



AMERICAN
BANKRUPTCY
INSTITUTE

Northeast Bankruptcy Conference and Consumer Forum

Business Track

Anatomy of a Small- to Middle-Market Restructuring in Today's New World

Hon. Peter G. Cary

U.S. Bankruptcy Court (D. Me.) | Portland

Kellie W. Fisher

Drummond Woodsum | Portland, Maine

David B. Madoff

Madoff & Khoury LLP | Foxboro, Mass.

Adam R. Prescott

Bernstein Shur | Portland, Maine

Jackie Reinhard

PKF O'Connor Davies Advisory LLC | Boston

NORTHEAST BANKRUPTCY CONFERENCE & CONSUMER FORUM

Newport Marriott • Newport, R.I.

JULY | 13-15 | 2023



AMERICAN
BANKRUPTCY
INSTITUTE



NORTHEAST
BANKRUPTCY
CONFERENCE &
CONSUMER FORUM

Newport Marriott
Newport, R.I.

JULY | 13-15 | 2023

Anatomy of a Small- to Middle-Market Restructuring in Today's New World

Panelists:



Hon. Peter G. Cary
U.S. Bankruptcy Court (D. Me.) | Portland



Kellie W. Fisher
Drummond Woodsum | Portland, Maine



David B. Madoff
Madoff & Khoury LLP | Foxboro, Mass.



Adam R. Prescott
Bernstein Shur | Portland, Maine



Jackie Reinhard
PKF O'Connor Davies Advisory LLC | Boston



Pre-Bankruptcy Analysis: Financial Advisor's Perspective

- Warning Signs: When to call to a financial advisor and risks of waiting too long
- Value preservation and value creation – considerations and challenges
- Evaluate the opportunities available
- Operating on parallel paths and identifying when to pivot



Warning Signs: When to call to a financial advisor and risks of waiting too long

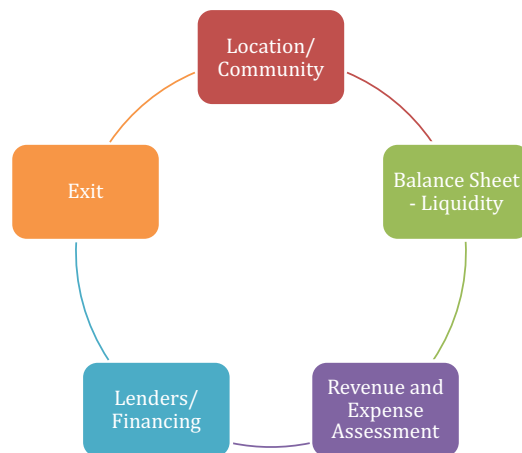




Value preservation and value creation – considerations and challenges



Evaluate the opportunities available





Operating on parallel paths and identifying when to pivot



The Hypothetical

ABC Corp. is a Maine LLC that owns and operates a 50-room hotel in Maine.

15 employees who help operate the hotel and provide services to its customers.

ABC Corp. provides room cleaning services, internet/wi-fi, phone, bus and trailer parking, business services, complimentary breakfast, and swimming pool and fitness center.

ABC Corp. has the following debt structure:

- \$5.5 million loan senior secured loan with first position liens on all assets.
 - ABC Corp.'s sole member has personally guaranteed this loan.
- \$1 million unsecured loan from sole member.
- \$1 million in trade debt, including \$200,000 with vendor is disputed.
- \$500,000 Maine state court judgment for fraud and false advertising.
- \$750,000 in anticipated rejection damages for vendor contracts ABC Corp. anticipates moving to reject on day if bankruptcy is filed.



1. The Statute

Section 1182 — Definitions

In this subchapter:

(1) Debtor. The term “debtor”

- (A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and
- (B) does not include
 - (i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$7,500,000 (excluding debt owed to 1 or more affiliates or insiders);
 - (ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or
 - (iii) any debtor that is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).



Let’s break this down. To qualify, the Debtor must:

- be engaged in commerce or business activities
- not be a Single-Asset Real Estate (SARE) debtor
- have debts of not more than \$7,500,000, *as of filing date*
 - not including insider, contingent, unliquidated debt
 - not less than 50% of which arose from commercial or business activities



Must be engaged in Commerce or Business

Our hotel clearly is engaged in commercial or business activities, but what if it ceased operating six months ago?

- *In re Robinson*, 2023 Bankr. LEXIS 1046 (Bankr. S.D. Miss.). Individual debtor owned and operated a chicken farm, until he lost the contract with the processing company, causing him to shut down. While he obtained unrelated employment, he continued to work to liquidate the farm, maintain chicken houses, cut the grass. Debtor filed a Sub V to accomplish all of this and the U.S. Trustee objected, arguing that debtor was no longer conducting business. Court agreed that the term "engaged in" was "inherently contemporary", not retrospective, and required an "assessment of the current state of affairs as of the filing date" (Citing *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403 (B.A.P. 9th Cir, 2022)). But, in this case, Court found that debtor's liquidation activities constituted commercial activity.

- *In re Offer Space, LLC*, 629 B.R. 299 (Bankr. D. Utah 2021). Court found that the debtor was eligible for Sub V even though it had ceased operations, because it continued to have active bank accounts, collect receivables, pay creditors and generally wind down business. Court distinguished between "operations" and "activities".

- But see *National Loan Investors, L.P. v. Rickerson (In re Rickerson)*, 636 B.R. 416 (Bankr. W.D. Pa. 2021). Where Debtor physician had owned and closed her own practice 10 years earlier, and now was employed as a physician by an insurance company, debtor was not engaged in commerce or business activities.



When is a small business a SARE?

- Case law generally holds that hotels are not SAREs, because they provide services besides renting rooms, like cleaning, phone service, internet:
- *In re Caribbean Motel Corp.*, 2022 Bankr. LEXIS 25 (Bankr. D. P. R.)
- *In re ENKOGS1*, 626 B.R. 860 (Bankr. M.D. Fla. 2021)
- *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y 2021) (holding that bed and breakfast was not a SARE)



What about the Debt Ceiling?

In the hypothetical, the Debtor has \$8.75 million in debt. How do we get this down to \$7.5 million?

1. Debt limit does not include \$1 million of insider debt, so down to \$7.75 million.
2. \$750,000 in rejection damages – Contingent and/or unliquidated?

In re Parking Mgmt., 620 B.R. 544 (Bankr. D. Md. 2020). Because rejection of executory contract or unexpired lease requires court approval, it is contingent on postpetition events, and thus not counted toward the debt limit (even if rejection is as of the petition date)

3. \$200,000 security deposit
4. \$500,000 judgment (appealable?)

In re Ibbott, 637 B.R. 567 (Bankr. D. Md. 2022) (and several cases cited therein). Chapter 13 case dismissed by Court where debts exceeded the debt limit. Judgment against the debtor was noncontingent and liquidated. Fact that judgment had not been entered on the docket, and was still appealable, did not change the nature of the debt.

5. \$200,000 disputed vendor debt

In re Hall, 2023 Bankr. LEXIS 1258 (Bankr. M.D. Fla.). Court held that disputed debts count toward the debt limit, and the “mere dispute as to liability does not automatically exclude that amount from the calculation”.



Debt limit determined as of the date of the filing.

In re Free Speech Systems, LLC, 649 B.R. 729 (Bankr. S.D. Tex. 2023). Company wholly owned by Alex Jones was eligible for and filed a Subchapter V in July 2022. In December 2022, Alex Jones, who had debts far in excess of debt limit, filed a separate Chapter 11. Creditors argued that corporate debtor lost eligibility when Jones filed his personal case. Court held that Sub V eligibility cannot be revoked after initially qualifying, based on affiliate exceeding the debt limit.

In re Dobson, 2023 Bankr. LEXIS 1311 (Bankr. W.D. Va.). Individual debtors filed Subchapter V and, at time of filing, indisputably qualified as Sub V debtors. On the day after the filing, Mr. Dobson caused his company to file a Chapter 7. The combined debts of the Dobsons and his company exceeded the debt limit.



At least 50% of Debt from commercial activities

In re Reis, 2023 Bankr. LEXIS 1169 (Bankr. D. Id.). Debtor filed an individual Sub V upon the closing of her medical practice. Over 50 percent of her debt (\$645,000) consisted of student loans from medical school. While Debtor had, most recently, operated her own medical practice, for 10 years prior she had been employed by various hospitals and medical facilities. The Court held that her student loan debt did not arise from commercial or business activities. *But*, the Court found it germane that she did not operate a business before medical school or for the 10 years after medical school. The court did not foreclose the possibility that student loans, under the right circumstance, could be considered arising from commercial or business activities.

National Loan Investors, L.P. v. Rickerson (In re Rickerson), 636 B.R. 416 (Bankr.W.D. Pa. 2021). Unpaid income tax debt did not arise from commercial activities, even though debt was also not consumer debt for Section 707(b) purposes.



Subchapter V: Hot Topics and Controversial Decisions

Effect of Pledge of LLC Interests on Authority to File: Are company documents requiring lender approval to file for bankruptcy enforceable?

- *In re Roberson Cartridge Co., LLC*, No. 22-20192-RLJ7, 2023 WL 2393809 (Bankr. N.D. Tex. Mar. 7, 2023)

Can the court revoke a debtor's Subchapter V election as a remedy?

- *In re Nat'l Small Bus. All., Inc.*, 642 B.R. 345, 350 (Bankr. D.D.C. 2022)
- *In re ComedyMX, LLC*, 647 B.R. 457 (Bankr. D. Del. 2022)
- *In re Free Speech Sys., LLC*, 649 B.R. 729, 735 (Bankr. S.D. Tex. 2023)



Subchapter V: Hot Topics and Controversial Decisions

Non-Dischargeability for Corporate Subchapter V Debtors: Sections 1192 and 523(a)

Non-Dischargeable

Cantwell-Cleary Co. v. Cleary Packaging, LLC
(In re Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022)

Dischargeable

In re Cleary Packaging LLC, 630 B.R. 466 (Bankr. D. Md. 2021)

Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC), 647 B.R. 337 (Bankr. W.D. Tex. 2022)

Gaske v. Satellite Restaurants Inc. (In re Satellite Restaurants Inc.), 626 B.R. 871 (Bankr. D. Md. 2021)

Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.), 2022 Bankr. LEXIS 1032 (Bankr. E.D. Mich. Apr. 13, 2022)

In re Rtech Fabrications, LLC, 635 B.R. 559 (Bankr. D. Idaho 2021)

In re 2 Monkey Trading, LLC, 650 B.R. 521 (Bankr. M.D. Fla. 2023)

In re Hall, 2023 WL 2927164 (Bankr. M.D. Fla. Apr. 13, 2023)



Subchapter V: Hot Topics and Controversial Decisions

Third Party Releases and Injunctions

- In re Central Florida Civic, LLC, 2023 WL 2400183 (Bankr. M.D. Fla. Feb. 17, 2023)
- In re Lupton Consulting LLC, 633 B.R. 844, 865 (Bankr. E.D. Wis. 2021)
- In re MyLife.com Inc., No. 2:22-BK-14858-ER, 2022 WL 17345118 (Bankr. C.D. Cal. Nov. 30, 2022)

What is “projected disposable income” and can courts impose actual disposable income in a non-consensual Subchapter V plan?

- In re Staples, Bankruptcy Case No. 20-8465 (Middle District of Florida) and In re Staples, No. 2:22-CV-157-JES, 2023 WL 119431 (M.D. Fla. Jan. 6, 2023)
- Legal Service Bureau, Inc. v. Orange County Bail Bonds (In re Orange County Bail Bonds), 638 B.R. 137 (B.A.P. 9th Cir. 2022)
- In re Lost Cajun Enterprises, LLC, 634 B.R. 1063, 1068 (Bankr. D. Colo. 2021)



Subchapter V: Hot Topics and Controversial Decisions

What constitutes appropriate remedies upon default in accordance § 1191(c)(3)(B)?

- In re Urgent Care Physicians, Ltd., No. 21-24000-BEH, 2021 WL 6090985 (Bankr. E.D. Wisc. Dec. 20, 2021)
- In re Channel Clarity Holdings LLC, No. 21BK07972, 2022 WL 3710602 (Bankr. N.D. Ill. July 19, 2022)
- In re Samurai Martial Sports, Inc., 644 B.R. 667 (Bankr. S.D. Tex. 2022)
- In re Ellingsworth Residential Cmty. Ass'n, Inc., No. 6:20-BK-01346-KSJ, 2020 WL 6122645 (Bankr. M.D. Fla. Oct. 16, 2020)

Can a Subchapter V plan be confirmed under § 1191(a) with a non-voting class of creditors?

- In re Creason, No. 22-00988-SWD, 2023 WL 2190623 (Bankr. W.D. Mich. Feb. 23, 2023)
- In re Robinson, 632 B.R. 208 (Bankr. D. Kan. 2021)

Faculty

Hon. Peter G. Cary is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Maine in Portland, initially appointed in 2014. He is also a panel member of the U.S. Bankruptcy Appellate Panel for the First Circuit, a member of the First Circuit Workplace Conduct Committee, and member of the First Circuit Access to Justice Committee - Bankruptcy Court Subcommittee, an Observer Judge for the First Circuit Judicial Council, the chair of the Academic Recognition Committee of the National Conference of Bankruptcy Judges, the treasurer of the Maine State-Federal Judicial Council, and an advisory director of the Nathan & Henry B. Cleaves Law Library. Judge Cary is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification. He received his undergraduate degree *cum laude* and Phi Beta Kappa from the University of Massachusetts at Amherst in 1982 and his J.D. *cum laude* from Boston College Law School in 1987.

Kellie W. Fisher is an attorney with Drummond Woodsum in Portland, Maine, and a member of the firm's Bankruptcy and Creditors' Rights practice. She focuses her practice on bankruptcy matters, commercial litigation and transactions involving distressed companies. Ms. Fisher routinely represents financial institutions, secured and unsecured creditors (including official and ad hoc committees), lenders, debtors, equityholders, chapter 7 trustees, and liquidating and litigation trustees. She has substantial bankruptcy and litigation experience in New England and around the country and advises clients on all aspects of the restructuring and bankruptcy process, including DIP lending and cash-collateral issues, plan negotiation and drafting, § 363 sales, adversary proceedings, contested matters, and fraudulent conveyance and preference litigation. She also routinely represents parties in out-of-court debt restructurings, Article 9 and real estate foreclosures, receiverships, and other debtor/creditor litigation. Recent examples of Ms. Fisher's representations include the senior secured lenders in numerous subchapter V cases, the official committee of unsecured creditors in the Calais Regional Hospital bankruptcy case, and the largest creditor in a contested sale trial in the IDL Development, Inc. chapter 11 bankruptcy case. She also successfully represented a Vermont-based textile firm as the debtor in its chapter 11 bankruptcy case and restructured millions of dollars in debt in the process. Ms. Fisher is recognized as "One to Watch" in Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in *The Best Lawyers in America*, and she co-chairs the board of the New England chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC). She is also an active member of ABI, and she has spoken at the ABI Northeast Bankruptcy Conference and as well as published articles for ABI. Prior to joining Drummond Woodsum, Ms. Fisher was a restructuring attorney at an international law firm in Boston. She received her B.A. in 2012 from Colby College and her J.D. in 2015 from Boston College School of Law.

David B. Madoff is a partner at Madoff & Khoury LLP in Foxboro, Mass. He previously practiced with the New York law firm of Hughes Hubbard & Reed and was a partner at Cohn Khoury Madoff & Whitesell LLP in Boston. Since 1997, Mr. Madoff has served on the panel of chapter 7 trustees for the District of Massachusetts, and since 2020 he has been a Region 1 Subchapter V trustee. He received the 2016 Pro Bono Publico Award from the U.S. Bankruptcy Court and, in 2005, received the Volunteer Lawyers Project's Denis Maguire Pro Bono Award for his commitment to the representation of the indigent. In addition to his trusteeships, Mr. Madoff's practice centers around chapter 11

reorganizations, bankruptcy litigation and state court business litigation. He received his B.A. from Columbia University in 1985 and his J.D. from Boston University in 1988, where he served as an editor on the *Boston University Law Review*.

Adam R. Prescott is a shareholder with Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, where he represents debtors, secured lenders, creditors' committees and asset-purchasers in chapter 11 cases around the country. He has experience in a broad range of industries, including health care, hospitality, food and beverage, manufacturing, retail, technology, transportation and banking. His bankruptcy and restructuring practice focuses on representing debtors, lenders, trade creditors, and many other constituents in chapter 11 reorganizations, business disputes and litigation, out-of-court restructurings, and numerous other matters. Mr. Prescott has handled numerous litigation matters in state courts, federal district and appellate courts, and bankruptcy courts. He has represented clients in litigation involving a broad array of business, commercial and antitrust disputes, and has litigated preference claims, relief-from-stay motions, fraudulent-transfer lawsuits and claim objections. He also is at the forefront of electronic discovery technology and practices and was a founding editor of the firm's *E-Discovery Field Guide*, and in spring 2019 he was an adjunct professor at the University of Maine Law School, where he taught a course on litigation and e-discovery practice. In addition, Mr. Prescott has experience advising clients on antitrust and competition matters, including from his time practicing at WilmerHale in Washington, D.C., before joining Bernstein Shur. His experience includes litigating Sherman Act claims and representing clients in civil and criminal antitrust investigations brought by the Department of Justice and state attorneys general. Mr. Prescott clerked for Hon. Rudolph Contreras at the U.S. District Court for the District of Columbia. He received his B.S. in 2009 with honors in economics from Trinity College, and his J.D. *summa cum laude* in 2012 from William & Mary School of Law, where he was admitted to the Order of the Coif and ranked first in his graduating class.

Jackie Reinhard, CPA is a principal with PKF O'Connor Davies Advisory LLC in Boston and has more than 15 years of experience in public accounting and financial reporting. She provides financial advisory consulting services for complex commercial litigation, as well as bankruptcy and restructuring. Ms. Reinhard works with clients on a variety of matters, including fraud and forensic investigation, economic damages, business interruption and other complex accounting matters. She has served as a member of the financial advisor team for debtors' committees, including one of the largest bankruptcies in U.S. history, and has performed various complex analyses of solvency and legal debt limits. Ms. Reinhard also has experience providing audit and advisory services to private businesses with an emphasis on private investment companies and real estate. Her clients have spanned various sectors of the financial services and real estate industries, including investment funds, development, hotel, commercial/retail and multi-family. Prior to joining the firm, Ms. Reinhard started her career at an international public accounting firm and then moved to a boutique private-equity real estate investment firm as director of investor and financial reporting. She is a member of the American Institute of Certified Public Accountants (AICPA) and the Massachusetts Society of Certified Public Accountants (MassCPAs). Ms. Reinhard received her B.A. in accounting from the University of Northern Iowa.