2125130 at *7 n. 35 (Bankr. D. Ariz. 2025). Because compensation and reimbursement for post-removal services are not allowable as an administrative expense, payments to the professionals cannot be included in the calculation of projected disposable income.
[239] American Bar Association Model Rule of Professional Conduct 1.7.
[240] An issue could arise if a dispute exists among various factions of equity security holders of the treatment of equity security holders under the plan or if one or more equity holders do not want the debtor to proceed.

case. Bankruptcy Rule 2016(b) requires that the attorney file the disclosure statement and send it to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Because payment will not come from the estate, it is not necessary for the court to allow the fees. In the case of an attorney, however, if compensation of the attorney exceeds the reasonable value of services, § 329(b) permits the court to cancel the agreement or order the return of any payment in excess of reasonable compensation.

If the services of an attorney or other professional results in confirmation of a plan, the owners who have paid them have an argument that they have an administrative expense claim under § 503(b)(3)(D). Section 503(b)(3)(D) permits allowance of an administrative expense for (among others) an equity security holder (1) who makes a "substantial contribution" to a chapter 11 case and (2) incurred an "actual, necessary expense" in doing so (3) unless the expense is for compensation and reimbursement specified in paragraph (4) of § 503(b), which provides for an administrative expense for "reasonable compensation for professional services rendered" and "reimbursement for actual, necessary expenses" incurred by an attorney or accountant of a creditor, indenture trustee, equity security holder or committee not appointed under § 1102.

The owners' premise is that confirmation could not have occurred without counsel for the debtor (and possibly other professionals) and that, therefore, their arranging for the retention of attorneys (or perhaps other professionals) made a substantial contribution to the case. At least with regard to a debtor that is an entity, the premise is irrefutable: only a debtor may file a plan, and an entity must have a lawyer to appear in a bankruptcy court. One could quibble that an individual could achieve confirmation *pro se* with the assistance of the subchapter V trustee,

but an individual's ability to obtain confirmation of a plan without a lawyer is questionable at best.

To obtain the required professional services for the debtor necessary for the substantial contribution, the owners had to incur the expense of paying the professional themselves. The causal link is likewise irrefutable unless one accepts the notion that a professional will provide services for free.

Although the expense is for professional compensation and reimbursement of a professional, the professional is not a professional specified in paragraph (4) of § 503(b) that paragraph (3) excludes. The professionals listed in paragraph (4) do not include professionals employed by a debtor.

Objectors may raise three arguments against allowance of a § 503(b)(3) administrative expense.

The first two involve the text of the statutes. One is that "expense" in paragraph (3) of § 503(b) does not include fees of the debtor's professionals. The related argument is that paragraph (4) of § 503(b) governs professional compensation and reimbursement and, therefore, paragraph (3) does not permit allowance of professional compensation and reimbursement of expenses at all.

The owners' response is that paragraph (3) expressly excludes compensation and reimbursement only of certain professionals (those specified in paragraph (4)) as an allowable expense, but the debtor's professionals are not in that list. Similarly, paragraph (4) deals only with attorneys and accountants for those specified entities and thus the specific provisions for them do not exclude reimbursement and expenses for other professionals.

More generally, the third argument is that allowance of an administrative expense to the owners for payment of the debtor's professionals is inconsistent with the statutory interplay of §§ 503(b), 327(a), and 330 and the *Lamie* ruling that professionals of a debtor (other than an individual in a chapter 12 or 13 case) are not entitled to compensation and reimbursement as an administrative expense. Allowing an indirect payment of the debtor's professionals from the debtor's estate when the debtors make the payment in the first instance is an impermissible end-run around the statutory scheme that prohibits direct payment.

The owners' response is that (1) the statutory language permits allowance and excludes compensation and reimbursement only of specified professionals and (2) the result is consistent with the operation of other statutes and *Lamie* because allowance of an administrative expense occurs only when the expense was necessary for a substantial contribution.

An alternative arrangement for the debtor and owners to consider is joint representation of the debtor and the owners after removal, with the owners assuming responsibility for payment. The post-removal debtor is no longer a fiduciary, and the debtor and owner have the same interests and objectives in the representation. Court approval is not required under § 327 because the debtor is not a debtor in possession.

This alternative permits an attorney or accountant to seek allowance of compensation and reimbursement of expenses as an administrative expense under paragraph (4) of § 503(b) because of the services rendered in making a substantial contribution to the case in representing the owners, whose expenses in making a substantial contribution are allowable under paragraph 3. Other professionals are not included in paragraph (4), so a joint representation agreement with other professionals would not provide this advantage.

Allowance of an administrative expense under paragraph (4) in this situation is subject to the same objections that arise under the first alternative that seeks allowance under paragraph (3). Under a "substance over form" analysis, it is no different than allowance of the fees of debtor's professionals under § 330 and payment of the fees by the estate as an administrative expense under § 503(b)(2). As in the previous situation, it is an end-run around other provisions of the Bankruptcy Code and the *Lamie* ruling that prohibit payment of attorneys and accountants for the debtor by the estate.

A third alternative that takes the "end-run" objection into account is retention of current professionals to represent the debtor (with payment by the owners) and retention of independent counsel to represent the owners. Debtor's counsel must file the plan, but the owners' counsel (or other professionals) takes the lead and does most of the work in its drafting and negotiating. Like the trustee and creditors, the owners are parties in interest and may consult with the debtor about the plan and prepare a proposed plan for the debtor to consider. Similarly, the debtor's lawyer must represent the debtor in confirmation litigation, but the owners – like the trustee and creditors – are entitled to appear and be heard at the confirmation hearing and to participate in pre-confirmation litigation.

Under this arrangement, the owner's lawyer (or other professional) is clearly providing services for the owners, and not for the debtor. Those services are consistent with the rights of the owners as parties in interest to participate in the case.

The result is that the owners' lawyer (or other professional) does most of the work and most of the total compensation and reimbursement arises from that work. The owners have an administrative expense claim under paragraph (3) for compensation and reimbursement of their

lawyers and other professionals that does not involve compensation of the debtor's professionals. In addition, they have a paragraph (3) claim for their payment of the debtor's professionals.

Objectors still have the argument that "expense" in paragraph (3) does not include the expense of compensation and reimbursement of professionals that an owner incurs in making a substantial contribution, but the argument seems weaker when it is not connected to the debtor's professionals.

V. WHETHER A CLASS ACCEPTS A PLAN WHEN NO CLASS MEMBER VOTES OR OBJECTS TO CONFIRMATION

Consensual confirmation under § 1191(a) requires compliance with § 1129(a)(8) that all impaired classes accept the plan. "Cramdown" confirmation may occur under § 1191(b) even if no creditor accepts the plan.

In a traditional chapter 11 case, the consequences of confirmation are the same whether confirmation occurs consensually under § 1129(a) because all creditors accept the plan or under the cramdown provisions of § 1129(b).

Consequences of confirmation differ in a subchapter V case, however, depending on whether cramdown confirmation under § 1191(b) is necessary. For example, when cramdown confirmation occurs, the subchapter V trustee makes payments under the plan (unless the plan or the confirmation order provides otherwise),[241] property of the estate remains in the estate upon confirmation,[242] discharge does not occur until the debtor completes payments under the plan,[243] and, in the case of an entity, debts excepted from discharge under § 523(a) may be excepted from discharge.[244]

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[241] § 1194(b).
[242] § 1186(a).
[243] § 1192
[244] § 1192((2). After consensual confirmation under § 1191(a), the exceptions in 11 US.C. § 523(a) to discharge do not apply to the discharge of a debtor that is a corporation or other entity. See *infra* Part VIII.

When no one in an impaired class votes or objects to confirmation, the question is whether the so-called "silent" class has accepted the plan for purposes of § 1129(a)(8), which is necessary for consensual confirmation under § 1181(a). When no class has accepted the plan or objected to its confirmation (and one or more of the classes is impaired), a related question is whether all the classes have accepted the plan, because consensual confirmation under § 1191(a) requires compliance with the condition in § 1129(a)(10) that at least one impaired class accept the plan.

Section 1126(c) provides that a class of creditors accepts a plan when more than one-half of creditors holding at least two-thirds in amount of the claims in the class that voted accept the plan. Courts have taken three approaches to determination of whether a "silent" class has accepted the plan.

In a traditional chapter 11 case, the Tenth Circuit in *In re Ruti-Sweetwater, Inc.*,[245] ruled that a class is deemed to accept a plan when no one in the class votes or objects to confirmation. Bankruptcy courts in the Tenth Circuit have followed *Ruti-Sweetwater* in subchapter V cases to confirm a plan as consensual under § 1191(a) even though one or more impaired classes did not vote, ruling that a silent class is deemed to have accepted it for purposes of §1129(a)(8).[246] One court, however, concluded that the requirement in § 1129(a)(10) that one impaired class accept the plan requires affirmative acceptance.[247]

[245] 36 F.2d 1263, 1267-68 (10th Cir. 1988).
[246] *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).
[247] *In re* Jaramillo, 2022 WL 4389292 (Bankr. D.N.M. 2022).

Courts outside the Tenth Circuit have declined to follow *Ruti-Sweetwater* as wrongly decided and follow the majority rule[248] that a class must affirmatively accept a plan for acceptance to occur.[249]

Two courts outside the Tenth Circuit have concluded that classes that do not vote are not counted for purposes of determining whether § 1129(a)(8) is satisfied.[250] The courts reasoned that section 126(c) requires determination of acceptance by dividing the number of acceptances by the total votes in the class. When no creditor in an impaired class has voted, the computation requires division of zero by zero, which produces an indeterminate result that is absurd and could not have been intended by Congress.

A number of courts have rejected this approach.[251]

The *ABI Subchapter V Task Force Final Report* addressed the problem of a "silent class."[252] The Report concluded that the existence of a silent class should not prevent consensual

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[248] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02 (16th ed.).

[249] *E.g., In re* Sushi Zushi of Texas, LLC, 2025 WL 957792 (Bankr. W.D. Tex. 2025); *In re* Thomas Orthodontics, S.C., 2024 WL 4297032 at *6-7 (Bankr. E.D. Wisc. 2024); *In re* Florist Atlanta, Inc., 2024 WL 3714512 (Bankr. N.D. Ga. 2024); *In re* M.V.J. Auto World, Inc., 661 B.R. 186 (Bankr. S.D. Fla. 2024); *In re* Creason, 2023 WL 2190623 (Bankr. W.D. Mich. 2023). See *Update*, *supra* note 8, at § XIV(D).

[250] *In re* Hot'z Power Wash, Inc., 655 B.R. 107 (Bankr. S.D. Tex. 2023); *In re* Franco's Paving LLC, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023). See *Update*, *supra* note 8, at § XIV(D).

The court in *Hotz Power Wash*, *supra,* 655 B.R. at 188, reasoned:

> [S]ince the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied.

[251] *In re* Sushi Zushi of Texas, LLC, 2025 WL 957792 (Bankr. W.D. Tex. 2025); *In re Thomas Orthodontics, S.C.,* 2024 WL 4297032 at *6-7 (Bankr. E.D. Wisc. 2024); *In re Florist Atlanta, Inc.,* 2024 WL 3714512 (Bankr. N.D. Ga. 2024); *In re M.V.J. Auto World, Inc.,* 661 B.R. 186 (Bankr. S.D. Fla. 2024). See *Update*, *supra* note 8, at § XIV(D).

The court in In *M.V.J. Auto World, supra,* concluded that the reasoning is "strained at best." The court explained, 661 B.R. at 189-90:

> In order to be consensually confirmed under section 1191(a), the Plan must satisfy section 1129(a)(8). Section 1129(a)(8) requires that each impaired class accept the plan. Section 1126(c) provides that acceptance is calculated based on how many holders of allowed claims in the class have voted to accept the plan, not, as was required pre-Bankruptcy Code, based on the number of allowed claims. It is not absurd that no creditors in a class voting on a plan should be treated any differently than a situation where there is not a sufficient number of creditors voting in favor of a plan to satisfy section 1129(a)(8). Moreover, section 1129(a)(8) does not compel acceptance or rejection; section 1129(a)(8) looks to whether a class has accepted a plan, not whether a class has rejected a plan or stood silent.

[252] *ABI Subchapter V Task Force Final Report*, *supra* note 4, at 56-61.

confirmation under § 1191(a), but that the absence of affirmative acceptance by a class should not result in confirmation without compliance with the cramdown standards in § 1191(b).[253] The Report proposed a statutory amendment to permit confirmation under § 1191(a) if no impaired class rejects the plan, no creditor within a silent class objects to confirmation, and the plan meets the cramdown requirements in § 1191(b).[254]

VI. PROJECTED DISPOSABLE INCOME ISSUES

Section 1191(b) permits "cramdown" confirmation of a plan even if no creditor accepts it. Like the cramdown provision in § 1129(b) in a traditional case, cramdown under § 1191(b) requires that, with respect to any impaired class that has not accepted the plan, the plan does not "discriminate unfairly" and is "fair and equitable." If the nonaccepting class is the class of unsecured creditors, the absolute priority rule in § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).

Section 1191(b) does not change the unfair discrimination requirement, but § 1191(c) states a "rule of construction" for the fair and equitable requirement. The fair and equitable conditions in § 1129(b)(2) that govern a traditional chapter 11 case do not apply in subchapter V.[255]

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[253] *Id.* at 60.

[254] *Id.* at 61. The Task Force recommended amendment of § 1191(a) to insert the italicized language:

> § 1191. Confirmation of plan
> (a) Terms. – The court shall confirm a plan under this subchapter only if *either* –
> *(1)* all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met; *or*
> *(2) (A) all of the requirements of section 1129(a), other than paragraphs (8), (10), and (15) of that section, of this title are met;*
> *(B) all of the requirements of section 1191(b) are met; and*
> *(C) no class of claims or interests that is impaired under the plan votes to reject the plan and no creditor within such class objects to confirmation of the plan*.

[255] § 1181(a).

The fair and equitable requirements for secured claims are the same. Under § 1191(c)(1), the plan must meet the requirements of § 1129(b)(2)(A) for secured claims in a traditional case.

Section 1191(c) does not state fair and equitable requirements for unsecured claims, but it contains additional components of the fair and equitable requirement. The absolute priority rule is eliminated.

One of the fair and equitable conditions is the projected disposable ("PDI") income requirement in § 1191(c)(2),[256] which provides a substitute for the absolute priority rule for the protection of creditors.[257]

Section 1191(c)(2) states two alternatives for satisfying the projected disposable income requirement. The same payments that satisfy the PDI test may also satisfy the "liquidation" or "best interest of creditors" test of § 1129(a)(7).[258]

The first is in subparagraph (A). Section 1191(c)(2)(A) requires that the plan provide that all the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.[259]

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[256] § 1191(c)(3) requires that the court find either that the debtor *will* be able to make all payments under the plan (subparagraph (A) or that there is a *reasonable likelihood* that the debtor will be able to so (subparagraph (B). In the latter situation, § 1191(c)(3)(B)(ii) requires that the plan include appropriate remedies to protect holders of claims or interests if the payments are not made. See *SBRA Guide, supra* note 3, at § VIII(B)(5); *Update*, *supra* note 8, at Part XII.

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

[258] *See* Legal Service Bureau, Inc. v. Orange County Bail Bonds (*In re* Orange County Bail Bonds, Inc.), 638 B.R. 137 (B.A.P. 9th Cir. 2022); *In re* Hyde, 2022 WL 2015538 (Bankr. E.D. La. 2022). The courts did not discuss the issue, but the point is implicit in their rulings. *See also* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 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.").

[259] § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

The second alternative in subparagraph (B) is that the plan provide that the value of property to be distributed under the plan is not less than the projected disposable income of the debtor for the three-year or longer period that the court fixes.[260] 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[261] or the postpetition liquidation of an asset[262] in an amount not less than the value of the debtor's disposable income.

The language of the PDI provisions in Subchapter V is identical in all material respects to the language of the chapter 12 provisions,[263] as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[264] Prior to BAPCPA, the chapter 12 PDI

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

Presumably, the amended chapter 13 provision takes account of the fact that the "means test" standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

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

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

[261] *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.

[262] Legal Service Bureau, Inc. v. Orange County Bail Bonds (*In re* Orange County Bail Bonds, Inc.), 638 B.R. 137 (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.

[263] § 1225(b).

[264] Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

provisions were identical in all material respects to the chapter 13 provisions[265] as they existed before the BAPCPA changes to chapter 13.

This Part discusses three PDI issues that courts have considered: (1) the calculation of PDI (Section (VI)(A)); (2) whether the court may require payment of PDI based on actual results rather than projections (a so-called "true-up") (Section VI(B)); and (3) the determination of the period of payment of PDI (Section VI(C)).

A. Calculation of Projected Disposable Income

The Bankruptcy Code does not define "projected disposable income," but it defines "disposable income" in subchapter V and in chapters 12[266] and 13.[267] In traditional chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.[268]

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

— the maintenance or support of the debtor or a dependent of the debtor;[269]

— a domestic support obligation that first becomes payable after the date of the filing of the petition;[270] and

— payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.[271]

The definition of disposable income in §1191(d) is substantially the same as the definition for chapter 12 cases in § 1225(b)(2). The subchapter V definition is also substantially

[265] § 1325(b). BAPCPA amended the chapter 13 PDI test to add the "means test" standards for determining projected disposable income and to change the former three-year period for payment of PDI to five years for "above-median" debtors.
[266] § 1225(b)(2).
[267] § 1325(b)(2).
[268] § 1129(a)(15). In subchapter V cases, § 1129(a)(15) does not apply, § 1181(a), and it is not a confirmation requirement. § 1191(a), (b).
[269] § 1191(d)(1)(A).
[270] § 1191(d)(1)(B).
[271] § 1191(d)(2).

the same as the definition in chapter 13 cases in § 1325(b)(2), except that (1) § 1325(b)(2) defines the income component as "current monthly income" (defined in § 101(10A)) and (2) § 1325(b)(3) has different rules for determining deductions. The chapter 11 provision incorporates the chapter 13 definition.[272]

Section VI(A)(1) discusses the debtor's burden to provide projections of its disposable income and to establish that payments under the plan satisfy the PDI test. Sections VI(A)(2) and (3), respectively, consider PDI issues relating to personal expenditures and nonbusiness income that arise in individual cases and the projected disposable income of the business. Section VI(A)(4) notes the issue of whether postconfirmation legal fees for litigating an exception to discharge are deductible in calculating PDI.

1. The debtor's projection of disposable income

A subchapter V plan must include "projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization."[273] If the debtor's projections of income and expenditures establish compliance with the projected disposable income requirement, no basis for a PDI objection exists unless the debtor's projections are inadequate (because, for example, they are not credible, lack any factual basis, or are incomplete), or do not properly project disposable income. An objection may assert that the projections understate income, overstate expenditures, or include expenditures that are not permissible deductions.

Courts addressing the adequacy of a debtor's financial projections have noted, "Nothing in the Code requires an audit or independent verification of a debtor's financial projections. 'The creation of a liquidation analysis and financial projections is not an exact science, so the Courts

[272] § 1129(a)(15).
[273] § 1190(1)(B).

typically defer to the debtors' projections, subject to cross-examination and/or a competing set of projections.'"[274]

But the situation changes when a party challenges the debtor's projections. In *In re Premier Glass Services, LLC,*[275] the court explained that, when a party objects to a debtor's calculation of projected disposable income, the court must "consider whether the estimate of projected disposable income is reliable and accurate based on the evidence presented."[276] Further, the court continued, because the PDI requirements are a statutory minimum for determining whether a plan meets the "fair and equitable" requirement in § 1191(c) for cramdown confirmation under § 1191(b), the court may consider other relevant factors in determining whether to confirm a plan.[277]

The *Premier Glass* court concluded that, to meet the burden of showing that a plan is fair and equitable, a debtor must show a "sincere effort" regarding two things. First, a reasoned basis must exist for the debtor's projections. Second, the debtor must show that the line items deducted from disposable income are "indeed 'necessary for the continuation, preservation, and operation of the debtor's business' and therefore fair and equitable to the unsecured creditors.' § 1191(c) and (d)."[278]

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[274] *E.g., In re* Premier Glass Services, LLC, 664 B.R. 465, 471 (Bankr. N.D. Ill. 2024); *In re* Channel Clarity Holdings, LLC, 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022). Both cases quote *In re* Lost Cajun Enters., LLC, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

[275] 664 B.R. 465 (Bankr. N.D. Ill. 2024); *see In re* Edgewood Food Mart, Inc., 666 B.R. 418 (Bankr. N.D. Ga. 2024) (finding that debtor's calculation of projected disposable income was credible based on testimony of debtor's accountant, an expert in forensic analysis and accounting with extensive experience in bankruptcy cases, who had been working with debtor before the filing of petition).

[276] *Id.* at 472. The court quoted *In re* Channel Clarity Holdings, LLC, 2022 WL 3710602 at *15 (Bankr. N.D. Ill. 2022), *quoting In re* Lost Cajun Enters., LLC, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

[277] *Id.* at 472.

[278] *Id.* at 473.

2. Calculation of projected disposable income based on individual's personal expenses and non-business income

An individual debtor has income from the debtor's business, may have non-business income, and has both personal and business expenditures. This section deals with the debtor's personal income and expenditures under paragraph (1) of § 1191(d).

A logical source for guidance on PDI issues in an individual subchapter V case is caselaw in chapter 13 cases and in chapter 11 and 12 cases of individuals. Most of the PDI case law arises in chapter 13 cases, so it is important to understand how the current chapter 13 provisions differ from the ones prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and how the subchapter V provisions are like the former chapter 13 provisions and different from the current ones.

BAPCPA amended the chapter 13 PDI requirement in two general ways.

First, BAPCPA changed the income component from "income that is received by the debtor" to "current monthly income." Section § 101(10A) defines "current monthly income" by reference to a debtor's historical income in the six months preceding the filing of the petition and has specific exclusions.[279] In a subchapter V case, income is the same as in a pre-BAPCPA chapter 13 case.

Second, BAPCPA changed the manner of determining expenditures that may be deducted as expenses reasonably necessary for the "maintenance or support" of the debtor and the debtor's dependents that the debtor may deduct in determining disposable income. After BAPCPA, the so-called "means test" standards govern the deductions that an "above-median"[280] debtor may

[279] For a discussion of current monthly income in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:26.

[280] Generally, an "above-median" debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a "below-median" debtor is one whose income is below the median. *See* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:12. The rules for determining the debtor's status are set forth in

take in calculating disposable income; they do not apply to a "below-median" debtor.[281] (The means test rules also do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.[282]) The maintenance and support deduction provisions in subchapter V cases are the same as in all pre-BAPCPA cases and in post-BAPCPA cases of below-median debtors.[283]

A specific difference is that § 1325(b)(2)(A)(ii) permits the deduction of certain charitable contributions. The subchapter V and chapter 12 statutes do not contain this deduction.

Courts have concluded that caselaw in pre-BAPCPA chapter 13 cases and in cases of below-median debtors[284] provides guidance in subchapter V cases for determining a debtor's disposable income.[285] Thus, for example, a debtor may not be entitled to deduct expenditures for "luxury items" in calculating PDI.[286]

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§ 322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the "means test" rules for determination of disposable income; and § 1325(b)(4), which defines "applicable commitment period" for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an "above-median" debtor must use the means test rules and pay projected disposable income for five years. A "below-median" debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor's plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed five years. *See* CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at §§ 4:9, 8:12.

[281] § 1325(b)(3).

[282] In chapter 11 cases, § 1129(a)(15) states that projected disposable income is "as defined in [§ 1325(b)(2)]." §1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of "amounts reasonably necessary to be expended" under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in § 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

[283] Given the lower income of above-median debtors, their cases do not generate much case law on the issue.

[284] For a discussion of application of the "reasonably necessary" standard for expenditures for maintenance and support in chapter 13 cases, see *In re* Cesaretti, 2023 WL 3676888 at *14-16 (Bankr. D. Nev. 2023); CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, at § 8:28.

[285] *E.g., In re* Cesaretti, 2023 WL 3676888 at *14 (Bankr. D. Nev. 2023); *In re* Hyde, 2022 WL 2015538 at * 9 (Bankr. E.D. La. 2022).

[286] *In re* McBride, 2023 WL 8446205 at *7 (Bankr. D. Me. 2023)

One of the specific exclusions from "current monthly income" in § 101(10A) is for Social Security benefits.[287] Because the income component in a subchapter V case is "income received by the debtor," it is arguable that Social Security benefits must be included in a subchapter V case. Social Security income, however, is exempt from property of the estate.[288] One court has concluded that Social Security benefits are not taken into account in determining projected disposable income in a subchapter V case.[289]

An individual debtor in a subchapter V case must file Schedules I and J that report the debtor's income and expenses. In some circumstances, the debtor may be required to disclose the income of a nonfiling spouse.[290]

The debtor must separately show the gross receipts, necessary business expenses, and total net income for the debtor's business as Line 8a of Schedule I requires and cannot simply report net income.[291] The next section discusses business income and expenses.

3. Projected disposable income of the business

Section 1191(d) defines "disposable income" as "the income that is received by the debtor that is not reasonably necessary to be expended" for purposes specified in paragraph (1)

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[287] § 101(10A)(B)(ii)(I).

[288] 42 U.S.C. § 407(a) ("The right of any person to any future payment under this subchapter [referring to subchapter II of Title 42] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.").

[289] *In re* Ghaffari, 2025 WL 33352 at * 1 (Bankr. D.N.M. 2025) (An individual debtor is not required to contribute Social Security income to fund a subchapter V plan, although an individual debtor may choose to make plan payments with Social Security income), *citing In re* Cranmer, 697 F.3d 1314, 1319 (10th Cir. 2012) (holding that a debtor's exclusion of exempt social security income from his chapter 13 plan cannot constitute a lack of good faith); *see* Alyssa Nelson, *Are Social Security Benefits "Disposable Income" for the Purposes of Subchapter V?,* 40-Sept AMER. BANKR. INST. J. 30 (2021).

[290] *In re* McBride*,* 2023 WL 8446205 at *3 (Bankr. D. Me. 2023). The court stated that the debtor must disclose the nonfiling spouse's income if the household expenses on Schedule J included all their household expenses. The court stated, "The decision to include or omit the non-filing spouse's income and any corresponding allocation of household expenses should reflect the economic realities of the household." *Id.* For a discussion of inclusion of a nonfiling spouse's income and expenditures in chapter 13 cases, see CHAPTER 13 PRACTICE AND PROCEDURE, *supra* note 23, *at* § 8:70.

[291] *In re* McBride*,* 2023 WL 8446205 at *3-4 (Bankr. D. Me. 2023).

of § 1191(d), which governs personal expenditures, just discussed, and paragraph (2), which applies to business expenditures. Chapters 12[292] and 13[293] use the same language. The definition thus contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

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

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

If the debtor's disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income[294] but will receive no money to pay it. When the generation of income by a

[292] § 1225(b)(2)(B).
[293] § 1325(b)(2)(B).
[294] Payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

In re Premier Glass Services, LLC,[295] addressed these issues. The court acknowledged that the calculation of income on an after-tax basis could be necessary given the debtor's status as a pass-through entity but ruled that the debtor had not demonstrated a reasoned basis for its projections.[296] Similarly, the court observed that a reserve for replacement costs for broken or outdated equipment could be necessary, but concluded that the debtor had provided no credible evidence about what equipment it would have to replace or what capital expenditures might be required.[297] Another court concluded that the PDI calculation could include 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.[298]

4. Deduction of legal fees for litigation of exception to discharge

The discharge of an individual in a subchapter V case is subject to the exceptions in § 523(a). When cramdown discharge of an entity occurs under § 1191(b), an entity's discharge may also be subject to the § 523(a) exception under one interpretation of the subchapter V discharge provisions.[299]

The PDI question is whether the debtor's legal fees for dischargeability litigation are reasonably necessary for the "continuation, preservation, or operation of the business of the

[295] 664 B.R. 465, 474-76 (Bankr. N.D. Ill. 2024).
[296] *Id.* at 474-75.
[297] *Id.* at 475-76.
[298] *In re* Urgent Care Physicians, Ltd., 2021 WL 6090985 at *10 (Bankr. E.D. Wisc. 2021).
[299] Part VIII discusses the issue.

debtor."[300] In an individual case, a further question is whether such fees are reasonably necessary for the "maintenance or support of the debtor or a dependent of the debtor."[301] A similar question is whether legal fees for dischargeability litigation prior to confirmation are not allowable as an administrative expense because dischargeability litigation does not benefit the estate.[302]

The court in *In re Premier Glass Services, LLC,*[303] considered, but did not decide, the extent to which a debtor may deduct anticipated legal expenses for dischargeability litigation in calculating projected disposable income. The court concluded that the debtor had failed to show that the legal fees were based on a reasoned projection and that they were necessary for the continuation, preservation, or operation of the debtor's business. Moreover, the court continued, the evidence did not show that the legal fees were fair and equitable.

Part X further discusses this issue.

B. Actual Results and Projected Disposable Income in Subchapter V Cases

The "fair and equitable" requirement for cramdown confirmation in Subchapter V cases includes a mandate that the debtor pay projected disposable income or its value for the PDI period – three years or a longer period not to exceed five years that the court fixes.[304] The question is whether the debtor must make additional payments if the actual disposable income exceeds projected disposable income for the period. May a court require the debtor to make

[300] § 1191(d)(2).
[301] § 1191(d)(1)(A).
[302] *See* NORTON BANKRUPTCY LAW AND PRACTICE §§ 106.1, 106.6.
[303] 664 B.R. 465, 476-77 (Bankr. N.D. Ill. 2024).
[304] § 1191(c)(2).

regular periodic payments based on projections and to make adjustments on a periodic basis to reflect actual results – a so-called "true -up?"

Good reasons support a requirement for a "true-up" of the debtor's payment obligations based on actual results.

Theoretically, the PDI requirement replaces the absolute priority rule under which creditors are entitled to control the equity in the debtor and, therefore, are entitled to all the profits that the debtor generates. When actual profits exceeded projections, allowing the debtor to retain the excess contradicts the underlying rationale for the substitution and further reduces the ownership interest of creditors, already constrained by limiting the time for payment of profits to the PDI period.

From a practical standpoint, the use of actual income has several advantages. It eliminates speculation at the time of confirmation about future revenues and expenses. Such determinations are far more complicated in a business situation than in the usual Chapter 13 case in which the individual's anticipated compensation and personal expenditures are ordinarily capable of reasonably certain estimation.

Further, it removes institutional concerns about the debtor's incentives to underestimate income and overestimate expenses. Prudent business management supports such an approach, but the debtor's prudence in the cramdown confirmation context may be exaggerated based on its motive of reducing payments to creditors. The fact that the debtor is largely in control of the evidence regarding the projections, at least in the first instance, exacerbates the problem.

Finally, only the debtor may modify a plan after cramdown confirmation.[305] If actual results do not meet projections, the debtor has the ability to return to the bankruptcy court to

[305] § 1193(b).

reduce its obligations, but creditors cannot seek more money if performance is better than expected. From a fairness perspective, it seems anomalous that the debtor has all the upside and none of the downside, whereas creditors have none of the upside and all the downside.

These considerations favor a PDI regime in subchapter V cases that requires a "true-up." Such an approach addresses the theoretical and practical issues arising from payments based solely on projections, although it creates reporting and accounting issues about how to determine what the debtor must pay based on actual results.[306]

Nevertheless, the PDI statute specifically refers to "projected" disposable income,[307] as do the chapter 12[308] and chapter 13[309] PDI tests from which the subchapter V PDI test is derived.[310]

In chapter 13 cases, courts have ruled that the payments must be based on *projected* disposable income and that payments to creditors cannot be based on the debtor's actual income and expenditures.[311] The plan provides for payment of a fixed amount, usually monthly, that the debtor must pay for the required time.

When chapter 12 was enacted as a temporary measure in 1986, it used the same language as the chapter 13 PDI test. But in chapter 12 cases, some courts required that the debtor show, at the end of the case and in connection with an application for a discharge, that the debtor had paid

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[306] *See In re Patel,* 621 B.R. 245 (Bankr. E.D. Cal. 2020). *SBRA Guide, supra* note 3, at 148-49 discusses the case.
[307] § 1191(c)(2).
[308] § 1225(b).
[309] § 1325(b).
[310] The subchapter V PDI test uses the same language as the chapter 12 test, § 1225, as modified by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). When enacted as a temporary measure in 1986, the chapter 12 PDI test used the language of the existing chapter 13 PDI test. BAPCPA amended the chapter 12 test to provide an alternative method of satisfying the test. Section 1191(c)(2)(A) and (B) provide two alternatives for satisfaction of the PDI test in a subchapter V case, which are the same as the two alternatives in the chapter 12 test, as amended by BAPCPA, § 1225(b)(1)(B) and (C). For a discussion of the development of these statutes, see *Update supra* note 8, at § VI(A).
[311] *E.g.,* Anderson v. Satterlee (*In re* Anderson), 21 F.3d 355 (9th Cir.1994).

all disposable income during the plan period to creditors. The court would then determine whether the debtor had paid all disposable income retroactively, and a debtor would have to either pay that amount or the case would be dismissed.[312]

The language in the chapter 12 PDI test in these chapter 12 cases was the same language as the current chapter 12 test in subparagraph (B) of § 1225(b)(1), which is the same as paragraph (A) of § 1191(c)(2). In both chapters, the provisions permit satisfaction of the PDI test if the plan provides that all the projected disposable income of the debtor to be received during the required period will be applied to make payments under the plan.

This chapter 12 case law would support the proposition that PDI in a subchapter V case under paragraph (A) of § 1191(c)(2) should be determined on an actual basis, not a projected one, and would pose the interesting issue of whether subchapter V PDI should be based on a chapter 13 approach – determination of PDI at confirmation on the basis of projected income and expenses – or a chapter 12 approach – determination of PDI at the end of the case as a discharge matter on the basis of actual disposable income.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, however, amended the chapter 12 PDI test to add a second way to satisfy the PDI test, paragraph (C) of § 1225(b)(1), and that alternative method exists in subchapter V cases under paragraph (B) of § 1191(c)(2). In both chapters, the alternative permits satisfaction of the PDI test by payment of the *value* of the PDI. It thus permits a "cash-out" of PDI in a lump sum, something that chapter 13 does not permit.

But a stream of payments may also result in payment of the "value" of PDI under the second alternative, thus permitting confirmation without any "true-up" requirement the first

[312] *E.g.,* Rowley v. Yarnall (*In re* Rowley), 22 F.3d 190 (8th Cir. 1994).

alternative might impose. One contemporary commentator observed that the purpose of the BAPCPA amendment to chapter 12 was to accomplish that result.[313]

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

Several courts have considered the "true-up" issue.

The first was *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*.[314] The debtor's plan proposed to pay creditors from two sources. One was $433,000 the debtor had realized from the liquidation of an estate asset. The other was its actual disposable income over five years. The debtor's projections were that it would have disposable income of $287,000 over three years and $493,000 over five, but the plan provided that creditors might receive less, based on actual earnings.[315]

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

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

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[313] Susan A. Schneider, *Bankruptcy Reform and Family Farmers: Correcting the Disposable Income Problem,* 38 Tex. Tech. L. Rev. 309, 342-43 (2006).
[314] 638 B.R. 137 (B.A.P. 9th Cir. 2022).
[315] The facts are simplified. For a more detailed statement of the facts, amplified by reference to documents in the bankruptcy court's record, see *SBRA Guide*, *supra* note 3, at 154-55 & n. 406.

projected disposable income for the commitment period. The $433,000 payment exceeded the projected disposable income of $287,000 for three years, which the court held was the proper period in the absence of the bankruptcy court's fixing of a longer time.

In *In re Staples*,[316] the *pro se* debtor proposed to pay projected disposable income of $150 per quarter for five years. The bankruptcy court confirmed the plan but changed the payment provision to require the debtor to pay actual disposable income as reflected on quarterly reports, with a minimum quarterly payment of $150.00.

On appeal, the district court stated that paragraph 2(A) of § 1191(c)(2) "simply requires that a plan provide that all projected disposable income be applied to make the distribution payments" and that paragraph 2(B) requires that "the value of property to be distributed is not less than the projected disposable income."[317]

The *Staples* court concluded that "requiring all the disposable income to be reported and distributed does not violate" these rules.[318] The court added that the bankruptcy court's requirements were within its authority under the All Writs Act[319] and § 105(a) because they "were clearly necessary and appropriate under the facts of this case." *Id.* at *4.

In *In re Packet Construction, LLC,*[320] the court conducted a thorough analysis of whether cramdown confirmation requires that a plan contain a "true-up" provision for the debtor to pay more if actual disposable income exceeds projections. The court ruled that it does not:[321]

[316] 2023 WL 119431 (M.D. Fla. 2023).
[317] *Id.* at *3.
[318] *Id*. at *3.
[319] 28 U.S.C. § 1651(a) provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."
[320] 2024 WL 1926345 (Bankr. W.D. Tex. 2024).
[321] *Id.* at * 1.

> [S]ubchapter V does not include a requirement that debtors true up their plan payments if actual income exceeds projected income. There may be circumstances under which a court could determine that the failure to provide actual disposable income, rather than projected disposable income, was not fair and equitable to a non-accepting impaired class of unsecured creditors. But in general, the Court does not believe that a true-up requirement can be imposed on subchapter V debtors.

The *Packet Construction* court first looked to the language of the statute and concluded that the ordinary meaning of "projected" is "estimated or forecast on the basis of current trends or data." A true-up requirement, the court reasoned, would read the word "projected" out of the statute. A forward-looking approach, the court continued,[322] was consistent with the approach of the Supreme Court in the chapter 13 context in *Hamilton v. Lanning*.[323]

The court declined to follow *Staples*,[324] noting that *Staples* did not purport to announce a general rule and that the authorities it cited did not support imposition of a true-up requirement as a general rule.[325]

The *Packet Construction* court then discussed the chapter 12 and chapter 13 case law regarding projected disposable income, observing that the chapter 13 cases overwhelmingly adopt a prospective interpretation but that some chapter 12 cases required a true-up.[326] The court explained that the approach of the chapter 12 cases had been criticized and that the amendment of chapter 12's PDI test indicated that the chapter 12 approach should not be followed.

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[322] *Id.* at *3.
[323] 560 U.S. 505 (2010).
[324] *In re* Staples, 2023 WL 119431 (M.D. Fla. 2023).
[325] *In re* Packet Construction, LLC, 2024 WL 1926345 at *3 (Bankr. W.D. Tex. 2024).
[326] *Id.* at *4-7.

Moreover, the court noted, the chapter 12 result was contrary to the Supreme Court's ruling in *Hamilton v. Lanning* in analyzing a closely analogous statute.[327]

Finally, the *Packet Construction* court noted that the inability of anyone other than the debtor to modify a plan after confirmation indicated that, "unless the debtor so chooses, no other party can force [the debtor] to increase projected payments to meet the actual income."[328]

The court acknowledged that a debtor after cramdown confirmation can modify a plan to reduce payments but concluded that "this result is not absurd."[329] The court explained:[330]

> [D]etermining projected disposable income is not a fanciful exercise; it must be established based on objective evidence, and it sets out a demanding standard for many debtors to meet. Vigilant creditors can and should evaluate and, if necessary, challenge projections before plans are confirmed. But construed properly, this aspect of subchapter V also provides incentive for debtors to exceed projections, because they get to keep the surplus. Perhaps Congress structured the statute this way precisely to induce small business growth and to provide yet another incentive for parties to bargain on consensual plans.
>
> In any case, whether it is ideal policy is not for courts to say. Congress has spoken and, in this Court's view, it has done so clearly. The result is not absurd, and the Court has no hesitation enforcing it.

The court concluded with an observation about the possibility of requiring a true-up in other circumstances:[331]

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[327] *Id.* at *5-6.
[328] *Id.* at *7.
[329] *Id.* at *7.
[330] *Id.* at *7 (footnote omitted).
[331] *Id.* at *7-8 (footnotes omitted).

> [S]ubchapter V includes no general rule imposing a true-up requirement on debtors confirming cramdown plans. It does not necessarily rule out the possibility that circumstances could arise under which a court would have the power to impose a true up. After all, section 1191 states that the "fair and equitable" test "includes" the requirement of meeting one of the alternative "projected disposable income" tests; because "includes" is expressly non-limiting in the Bankruptcy Code, other elements could be added to the test, as circumstances warrant, beyond those actually present in the statute.
>
> The Court is skeptical that circumstances exist in which it is appropriate to require a true up. It appears that Congress has spoken squarely on this issue, ordaining that it is future-looking projections and not subsequent realities that determine the income to be contributed to a plan. Courts should be very wary of altering this policy choice in a significant way by requiring the devotion of not just projected but also actual disposable income, as determined retrospectively, to the plan.
>
> But this question need not be determined here. No special circumstances have been alleged, and therefore no true up is warranted.

The court in *In re Nelkin & Nelkin, P.C.,*[332] likewise concluded that the plain language of § 1191(c)(1)(A) precludes a true-up requirement. The court reasoned that the normal meaning of "projected" is "estimated or forecast on the basis of current trends or data"[333] and that a retroactive analysis, which a true-up requires, "is not one that is estimated or forecast."[334]

[332] 662 B.R. 550, 555-56 (Bankr. S.D. Tex. 2024).
[333] *Id.* at 565 (*quoting In re* Packet Construction, LLC, 2024 WL 1926345 at *2 (Bankr. W.D. Tex. 2024) (*quoting Projected,* OXFORD DICTIONARIES, https://premium.oxforddictionaries.com/us/definition/american_english/projected (last visited April 29, 2024))).
[334] *Id.* at 555.

The *Nelkin* court also reasoned that § 1191(c)(1)(B), which permits payment of the value of projected disposable income, requires a prospective determination of projected disposable income. Reading § 1191(c)(1)(A) as requiring a retroactive calculation, the court concluded, would create inconsistencies in the statute.[335]

Like the *Packet Construction* court, the *Nelkin* court concluded that the "fair and equitable" requirement in § 1191(c) *includes* the PDI requirement in § 1191(c)(2) and that, therefore, § 1191(c)(2) "does not preclude a bankruptcy court's ability to order one under certain conditions."[336] Thus, the court stated, "if necessary or appropriate to ensure that a non-consensual plan is fair and equitable, a bankruptcy court may order additional requirements, other than the ones specifically enumerated under § 1191(c)."[337]

The *Nelkin* court did not address what specific circumstances might warrant a true-up because the plan provided for one. The court concluded that the plan did not comply with § 1191(c)(2), however, because the plan did not provide for the debtor "to report actual disposable income so interested parties have no means of ensuring that Debtor is complying with the Plan's requirement to disburse all of Debtor's projected disposable income."[338]

The court in *In re Premier Glass Services, LLC*,[339] addressed the "true-up" issue in the context of a debtor's calculation of projected disposable income that included deductions for reimbursements to the debtor's members for taxes they would incur on "pass-through" income of the debtor, capital replacement costs, and attorney's fees for ongoing litigation with a creditor. In ruling that the evidence had not established that these items could be deducted in

[335] *Id.* at 566.
[336] *Id.* at 566.
[337] *Id.* at 566.
[338] *Id.* at 567.
[339] 664 B.R. 465, 478 (Bankr. N.D. Ill. 2024).

calculating projected disposable income, the court noted that the plan provided no upward adjustment in payments for creditors if these amounts were less than projected and observed:[340]

> While courts disagree about whether a bankruptcy judge can *require* a true-up, there is no binding precedent to prevent a court from confirming a plan where a debtor has included such a provision. A true-up may be especially appropriate where, as here, a debtor sets aside large reserves for projected capital expenditures that benefit its insiders at the expense of its creditors.
>
> A true-up seems especially appropriate for the legal fees deduction, because it does not appear there is any real relationship between past legal expenses and projections.

C. Determination of Length of Period for Payment of Projected Disposable Income

The "fair and equitable" requirement for cramdown confirmation in § 1191(c)(2) requires that the debtor commit projected disposable income for three years "or such longer period not to exceed 5 years as the court may fix." The statute contains no guidance for determining the length of the period.

The projected disposable income tests in cases under chapter 12[341] and 13[342] and in traditional chapter 11 cases of individuals[343] also prescribe a period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the "commitment period," but only chapter 13 specifically uses the term by defining the "applicable commitment period" – the period for which the debtor must use

[340] *Id.* at 478 (footnote omitted).
[341] § 1225(b).
[342] § 1325(b).
[343] § 1129(a)(15). The requirement applies only if an unsecured creditor invokes it.

projected disposable income to pay unsecured creditors – as three years for "below-median" debtors and five years for "above-median" debtors.[344]

In chapters 12 and 13 and in traditional chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. In a chapter 12 case and in the case of a below-median chapter 13 debtor, the court must decide whether to *approve* the term of a plan longer than the required three-year commitment period if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor wants.[345] The commitment period is five years in a

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[344] § 1125(b)(4).

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

In chapter 13 cases, the statute fixes the "applicable commitment period" for payment of PDI as three years for a below-median debtor and five years for an above-median debtor. The plan of a below-median debtor cannot exceed three years unless the court approves a longer period, § 1325(d)(2), but the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

Thus, the court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years, §§ 1222(c), 1322(d), but does not determine what the minimum commitment period is.

In chapter 11 cases, § 1129(a)(15) specifies the commitment period as the longer of five years or the period for payments under the plan. The terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments. The court neither approves nor fixes the commitment period.

Until enactment of BAPCPA in 2005, the chapter 13 projected disposable income test required use of projected disposable income for only three years for all debtors, regardless of the length of the plan. § 1325(b)(1)(B) (2000) (current version at § 1325(b)(4) (2018)). Further, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. § 1322(c) (2000) (current version at § 1322(d) (2018)) (BAPCPA renumbered subsection (c) as subsection (d)); *see* CHAPTER 13 PRACTICE AND PROCEDURE. *supra* note 23, at § 4:9. The BAPCPA amendments require commitment of PDI for five years in the case of an above-median debtor, and therefore, an above-median debtor's plan must have a term of five years.

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* CHAPTER 13 PRACTICE AND PROCEDURE § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under §1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

chapter 13 case of an above-median debtor and the longer of five years or the term of the plan in a traditional chapter 11 case.

Because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent in other chapters regarding the length of the period does not provide any guidance; those PDI tests do not present the issue that §1191(c)(2) presents.

Some courts have described three years as a "default" or "baseline" requirement for the length of the commitment period.[346] For example, the court in *In re Urgent Care Physicians, Ltd.*,[347] considered arguments by the U.S. Trustee and creditors that the court should require the debtor to make payments for five years for the plan to be fair and equitable instead of the three years that the plan proposed. 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."[348] The court added that Congress's concern for employees, customers, and others, as well as for the small business itself,

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

[346] Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (*In re* Orange County Bail Bonds, Inc.), 638 B.R. 137 (B.A.P. 9th Cir. 2022); *In re* Urgent Care Physicians, Ltd., 2021 WL 6090985 (Bankr. E.D. Wisc. 2021).

[347] 2021 WL 6090985 (Bankr. E.D. Wisc. 2021).

[348] *Id.* at *10.

"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."[349]

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.[350]

The court concluded:[351]

> 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.)*[352] the Bankruptcy Appellate Panel of the Ninth Circuit described the three-year period as a "baseline requirement:"[353]

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[349] *Id.*
[350] *Id.* at *11.
[351] *Id.* at *11 (citation omitted):
[352] 638 B.R. 137 (B.A.P. 9th Cir. 2022).
[353] *Id.* at 146.

> 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,[354] 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.[355]

In re Trinity Family Practice & Urgent Care PLLC[356] adopted a different approach. The court ruled that a plan for payment of PDI for three years satisfied the good faith requirement of § 1129(a)(3) but that the debtor had not established that the three-year PDI period was fair and equitable under § 1191(b) and (c)(2)(A). Because the court concluded that the evidence was

[354] *Id.*
[355] *Id*. at 146-47.
[356] 661 B.R. 793 (Bankr. W.D. Tex. 2024).

insufficient for it to determine if it should fix a longer plan payment period up to five years, the court denied confirmation and allowed the debtor an opportunity to propose an amended plan.

The opinion analyzes the court's role in considering the term of the plan and sets out the non-exclusive factors that guide a court in exercising its discretion to determine the term of the plan.

In *Trinity Family Practice,* the debtor proposed to pay PDI for three years, resulting in a distribution to the unsecured class of $ 38,761.29, an 8.2% distribution. A partially secured creditor voted its secured and unsecured claims to reject the plan and objected to cramdown confirmation on the grounds that the three-year period was not proposed in good faith as § 1129(a)(3) requires and that the plan was not fair and equitable under § 1191(b) and (c).

Taking a "totality of the circumstances" approach to the question of good faith, the court concluded that the plan satisfied the factors the courts have considered in evaluating the good faith requirement of § 1129(a)(3): (1) whether the plan provides a result consistent with the Bankruptcy Code's objectives; (2) whether the proposed plan has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected; and (3) whether the debtor exhibited fundamental fairness in dealing with its creditors.[357]

Specifically, the court ruled that the proposal of a three-year plan, as § 1191(c)(2) expressly permits, "does not constitute lack of good faith solely because the Debtor could pay more if the proposed period of plan payments were longer. The Debtor's proposal of a three-year plan payment period is not consistent with the type of misconduct, actions, and behavior often accompanying a finding of a bad faith plan proposal."[358]

[357] 661 B.R. at 813.
[358] *Id.* at 815 (footnotes omitted).

The *Trinity Family Practice* court interpreted the "fair and equitable" requirement of § 1191(b) and the provision in § 1191(c)(2) for the court to fix the PDI period between three and five years as involving two inquiries when a plan provides for payment of PDI for three years. First, the court must determine whether the three-year plan is "fair and equitable." Second, the court must determine whether it should fix a longer period not to exceed five years. [359]

The court began by noting that the "fair and equitable" provision in § 1191(b) *includes* the requirement that it comply with § 1191(c). The court explained:[360]

> After the court determines that the proposed plan is in compliance with the baseline requirements of § 1191(c), the court has the "discretion to require more as a condition of finding [that the] plan is fair and equitable."[361]. . . In other words, meeting the baseline requirements of § 1191(c) is a *necessary* condition for the subchapter V plan to be fair and equitable, but does not assure that the plan is fair and equitable.

The *Trinity Family Practice* court noted the ruling in *Urgent Care,*[362] discussed above, that "a plan term of three years is more reasonable, generally speaking (or as a default) than a five-year term, absent unusual circumstances"[363] and agreed that the language of § 1191(c)(2)(A) creates a "baseline plan payment period" of three years.

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[359] The *Trinity Family Practice* court did not expressly state that the inquiry includes two separate components. It did, however, explain that its task was to determine "whether a subchapter V plan that provides for payment of all of the Debtor's projected disposable income to creditors for a period of three years is fair and equitable under § 1191(b) and (c)(2), or if the Court should fix a longer payment period." 661 B.R. at 812. Moreover, the court consistently noted that its determination involved both questions. *Id.* at 816, 823, 825, 827. Separate identification of both components is helpful for analytical purposes.

[360] *Id.* at 815-16 (emphasis in original).

[361] The court quoted *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137, 146 (B.A.P. 9th Cir. 2022), discussed in earlier text.

[362] *In re Urgent Care Physicians,* 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021).

[363] *Trinity Family Practice,* 661 B.R. at 818.

But the *Trinity Family Practice* court disagreed with *Urgent Care's* statement that a three-year period is generally more reasonable absent "unusual circumstances."[364] The court reasoned that requiring an objecting party to prove "unusual circumstances" would "impermissibly shift the burden under § 1191(c)(2)(A) from the debtor to the creditor," contrary to the court's conclusion that the debtor has the burden of proof regarding confirmation of a plan.[365] Further, the court observed, *Urgent Care* did not consider what "unusual circumstances" might be or identify factors for a court to consider in deciding whether to approve a three-year payment period or, if necessary, fix a longer payment up to five years.[366]

The court noted, as earlier text discusses, that § 1191(c)(2) provides no guidance or standards on how the court should fix the plan payment period and that provisions for determining the period for plan payments in chapter 12 and 13 cases and in individual chapter 11 cases likewise provide no guidance because the court does not fix the time in such cases.[367] The court reasoned that "Congress intended to leave to the sound discretion of bankruptcy courts the sole authority to fix the plan payment period in subchapter V cases."[368]

Based on this analysis, the court concluded that it had "broad discretion" in deciding whether the proposed three-year period was "fair and equitable" or whether it should fix a longer period not exceeding five years.[369] The court then discussed the confirmation process for addressing the payment period issue and identified the non-exclusive factors that guide the court's determinations.

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[364] *Id.* at 818.
[365] *Id.*
[366] *Id.*
[367] *Id.* at 820.
[368] *Id.* at 819.
[369] *Id.* at 821.

Because § 1189 provides that only the debtor may file a plan and because § 1191(c)(2)(A) establishes a three-year baseline payment period, the court reasoned, a bankruptcy court should give "appropriate deference" to the debtor's business judgment when considering the debtor's proposed period of payments. This is consistent, the court continued, with the intent of Congress to create a quick, efficient reorganization process that results in discharge as soon as possible. In addition, it acknowledges the shorter life span of the average small business while properly balancing competing interests of debtors and creditors.[370] In the absence of an objection to a three-year period, therefore, the court would not likely raise the issue of a longer period *sua sponte*, although it has the discretion to do so.

If an objection is filed, however, the debtor's proposal is no longer entitled to deference, and the debtor bears the burden of showing that the proposed payment period is fair and equitable.[371]

At the conclusion of the hearing on whether the court should require a longer period, the court explained, it has these alternatives:[372]

1. Conclude that a three-year period is fair and equitable and confirm the plan;

2. Conclude that the three-year period is not fair and equitable and deny confirmation;

3. Fix a longer period up to five years and confirm the plan; or

4. Determine it has insufficient evidence to fix the payment period and deny confirmation.

[370] *Id.* at 821.
[371] *Id.* at 821-22.
[372] *Id.* at 822.

The *Trinity Family Practice* court then identified five factors for a court to consider in determining whether a three-year payment period is fair and equitable and whether to fix a longer period:[373]

1. Capital reserves or capital expenditures during the period of plan payments;

2. Reasonableness of income and expenses set forth in the plan projections during the period of plan payments as compared to historical operations and operations during the postpetition, preconfirmation time period;

3. Salary and/or other payments to insiders during the period of plan payments;

4. Risks and consequences of a longer period of plan payments; and

5. Any other unique or extraordinary facts specific to the case.

The court emphasized that the debtor has the burden to prove that each of the factors support the proposed payment period, that the factors are not exclusive, and that no factor alone is dispositive or controlling with regard to fixing the payment period under § 1191(c)(2)(A).[374]

The *Trinity Family Practice* court concluded that the debtor had presented insufficient evidence relating to the first four factors for it to make a determination that the three-year payment period was fair and equitable or to fix a longer plan payment.[375] Neither the debtor nor the creditor offered any argument or evidence of unique or extraordinary facts or circumstances. Accordingly, the court denied confirmation without prejudice and allowed the debtor an opportunity to file an amended plan.

In *In re Premier Glass Services, LLC,*[376] the court noted that the debtor's projections should be for five years, not the four years proposed in the plan, in view of the court's authority

[373] *Id.* at 822.
[374] *Id.*
[375] *Id.* at 823-27.
[376] 664 B.R. 465 (Bankr. N.D. Ill. 2024).

under § 1191(c)(2) to fix a commitment period of five years. In denying confirmation because the debtor had not established that its calculation of disposable income was accurate, the court applied the *Trinity Family Practice* factors in determining that the proposed plan was not "fair and equitable."[377]

The court confirmed a plan providing for a three-year PDI period in *In re Edgewood Food Mart, Inc.*[378] 2024 WL 4712996 (Bankr. N.D. Ga. 2024). Noting the different approaches of *Urgent Care* and *Trinity Family Practice,* the court concluded that a three-year period was appropriate under either analysis.[379] The court observed that the plan paid creditors over three years what they would have received in a five-year plan. The quicker payment was possible because the debtor's principal had committed to fund professional fees and had caused an affiliated entity that was the debtor's landlord to agree to assumption of the lease with its cure claim treated as a general unsecured claim. The court also observed that the debtor's principal would be providing postpetition management services without compensation, whereas he had previously received a salary.

[377] *Id.* at 473-74. Sections VI(A)(3) and (4) discuss the *Premier Glass* court's consideration of the calculation of disposable income.
[378] 2024 WL 4712996 (Bankr. N.D. Ga. 2024).
[379] *Id.* at *14.

VII. TERMINATION OF TRUSTEE'S SERVICE AFTER CRAMDOWN CONFIRMATION

When the court confirms a consensual plan under §1191(a), § 1183(c)(1) provides for termination of the trustee's service upon substantial consummation,[380] which ordinarily occurs when distribution commences.

Subchapter V does not specify a termination date for the trustee's service when confirmation of a plan occurs under the cramdown provisions of §1191(b). Because § 1194(b) provides for the trustee to make payments under the plan unless the plan or confirmation order

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[380] § 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.

Most courts rule that "commencement of distribution" occurs when the debtor makes the first payment to a creditor under the plan. *E.g., In re* National Tractor Parts, Inc., 2022 WL 2070923 at * 4 (Bankr. N.D. Ill. 2022) ("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.") (subchapter V case); *accord, e.g., 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 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).

Some courts, however, have concluded that commencement of distribution does not occur merely because the debtor has made some payments under the plan. *E.g., In re* Dean Hardwoods, Inc., 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010) ("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."); *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 Tractor Parts, Inc.,* 2022 WL. 2070923 at *5 (Bankr. N.D. Ill. 2022).

provides otherwise, the trustee's service continues, at a minimum, until the trustee has made the required disbursements. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge under § 1192. Thus, the appropriate time for termination of the trustee's service is when the debtor has completed the required payments.[381]

Section 1194(b) permits the debtor, rather than the trustee, to make plan payments if the plan or order confirming the plan so provides. The practice is common because, in many cases, no one, including the subchapter V trustee, wants the added expense of compensating the trustee for making distributions.[382]

Four bankruptcy courts have concluded that, when the debtor will make payments under a plan after cramdown confirmation, the court may order the termination of the subchapter V trustee's service upon substantial consummation of the plan and the trustee's filing of a final report shortly after substantial consummation.

In *In re DynoTec Industries, Inc.,*[383] the court confirmed a liquidation plan for the debtor under the cramdown provisions of § 1191(b). After confirmation, the subchapter V trustee sought compensation for postconfirmation services in connection with the collection of accounts receivable and sought to "surcharge" the final plan payment due to the creditor secured by the accounts. After ruling that the trustee was not entitled to compensation because he had no duties to perform after confirmation and because the application was time-barred under the terms of the confirmation order, the court addressed termination of the subchapter V trustee's services. The

[381] *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 68, at 3-16 ("Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee.").
[382] See *SBRA Guide supra* note 3, at § IX(B).
[383] 2024 WL 2003065 (Bankr. D. Minn. 2024).

court summarized subchapter V's provisions for termination of a subchapter V trustee's services:[384]

> If the Plan in this case had been confirmed under § 1191(a), the Trustee's appointment would have terminated automatically, by operation of law, upon substantial consummation. 11 U.S.C. § 1183(c)(1). Termination is more fluid when a plan is confirmed under § 1191(b). For nonconsensual plans, the "default" role of the trustee is to administer all plan payments for the life of the plan. 11 U.S.C. § 1194(b). The plan commitment period in a nonconsensual plan can vary from 3 to 5 years, due to the rule of construction set forth in § 1191(c). Alternatively, a debtor can opt out of the default and administer its own plan payments after confirmation. 11 U.S.C. § 1194(b). It is quickly apparent why the Code does not include a parallel provision for cases confirmed under § 1191(b): a trustee could have a duty to handle plan payments for 3 years, 5 years, or not at all, depending on the specific terms of the plan and confirmation order in each nonconsensual case.
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> This is not a drafting error. Flexibility improves success rates in small business cases. A contentious case may justify the ongoing administrative expense of maintaining the trustee's appointment for the entire plan commitment period. By contrast, some Subchapter V cases are confirmed under § 1191(b) solely due to the "apathetic creditor problem." Apathetic creditors do not warrant the expense of a trustee for the entire post-confirmation period. Similarly, a cash-strapped debtor may want to administer its own plan payments because it is an inexpensive option permitted by § 1194(b). To eliminate administrative expense entirely, frugal debtors can request a confirmation order that

[384] *Id.* at *3 (footnote omitted).

terminates the Trustee's appointment upon substantial consummation of their nonconsensual plan. And, there is scant risk to doing so. The Code permits trustees to be re-appointed in consensual cases, notwithstanding the automatic termination described in § 1183(c)(1). A fortiori, a trustee who is terminated after substantial consummation of a nonconsensual plan can also be reappointed, or the U.S. Trustee can serve as trustee, "as necessary," per § 1183(a). Alternatively, the debtor can reduce the scope of the trustee's post-confirmation duties without actually terminating its appointment, thereby reducing post-confirmation expense. Ultimately, a trustee's role should be "right sized" to suit the needs of each case.

The court speculated that, because the confirmation order "all but eliminated" the trustee's role after confirmation, the trustee's services should have been terminated upon substantial consummation of the plan. The court then ordered termination of the trustee's services because he had filed a final report and had no further duties in the case, subject to reappointment if needed.[385]

The court in *In re Florist Atlanta, Inc*.[386] applied the approach of *DynoTec* to terminate the services of the subchapter V trustee upon substantial consummation of a cramdown plan providing for the debtor to make plan payments and the trustee's filing of a final report within 14 days thereafter.

The court observed that, after the debtor made its first payment under the plan, substantial consummation would occur and that, thereafter, the subchapter V trustee would have only four duties: (1) the filing of a final report and account of the administration of the estate; (2) the filing of postconfirmation reports as the court orders; (3) appearance at any hearing concerning

[385] *Id.* at *3.
[386] 2024 WL 3714512 (Bankr. N.D. Ga. 2024).

postconfirmation modification or sale of property of the estate; and (4) the performance of certain duties if the court removed the debtor from possession.[387]

The confirmed plan did not contemplate that the trustee perform any duties after its substantial consummation and no one had requested that the trustee file postconfirmation reports. Thus, the court reasoned: "Because the Debtor will make plan payments in this case, the Subchapter V Trustee will have nothing to do after filing the final report, subject to the possible occurrence of future events that would require trustee services."[388]

The court concluded that, in these circumstances, it was appropriate to terminate the subchapter V trustee's services upon substantial consummation and the filing of the trustee's final report. The court explained:[389]

> Section 1183(c)(1) of the Bankruptcy Code provides for termination of the service of a subchapter V trustee upon substantial consummation of a consensual plan confirmed under § 1191(a). Subchapter V has no provision for termination of a subchapter V trustee's services after cramdown confirmation under § 1191(b). But nothing in subchapter V limits the court's authority to similarly terminate the services of a trustee upon substantial consummation of a cramdown plan confirmed under § 1191(b) when a subchapter V trustee will not be making payments to creditors and will have no postconfirmation duties to perform. None of the parties at the confirmation hearing objected to such termination of the Subchapter V Trustee's services in this case.

[387] *Id.* at *2.
[388] *Id.* at *2.
[389] *Id.* at *2.

In these circumstances, it is appropriate for the Court to order the termination of the services of the Subchapter V Trustee upon substantial consummation of the plan (which will occur when the debtor commences plan payments) and the filing of the Subchapter V Trustee's final report. *See In re DynoTec Industries, Inc.*, 2024 WL 2003065 (Bankr. D. Minn. 2024).

The *Florist Atlanta* court recognized that the services of a subchapter V trustee would be necessary if the Debtor sought postconfirmation modification of the plan, wanted to sell property of the estate, or was removed from possession. Accordingly, the court ordered that the termination of the trustee's services be without prejudice to the reappointment of a subchapter V trustee if any of these events occurred.[390]

The debtors in *In re Lager*[391] *s*ought entry of a final decree after substantial consummation of a cramdown plan providing for the debtor to make plan payments. Bankruptcy Rule 3022 provides for entry of a final decree "after an estate has been fully administered."

The court noted that the Advisory Committee Note to Bankruptcy Rule 3022 stated the factors a court should consider in determining whether an estate has been administered:

(1) whether the order confirming the plan has become final;

(2) whether deposits required by the plan have been distributed;

(3) whether the property proposed by the plan to be transferred has been transferred;

(4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan;

(5) whether payments under the plan have commenced; and

[390] *Id.* at *3.
[391] 2024 WL 3928157 (Bankr. N.D. Tex. 2024).

(6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

The *Lager* court explained that the first and sixth factors were satisfied because a confirmation order had become final, and nothing was pending before the court; the second factor was not applicable because the plan did not require any deposits. The remaining factors, the court noted, all relate to whether the plan has been substantially consummated.[392] Because substantial consummation had occurred upon the commencement of payments, the court concluded that the case had been fully administered under a traditional analysis.[393]

The subchapter V trustee, however, objected to entry of a final decree because she still had duties to fulfill under the Bankruptcy Code, primarily the duty to file a final report as § 1183(b)(1) (incorporating § 704(a)(9)) requires. In the circumstances of the case, however, the court concluded that it was appropriate to order the termination of the trustee's services after substantial consummation.[394]

The court reasoned that, if the need for the trustee's services other than the filing of a final report arose, the case could be reopened, and the trustee could be reappointed. Further, the court continued, because the trustee had not administered any assets and was not responsible for making plan payments, leaving the case open for the filing of a final report was not sufficient cause for keeping the case open.[395]

The court nevertheless concluded that entry of a final decree would be inappropriate because the debtor intended to reopen it after completion of plan payments to obtain a discharge.

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[392] *Id.* at *9.
[393] *Id.* at *10.
[394] *Id.* at *10.
[395] *Id.* at *11.

A logical alternative, the court concluded, was to administratively close the case, subject to reopening when the case was ripe for discharge.

The court, therefore, ordered that the trustee file a final report within 14 days and that the case be administratively closed after payment of the trustee's compensation for postpetition services, subject to reopening after completion of plan payments for the debtors to request a final decree, a discharge order, and the trustee's filing of a final report.[396]

The court in *In re Carolina Sleep Shoppe*[397] entered a final decree and closed the case after cramdown confirmation upon substantial consummation where the plan provided for the debtor to make payments under the plan and the confirmation order provided for termination of services of the subchapter V trustee upon substantial consummation.

The court concluded that the provision of the confirmation order discharged the trustee upon substantial consummation and that the case had been fully administered under the factors in the Advisory Committee Note to Bankruptcy Rule 3022, discussed above. Accordingly, the court ruled, it was required to enter a final decree and close the case under § 350(a) and Bankruptcy Rule 3022.

The *Carolina Sleep Shoppe* court addressed two procedural matters. First, the court directed the subchapter V trustee to file a report of no distribution as a simple docket entry to inform the court and parties of the discharge of the trustee. Second, the court noted that the appropriate way to request to close the case is through a motion rather than including such a request in a final report.[398]

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[396] *Id.* at *12.
[397] 2025 WL 1122411 (Bankr. E.D.N.C. 2025).
[398] *Id.* at *9.

Although *Florist Atlanta, Lager,* and *Carolina Sleep Shoppe* have the same practical result – effective termination of the trustee's services upon substantial consummation of a cramdown plan where the debtor makes plan payments – they employ different approaches to closing of the case.

The *Florist Atlanta* court terminated the trustee's services but did not address closing of the case. The *Lager* court administratively closed the case, subject to reopening. Although the *Lager* court stated that termination of the trustee's services would be appropriate, its order provided for the trustee to file a final report in connection with reopening of the case for entry of a final decree and for discharge of the trustee upon completion of plan payments. In *Carolina Sleep Shoppe,* the court closed the case.

VIII. APPLICATION OF § 523(a) EXCEPTIONS TO DISCHARGE OF CORPORATION AFTER CRAMDOWN DISCHARGE

Consensual confirmation of a plan in a subchapter V case results in a discharge under § 1141(d), which also governs discharge in all traditional chapter 11 cases. In an individual case, § 1141(d)(2) makes the exceptions to discharge in § 523(a) applicable, but the § 523(a) exceptions do not apply to the discharge under § 1141(d) of an entity in either a subchapter V case or a traditional chapter 11 case.[399]

When cramdown confirmation in a subchapter V case occurs under § 1191(b), however, § 1192 governs the discharge. Section 1192(2) excepts debts from the cramdown discharge "of the kind specified in § 523(a)." Unlike § 1141(d)(2), § 1192(2) does not limit applicability of the § 523(a) exceptions after cramdown confirmation to individuals.

[399] Halo Human Resources, LLC v. American Dental of LaGrange (*In re* American Dental of LaGrange), 2025 WL 384536 (Bankr. M.D. Ga. 2025); Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), 2020 WL 13881425 (Bankr. E.D. Tex. 2020).

The language of § 1192(2), therefore, indicates that the § 523(a) exceptions apply to the discharge of an entity, as well as to the discharge of an individual, after cramdown confirmation in a subchapter V case.

The language in the preamble of § 523(a) leads to a different conclusion. As amended by SBRA, the preamble to § 523(a) states:

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

SBRA added the italicized "1192" to the list of other sections, which are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases. As amended, therefore, § 523(a) states, "A discharge under section . . . 1192 . . . does not discharge an individual debtor from any debt" that § 523(a) lists.

The implication of this language is that § 1192(2)'s reference to debts "of a kind specified" in § 523(a) includes only debts that § 523(a) excepts, which are only debts of individuals. In other words, although §1192(2) states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of an entity has no operative effect because § 523(a), as amended, applies only to individuals. Under this analysis, the discharge of an entity after cramdown confirmation is not subject to the exceptions in § 523(a).

Courts disagree as to whether the § 523(a) exceptions apply to the discharge of an entity after cramdown confirmation. In addition to the text of the two statutes, the debate involves analysis of the context of the statutes, chapter 11 policy, and legislative history.[400]

[400] For detailed discussion of the reasons that support each of the competing interpretations and why the interpretation of the bankruptcy courts is the better one, see Paul W. Bonapfel and Robert Schaaf, *Do § 523(a)*

The Bankruptcy Appellate Panel for the Ninth Circuit[401] and most bankruptcy courts considering the issue[402] have concluded that the § 523(a) exceptions do not apply to the discharge of an entity. The Fourth,[403] Fifth,[404] and Eleventh[405] circuits, a district court,[406] and some bankruptcy courts[407] have ruled that they do.

Exceptions to Discharge Apply to The Discharge of a Corporation in a Subchapter V Case After "Cramdown" Confirmation Under § 1191(b)? 32 NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE (No. 4 Dec. 2023); 8 COLLIER ON BANKRUPTCY ¶ 1192.03[2] (16th ed.); *SBRA Guide*, *supra* note 3, at § X(D)(2).

[401]Lafferty v. Off-Spec Solutions, LLC (*In re* Off-Spec Solutions, LLC), 647 B.R. 337 (B.A.P. 9th Cir. 2023), notice of appeal filed, Ninth Circuit Case No. 23-60034 (July 20, 2023), appeal dismissed on stipulation of the parties, 2023 WL 9291577 (Nov. 2. 2003).

[402] Spring v. Davidson (*In re* Davidson), 2025 WL 51126 (Bankr. N.D. Fla. 2025); Primary Investments Group, Inc., v. RA Custom Design, Inc. (*In* re RA Custom Design, Inc.), 2024 WL 607716 (Bankr. N.D. Ga. 2024); Chicago & Vicinity Laborers' District Pension Plan v. R & W Clark Construction, Inc. (*In re* R & W Clark Construction, Inc.), 656 B.R. 628 (Bankr. N.D. Ill.), *rev'd* 2024 WL 4789403 (N.D. Ill. 2024)**;** BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC). 650 B.R. 521 (Bankr. M.D. Fla. 2023), *rev'd,* 142 F.4th 1323 (11th Cir. 2025); Nutrien Ag Solutions v. Hall (*In re* Hall), 651 B.R. 62 (Bankr. M.D. Fla. 2023); Avion Funding LLC v. GFS Industries, LLC (*In re* GFS Industries, LLC), 647 B.R. 337 (Bankr. W.D. Tex. 2022), *rev'd,* 99 F.4th 223 (5th Cir. 2024); Jennings v. Lapeer Aviation, Inc. (*In re* LaPeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021); Cantwell-Cleary Co. v. Cleary Packaging, LLC (In *re* Cleary Packaging, LLC), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc., Crabcake Factory USA (*In re* Satellite Restaurants, Inc., Crabcake Factory USA), 626 B.R. 871, 876 (Bankr. D. Md. 2021).

[403] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022). After the Fourth Circuit's ruling, the debtor amended its subchapter V election to remove it and to proceed in a traditional chapter 11 case. The withdrawal of the election effectively mooted the dischargeability action because exceptions to the discharge of an entity do not exist in a traditional chapter 11 case. The court denied confirmation of plans filed by the debtor and by the creditor in *In re Cleary Packaging, LLC*, 657 B.R. 780 (Bankr. D. Md. 2023). For a discussion of the order denying confirmation, see *Update*, *supra* note 8, at § III.

[404] Avion Funding LLC v. GFS Industries, LLC (*In re* GFS Industries, LLC), 99 F. 4th 223 (5th Cir. 2024).

[405] BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC), 142 F.4th 1323 (11th Cir. 2025).

[406] Chicago & Vicinity Laborers' District Pension Plan v. R & W Clark Construction, Inc. (*In re* R & W Clark Construction, Inc.), 2024 WL 4789403 (N.D. Ill. 2024).

[407] Marmic Fire & Safety Co., Inc. v ETG Fire, LLC (*In re* ETG Fire, LLC), 2025 WL 915381 (Bankr. D. Co. 2025); Christopher Glass & Aluminum, Inc. v. Premier Glass Services, LLC (*In re* Premier Glass Services, LLC), 2024 WL 3808696 (Bankr. N.D. Ill. 2024); Ivanov v. Van's Aircraft, Inc. (*In re* Van's Aircraft, Inc.), 2024 WL 2947601 (Bankr. D. Ore. 2024); Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), 2020 WL 13881422 (Bankr. E.D. Tex. 2020); *In re* Duntov Motor Co., LLC. Docket No. 21-40348-MXM-11, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021). Another bankruptcy court ruled that a judgment for patent infringement against a corporation in a subchapter V case was excepted from discharge under § 523(a)(6) as a willful and malicious injury without addressing whether § 523(a) exceptions apply to the discharge of a corporation or citing the applicable subchapter V discharge provision, § 1192(2). Concrete Log Systems, Inc. v. Better Than Logs, Inc. (*In re* Better Than Logs, Inc.), 631 B.R. 670, 688–89 (Bankr. D. Mont. 2021).

The court in *Duntov Motor Co.* later concluded that the creditor had not met its burden of establishing nondischargeability. *In re* Duntov Motor Company, LLC, 2023 WL 8252914 at *29-31, n. 265 (Bankr. N.D. Tex. 2023). The court in *Tonka* later dismissed the complaint after confirmation of a consensual plan. Sun City Truck Sales v. Tonka Int'l. Corp. (*In re* Tonka Int'l. Corp.), 2020 WL 13881425 (Bankr. E.D. Tex. 2020).

IX. INJUNCTION IN PLAN TO PREVENT COLLECTION FROM PRINCIPAL ON GUARANTY PENDING PAYMENTS UNDER THE PLAN

A common situation in a subchapter V case is a guaranty by the principal of one or more debts. Some debtors have included provisions in plans that enjoin enforcement of a guaranty or other actions against the principals of the debtor during the term of the plan. The provisions typically provide for termination of the injunction if the debtor defaults under the plan and for tolling of the statute of limitations while the injunction is in effect.

Affected creditors have objected that such an injunction is impermissible under § 524(e), which states that the discharge of a debt does not affect the liability of any other entity on the debt, and that it does not meet the "fair and equitable" requirement for cramdown confirmation in § 1191(b).

Courts have recognized that a bankruptcy court has the authority under § 105(a) to temporarily enjoin collection of debts of the debtor from third parties in "unusual circumstances"[408] when necessary to facilitate reorganization. The circumstances include (1) an identity of interests between the nondebtor and debtor such that enforcement of the obligation

[408] *E.g.,* Queenie, Ltd. v. Nygard Int'l., 321 F.3d 282 (2d Cir. 2003); *In re* Zale Corp., 62 F.3d 746, 761 (5th Cir. 1995); Patton v. Bearden, 8 F.3d 343, 349 (6th Cir. 1993); S.E.C. v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 960 F.2d 285, 293 (2d Cir. 1992); Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (*In re* W. Real Estate Fund, Inc.), 922 F.2d 592, 601 (10th Cir. 1990); A.H. Robins Co. v. Piccinin, 788 F.2d 998, 1003-06 (4th Cir. 1986).

against the nondebtor is essentially enforcement against the debtor and (2) an adverse impact of enforcement against the nondebtor on the debtor's ability to accomplish reorganization.

Several courts have confirmed subchapter V plans that provide for an injunction against collection of debts of the debtor against its principals during the term of the plan.

In *In re Global Travel International, Inc.,*[409] the debtor's plan contained a "conditional temporal injunction" that protected the principal and a key employee from litigation by the debtor's creditors against them during the three-year payment period, provided that the debtor was performing under the plan. The plan tolled and abated statutes of limitation so that enjoined parties could pursue their claims if the plan did not result in full payment.

The plan required the two beneficiaries of the injunction to contribute $25,000 to the plan, to limit their compensation to 10% of the excess of actual income over projected income, and to continue to provide their time, resources, and industry knowledge towards the successful completion of the plan for the benefit of creditors.

The unsecured class accepted the plan, but a creditor holding the guaranty objected to confirmation on the ground that the injunctions violated § 524(e).

The court concluded that the plan did not contain a third-party release or permanent bar to the assertion of claims on the guaranty that violated § 524(e). Although the injunction was not a permanent bar order, the court evaluated the requested injunction by applying the factors identified in *In re Dow Corning Corp.,*[410] as governing third-party releases or bar orders in a

[409] 2022 WL 4690426 (Bankr. M.D. Fla. 2022).
[410] 280 F.3d 648, 658 (6th Cir. 2002), *abrogated by* Harrington v. Purdue Pharma L.P., 144 S.Ct. 2071 (2024).

plan.[411] (The case was decided before the Supreme Court's decision in *Harrington v. Purdue Pharma L.P.*[412] abrogated *Dow Corning.*)

The *Global Travel* court listed these factors:[413]

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

2. Whether the non-debtor has contributed substantial assets to the reorganization;

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

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

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

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

The *Global Travel* court noted[414] that the list is nonexclusive and flexibly applied, that bar orders must be essential to a successful reorganization, and that the bankruptcy court must make specific factual findings to support entry of a bar order, with discretion to determine which factors are relevant in each case.

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

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[411] The *Dow Corning* test applied under precedent in the Eleventh Circuit. Seaside Eng's & Surveying, Inc., 780 F.3d 1070, 1079 (11th Cir. 2015), *abrogated by* Harrington v. Purdue Pharma L.P., 144 S.Ct. 2071 (2024).
[412] 144 S.Ct. 2071 (2024).
[413] *Global Travel,* 2022 WL 17581986 at *3.
[414] 2022 WL 4690426 at *3.

With regard to identity of interests, the court noted that, although no indemnity obligation existed, the principal was the debtor's primary asset and that without him the business would suffer. The court credited the principal's testimony that pending arbitration with the creditor was "massively consuming" and that he would have to be replaced at an annual cost of $100,000 to $150,000 while he defended the arbitration. The court concluded that "the proposed injunction is essential to the reorganization due to the identity of interests" between the debtor and the principal.[415]

The cash contribution and the limitation on compensation was "substantial and sufficient consideration" for the temporary injunction, and the temporary injunction was essential to the reorganization.[416] The impacted class had overwhelmingly accepted the plan, the plan had a mechanism to pay the creditor, which would receive payments in the same manner as other members of the class, and it expressly preserved the creditor's rights on the guaranty if it did not receive payment in full by the end of the plan's term.[417]

Finally, the court concluded that the plan provided the creditor with the opportunity to recover on its claim in full because it left the creditor's rights intact by tolling and abating all statutes of limitations and deadlines during the three-year term.[418]

In re Central Florida Civil, LLC,[419] similarly confirmed a subchapter V plan with an injunction preventing pursuit of guaranty claims pending payments under plan.

Although the Supreme Court's ruling in *Harrington v. Purdue Pharma L.P.*[420] that a plan cannot contain nonconsensual third party releases abrogated *Dow Corning* (and similar rulings of

[415] *Id.* at *4.
[416] *Id.* at *4.
[417] *Id.* at *5.
[418] *Id.* at * 5.
[419] 649 B.R. 77 (Bankr. M.D. Fla. 2023).
[420] 144 S.Ct. 2071 (2024).

other courts), courts have ruled that *Purdue Pharma* does not address temporary injunctions against enforcement of claims against principals of a debtor pending payments under a plan and that they are permissible in appropriate circumstances.[421]

In *In re Hal Luftig Company,*[422] the court had granted the debtor's request in an adversary proceeding to extend the automatic stay to prohibit a creditor from enforcing its judgment against the principal of the debtor. The debtor's plan provided for continuation of the stay until the debtor received a discharge after completion of payments of projected disposable income for five years, which would not result in full payment of the creditor's claim. No creditors accepted the plan.

A creditor objected to confirmation on the ground that inclusion of the stay extension violated the fair and equitable requirement of 11 U.S.C. § 1191(b). The court noted that the language of the fair and equitable requirement for subchapter V cases in § 1191(c) states that it "includes" the specified requirements. Thus, the court observed, courts have held that § 1191(c) establishes baseline requirements and that courts have discretion to consider other factors when appropriate.[423] Because the plan satisfied all other requirements for cramdown confirmation under § 1191(b), the only question before the court was whether the plan was fair and equitable under § 1191(c).

The *Hal Luftig* court began by noting that extension of the automatic stay to non-debtors is permissible when "a claim against the non-debtor will have an immediate adverse economic

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[421] *In re* Miracle Restaurant Group, LLC, 2025 WL 1400915 (Bankr. E.D. La. 2025); *In re* Hal Luftig Company, 667 B.R. 638, 658-59 (Bankr. S.D.N.Y. 2025).
[422] 667 B.R. 638 (Bankr. S.D.N.Y. 2025).
[423] *Id.* at 656-657. The court cited *In re Curiel*, 651 B.R. 548, 561 n.7 (B.A.P. 9th Cir. 2023) (Section 1191(c) "states that whether the plan is fair and equitable includes those requirements. Because the term 'includes' is not limiting, a court may consider other relevant factors as well."); and *In re Trinity Fam. Practice & Urgent Care PLLC*, 661 B.R. 793, 816 (Bankr. W.D. Tex. 2024) ("[M]eeting the baseline requirements of § 1191(c) is a *necessary* condition for the subchapter V plan to be fair and equitable, but does not assure that the plan is fair and equitable.") (emphasis in original).

consequence for the debtor's estate."[424] Determination of whether to extend the stay, the court continued, involves the four-factor analysis that governs issuance of a preliminary injunction:[425]

(1) likelihood of success on the merits;

(2) likelihood of irreparable injury in the absence of an injunction;

(3) balancing of hardships; and

(4) the public interest.

The court concluded that non-consensual third party stay extensions survived the Supreme Court's ruling in *Purdue Pharma*[426] that the Bankruptcy Code does not authorize non-consensual third-party releases.[427]

Nevertheless, the court explained that courts[428] had concluded that *Purdue Pharma* changed the "likelihood of success" factor from the likelihood that the plan process would result in a non-debtor release to the likelihood that the debtor would achieve alternative outcomes that could be viewed as "success on the merits." The alternative successful outcomes include providing a breathing spell from the distraction of litigation to permit the debtor to focus on the reorganization of its business or the court's belief that the parties may ultimately be able to negotiate a plan that includes a consensual resolution of the claims against the non-debtors.[429]

The *Luftig* court next considered whether a non-debtor stay extension could remain in place for the life of the plan. Acknowledging that many courts view stay extensions as

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[424] *Id.* at 657. The court quoted *Queenie, Ltd. v. Nyugard Int'l,* 321 F.3d 282, 287-88 (2d Cir. 2003).
[425] *Id.* at 657-68.
[426] Harrington v. Purdue Pharma L.P., 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024).
[427] *Id.* at 658-59. The court cited: *In re Parlement Techs., Inc.,* 661 B.R. 722, 724 (Bankr. D. Del. 2024); *Purdue Pharma L.P. Massachusetts (In re Purdue Pharma, L.P.),* 666 B.R. 461, 472-73 (Bankr. S.D.N.Y. 2024); and *Coast to Coast Leasing, LLC v. M & T Equip. Fin. Corp. (In re Coast to Coast Leasing, LLC)*, 661 B.R. 621, 624 (Bankr. N.D. Ill. 2024).
[428] *Massachusetts (In re Purdue Pharma, L.P.),* 666 B.R. 461, 473 (Bankr. S.D.N.Y. 2024); *In re Parlement Techs., Inc.,* 661 B.R. 722, 724 (Bankr. D. Del. 2024).
[429] *Id.* at 659.

temporary injunctive relief, the court noted that the duration of some non-debtor stay extensions, in the aggregate, had been comparable to the length of the extension under the debtor's plan.[430] The court concluded that the stay extension could last for the length of the plan, consistent with the provision of § 362(c)(2)(C) that continues the automatic stay in a chapter 11 case until the time a discharge is granted or denied.[431]

The *Luftig* court then analyzed whether the circumstances satisfied the requirements for extending the automatic stay to the principal under the standards it enunciated.

The court first concluded that the creditor's enforcement of its judgment would have an immediate adverse economic effect on the estate. The court found that most of the debtor's business was generated through the principal's efforts, that successful reorganization required that he be able to continue his efforts on current projects and new opportunities, and that collection efforts had affected the debtor's ability to generate revenue.[432]

The court then examined the four factors in the preliminary injunction analysis and concluded that all had been satisfied.[433] First, providing relief to the principal from the distractions of litigation was necessary for the success of the debtor's reorganization and thus satisfied the modified "likelihood of success on the merits" requirement. Second, the debtor would suffer irreparable harm because it would be difficult or impossible for the debtor's business to carry out the plan and successfully reorganize if the principal could not focus on its business operations. *Id.* Third, the balance of hardships weighed in the debtor's favor. Whereas the creditor's collection efforts would undermine the debtor's reorganization, the harm to the creditor was minimal because extension of the stay was not permanent; upon the conclusion of

[430] *Id.* at 659-60.
[431] *Id.* at 660.
[432] *Id.*
[433] *Id.* at 660-62.

plan payments, the creditor could proceed to pursue its claim. Finally, the court found that the stay extension was not adverse to the public interest because promoting a successful reorganization serves the public interest.

The court concluded that, in the circumstances of the case, the extension of the stay to the principal did not render the plan unfair and inequitable.

The court in *In re Miracle Restaurant Group, LLC,*[434] confirmed a subchapter V plan that contained an injunction prohibiting any action to collect any debt treated through the plan from any guarantor, insider, officer, director, employee, or interest holder during the term of the plan. The plan provided for termination of the injunction upon an uncured default by the debtor under the plan and tolled the statute of limitations.

The plan placed one unsecured creditor in its own class and provided for its full payment, with interest, through monthly payments, during the three-year term of the plan and a balloon payment for the balance at the end of the term. The creditor and the U.S. Trustee objected to confirmation on the ground that *Purdue Pharma* prohibited the temporary injunction.

The court agreed with the *Hal Luftig* court that *Purdue Pharma* did not preclude a plan provision for a nonconsensual temporary injunction to prohibit enforcement of claims against nondebtor parties.[435] Under caselaw in its circuit, the court ruled, a temporary injunction is permissible in "unusual circumstances"[436] under *Feld v. Zale Corp. (In re Zale Corp.)*,[437] if the issuance of such an injunction under § 105(a) as part of a confirmed plan satisfies the four-prong test for issuance of a preliminary injunction.[438]

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[434] 2025 WL 1400915 (Bankr. E.D. La. 2025).
[435] *Id.* at * 4.
[436] *Id.* at * 6-8.
[437] 62 F.3d 746, 760 (5th Cir. 1995).
[438] 2025 WL 1400915 at * 9.

"Unusual circumstances," the *Miracle Restaurant* court explained, include circumstances (1) when the debtor and nondebtor have such an identity of interests that enforcement of a claim against the nondebtor is essentially enforcement of a claim against the debtor or (2) when enforcement against a nondebtor will have an adverse impact on the debtor's ability to accomplish reorganization.[439]

The court found an identity of interest between the debtor and the guarantors and that the temporary injunction was necessary to the debtor's successful reorganization.[440] The guarantors were vital to successful reorganization, the court explained, because they provided day-to-day management of the debtor. Enforcement of the guaranties would divert their time, attention, and resources from the debtor's reorganization efforts.

Further, the court observed, the plan contemplated refinancing the balance of the debtor's unpaid debts at the end of the term; enforcement of the guaranties could negatively affect the strength of any necessary guaranty for such refinancing and discourage any future infusion of capital or financing. The adverse impact on refinancing efforts could affect the debtor's implementation of the plan and reduce creditor recoveries.

The court also concluded that the injunction satisfied the four-prong preliminary injunction test.[441]

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[439] *Id.* at *7-8, *quoting* Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746, 761 (5th Cir. 1995). The *Miracle Restaurant* court, 2025 WL at * 8, noted other cases that *Zale Corp.* cited as examples of "unusual circumstances: Patton v. Bearden, 8 F.3d 343, 349 (6th Cir. 1993) ("Such circumstances usually include when the debtor and the non-bankrupt party are closely related or the stay contributes to the debtor's reorganization."); S.E.C. v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 960 F.2d 285, 293 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1003–06 (4th Cir. 1986) (stating that a § 105 injunction may be appropriate where proceeding would have an adverse impact on the debtor's ability to reorganize or deplete property of estate).

[440] *Miracle Restaurant Group,* 2025 WL 1400915 at *9.

[441] *Id.* at *9-10.

In the context of a temporary plan injunction, the court explained, the "substantial likelihood of success on the merits" requirement is whether the reorganization is likely to succeed. The court observed that no party had objected to the feasibility of the plan and that the court had determined at the confirmation hearing that the plan was feasible, a finding that supported the conclusion that the plan is substantially likely to succeed.

The court found that the record showed that "the opportunity for this Debtor to successfully reorganize is seriously jeopardized" in the absence of a temporary injunction, thus satisfying the "irreparable injury" requirement.[442]

Under the terms of the confirmed plan, the court noted, the creditor would be paid in full within the plan's three-year term, and the injunction would expire upon the debtor's failure to timely cure any default. The only harm to the creditor, the court found, was that it had to accept payment terms that it did not like. "That harm is minimal," the court reasoned, "compared to the harm the Debtor faces if the temporary injunction is not granted: the Debtor forfeits its ability to reorganize."[443]

Issuance of an injunction would not disserve the public interest, the court ruled, because "[t]he public has an interest in allowing businesses to reorganize instead of liquidate."[444] Moreover, the court observed, issuance of the injunction also protects "numerous other creditors and their rights to receive equitable distributions under the Plan."[445]

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[442] *Id.* at *9.
[443] *Id.* at *10.
[444] *Id.* at 10, quoting Neutra, Ltd. v. Terry (*In re* Acis Capital Mgmt., L.P.), 604 B.R. 484, 529 (N.D. Tex. 2019)
[445] *Id.*

The court in *In re Engineering Recruiting Experts, LLC,*[446] applied the reasoning in *Hal Luftig* and *Miracle Restaurant* in concluding that a plan could in appropriate circumstances include a temporary injunction against enforcement of claims against co-debtors during the term of the plan. The court applied the *Zale* factors to conclude that a temporary injunction in the plan to protect the principal – its sole owner and the "linchpin"[447] of its operations – was permissible. Although the plan provided for protection of "any co-debtor," the court limited the injunction to the principal because the debtor had not presented evidence or argument with regard to any other co-debtors.[448]

X. FEES OF DEBTOR'S ATTORNEY FOR DISCHARGEABILITY LITIGATION

An individual may face claims from one or more creditors that some debts are excepted from discharge under § 523(a). A corporation (or other entity) has the same problem if cramdown consensual confirmation occurs and the court applies the interpretation of the cramdown discharge provisions in § 1192(2) that the § 523(a) exceptions apply to its discharge.[449]

When a lawyer defends dischargeability litigation, a question is whether the services are on behalf of the *debtor in possession* as opposed to the *debtor.* Put another way, the question is whether the services benefit the *estate.*

The answer is important for two reasons.

The first is whether the fees are allowable as an administrative expense, payable by the estate. As Section IV(D)(2) explains, § 330(a) provides for compensation of a lawyer for the

[446] 2025 WL 2506031 (Bankr. M.D. Fla. 2025).
[447] *Id.* at *5.
[448] *Id.* at * 2.
[449] See *supra* Part VIII.

debtor in possession and does not permit compensation of the debtor's lawyer. Moreover, § 330(a)(4)(A)(ii) prohibits allowance of compensation for services that are not "reasonably likely to benefit the estate" or "necessary in the administration of the case" (except for services of counsel for a chapter 13 debtor or an individual chapter 12 debtor).

The second is whether the fees are a permissible deduction for purposes of the projected disposable income test in § 1191(c)(2). Permissible deductions from disposable income under § 1191(d) are reasonably necessary expenditures for "the maintenance or support of the debtor or a dependent of the debtor"[450] or for "the payment of expenditures necessary for the continuation, preservation, or operation of the debtor."

In re Schlomer[451] considers the first issue. The court had approved the retention of special counsel to represent the individual debtor in dischargeability litigation in a traditional chapter 11 case. In this opinion, the court scheduled a hearing *sua sponte* on whether to reconsider the retention order to "clarify that [the lawyer] need not and does not represent the interests of the bankruptcy estate but rather the debtor personally and, accordingly, that [the lawyer] need neither be retained under section 327 nor have its compensation governed by sections 328 or 330."[452]

Noting the distinction between the debtor and debtor in possession in an individual chapter 11 case, the court stated the general rule that "if the professional services do not benefit the estate, then they cannot be paid from estate assets[453] and cited cases in which other courts had

[450] § 1191(d)(1)(A). Subparagraph (B) permits deduction for a domestic support obligation, which is inapplicable to this issue.
[451] 2025 WL 553042 (Bankr. W.D. Tex. 2025).
[452] *Id.* at *1.
[453] *Id.* at *2.

ruled that a lawyer's fees for services on behalf of the debtor personally did not benefit the estate.[454]

The court then turned to the retention and compensation of what it called counsel for the "actual debtor" in a chapter 11 case. The term is a useful one that refers to a debtor when the debtor's personal interests, as opposed to the estate's, are at stake and the debtor hires counsel for representation on the debtor's own behalf.

The court explained how provisions of the Bankruptcy Code govern the retention and compensation of an "actual debtor's" attorney.

Debtors are entitled to "vigorously litigate any proceedings in which they are personally entangled"[455] and may retain counsel to represent their personal interests. But because a debtor in possession has a fiduciary duty to the estate, debtors and their counsel must "remain vigilant to make sure that they do not act contrary to the interests of the estate, including in their litigation decisions."[456] When a debtor's personal interests conflict with those of the estate, "debtors must remove themselves (or be removed) from their role as trustee/debtor-in-possession."[457]

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[454] Keate v. Miller (*In re* Kohl), 95 F.3d 713 (8th Cir. 1996) (holding that debtor's efforts to protect exempt homestead from foreclosure and to reaffirm and negotiate tax debts do not benefit chapter 11 estate); *In re* Young, 2021 WL 6091102 at *6 (Bankr. D.N.M. 2012) ("Fees that benefit only the Debtors as individuals and not in their capacities as debtors in possession provide no benefit to the estate in a Chapter 11 case and are not compensable from assets of the estate.").

The court also cited two cases involving employment of divorce counsel. *In re* Goldstein, 383 B.R. 496, 502 (Bankr. C.D. Cal. 2007) ("In this case, authorizing each joint debtor to employ respective divorce counsel is in the best interest of the two estates involved in this case."); *In re* Colin, 27 B.R. 89 (Bankr. S.D.N.Y. 1983) (permitting chapter 11 individual debtor-in-possession to retain special counsel to pursue divorce action.). Finally, the court cited one case in which the court examined the fee application to determine what benefited the estate and what did not. *In re* Polishuk, 258 B.R. 238 (Bankr. N.D. Okla. 2001).

[455] 2025 WL 553042 at *5.

[456] *Id.*

[457] *Id.* The court did not discuss, as an alternative to removal of the debtor from possession, the expansion of the trustee's duties to manage the conflict, as Section IV(C) discusses.

"[S]o long as the debtor's interests do not conflict with the estate's, the debtor can take actions to benefit itself, including by hiring lawyers to represent its interests. Nor does the Code specifically limit the debtor's ability to pay compensation out of non-estate assets, aside from the requirements of section 329 of the Bankruptcy Code."[458] Section 329 requires disclosure of compensation paid or agreed to be paid by a debtor and authorizes the court to cancel any retention agreement and to require the return of any payment to the extent the payment exceeds the reasonable value of services rendered.

In the context of representation in a nondischargeability action, the court noted, "Nondischargeability proceedings primarily impact not the bankruptcy but whether the debts at issue will be discharged and thus removed from the debtor's post-bankruptcy life."[459] The court cited cases ruling that dischargeability litigation does not benefit the estate and that a debtor's attorney's fees cannot be paid from estate assets.[460]

The court doubted that the court's approval of the debtor's retention of counsel to defend a dischargeability action or of counsel's compensation was required and scheduled a hearing to reconsider the retention order. The court proposed to hold that the lawyer need not be retained under § 327(e), that compensation was not approved under § 328 or subject to review under § 330, and that compensation was subject only to review under § 329.[461]

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[458] *Id.* at 4.
[459] *Id.*
[460] *Id.* at n. 19. The court cited: Stewart v. Law Offices of Dennis Olson, 93 B.R. 91, 95 (N.D. Tex. 1988); *In re* Jones, 665 F.2d 60 (5th Cir. 1982) (adopting rule, under pre-Bankruptcy Code law, that "attorneys' fees related to defending against objections to the discharge are not payable out of the estate"); *In re* Polishuk, 258 B.R. 238, 249-50 (Bankr. N.D. Okla. 2001) (finding, in Chapter 11 case in which debtor was in possession, that nondischargeability litigation with ex-spouse did not benefit the estate and therefore the fees could not be paid from estate assets). *See also In re* Kadiric, 670 B.R. 307, n. 10 (Bankr. W.D. Mich. 2025), *citing In re* Schlomer, 2025 WL 553042 at *4 (Bankr. W.D. Tex. Feb. 19, 2025) ("For the sake of transparency, the court expresses concern about the estate's retaining counsel to defend the Debtors' discharge, a matter of peculiar importance to the Debtors but seemingly of no value to the estate or their creditors generally."); NORTON BANKRUPTCY LAW AND PRACTICE §§ 106.1, 106.6.
[461] *Id.* at *6.

If fees for dischargeability litigation must be paid from non-estate assets, the debtor's problem is finding non-estate assets.

In a traditional chapter 11 case, an individual debtor has no non-estate assets other than exempt property because § 1115(a) provides that, in the case of an individual, property of the estate includes postpetition earnings and any property acquired after the commencement of the case. Section 1115(a), however, does not apply in a subchapter V case,[462] so an individual debtor in a subchapter V case could pay dischargeability counsel from postpetition earnings. But if cramdown confirmation under § 1191(b) occurs, property of the estate includes postpetition earnings and postpetition property.[463]

An individual in a subchapter V case, therefore, can pay for dischargeability counsel at least until confirmation of a plan. The individual may do so thereafter if consensual confirmation occurs under § 1191(a) with money from earnings that is not needed for personal expenses and payment of obligations under the plan. After cramdown confirmation, however, that option does not seem to be available, although it is arguable that a debtor should be able to pay a personal expense with money that is not required to make the payments under the plan.

In the case of a corporation or other entity, property of the estate under § 541(a)(1) includes "all legal or equitable interests of the debtor in property as of the commencement of the case. Property of the estate includes "proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after commencement of the case" under § 541(a)(6) and "any interest that the estate acquires after commencement of the case" under § 541(a)(7). A corporation or other entity, therefore, has no earnings or assets that do not constitute estate property.

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[462] § 1181.
[463] § 1186(a).

It is arguable in the case of a corporation or other entity that representation in dischargeability litigation provides a benefit to the estate or is necessary to administration of the case because the debtor must have counsel to defend the litigation[464] and no other source for payment of attorney's fees exists. Further, the estate of an entity has an interest in the nondischargeability litigation because a ruling that a debt is nondischargeable may negatively affect the ability or willingness of the debtor to proceed with a plan. If the debtor will be saddled with nondischargeable debt, owners may conclude that it is not worth their time and effort to try to reorganize the debtor.

The debtor in *Schlomer* had anticipated dischargeability litigation and paid the dischargeability lawyer a $60,000 prepetition retainer. A prepetition retainer may provide a non-estate source for payment of dischargeability counsel. Nevertheless, as the *Schlomer* court noted, "Transfers of the debtor's assets immediately prior to a bankruptcy proceeding may also be subject to avoidance under various provisions of bankruptcy law, and retainers in which the debtor still has an equitable interest as of the petition date may become property of the estate and complicate non-estate counsel's ability to be paid."[465] The court stated that the issues of potential avoidability or recovery of any prepetition transfers were beyond the scope of its opinion, and that applies to the discussion here.

The second issue is whether the expenses of dischargeability litigation are deductible in determining a debtor's projected disposable income.

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[464] A corporation cannot appear in a bankruptcy court without counsel. *See supra* note 220 and accompanying text.
[465] *In re Schlomer,* 2025 WL 553042 at * 4 n. 18 (Bankr. W.D. Tex. 2025). The court cited: §§ 541–51; Arens v. Boughton (*In re* Prudhomme), 43 F.3d 1000, 1004 (5th Cir. 1995); Barron v. Countryman, 432 F.3d 590 (5th Cir. 2005); Wootton v. Ravkind (*In re* Dixon), 143 B.R. 671 (Bankr. N.D. Tex. 1992); *In re* Miell, 2009 WL 2253256, at *1–4 (Bankr. N.D. Iowa 2009).

If a debtor cannot use estate property to pay expenses of dischargeability litigation, one argument is that they cannot be deducted because, due to the cramdown discharge that gives rise to the PDI requirement, all assets and earnings of the debtor are property of the estate. Because the debtor cannot use property of the estate to pay the expenses, no deduction is permissible.

The second argument is that dischargeability litigation expenses are not expenditures that the definition of disposable income permits. The question is whether they are expenditures for the "maintenance and support" of the debtor or necessary for the "continuation, preservation, or operation of the business of the debtor."

In *In re Premier Glass Services, LLC,*[466] the court considered whether the debtor could deduct anticipated legal fees for appealing from an arbitration award against the debtor and its principal jointly and defending the dischargeability litigation the creditor filed.[467] The litigation thus involves the merits of the creditor's claim as well as its dischargeability. The court ruled that the debtor had not established that the amount of the fees was based on a reasoned projection and had not shown that the fees were necessary for the continuation, preservation, or operation of the debtor's business. Further, the court ruled that the evidence did not show that the deduction for legal fees was "fair and equitable."[468] (The court did not consider whether fees for dischargeability litigation could not be deducted because the debtor could not pay them from estate assets.)

The court expressed concern that payment of the legal fees provided "considerable benefit" to the debtor's owners and the principal at the expense of creditors. If the creditor

[466] 664 B.R. 465 (Bankr. N.D. Ill. 2024).
[467] The court had ruled that the § 523(a) exceptions applied to the debtor's discharge if cramdown confirmation occurred. Christopher Glass & Aluminum, Inc. v. Premier Glass Services, LLC (*In re* Premier Glass Services, LLC), 2024 WL 3808696 (Bankr. N.D. Ill. 2024).
[468] *Id.* at 476.

prevailed, the court said, "the deduction for legal fees will be a total loss, and will be, in effect, a transfer from [the creditors] to the [Debtor's] counsel."[469]

The court denied confirmation because the debtor did not meet its burden of proof and permitted the debtor to file a new plan.[470] It did not make a definitive ruling on the deductibility of the litigation expenses. Nevertheless, the opinion illustrates the difficulties debtors face in paying for litigation against creditors with money that would otherwise be available to pay them.

[469] *Id.* at 477.
[470] *Id.* at 469.